UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD vs. JOHN P. LOVE, JR.	:	DECISION OF THE VICE COMMANDANT ON APPEAL NO. 2623

This appeal is taken in accordance with 46 U.S.C. § 7704 and 46 C.F.R. § 5.701, and the procedures in 33 C.F.R. Part 20.

On September 9, 1999, the United States Coast Guard initiated an administrative proceeding in the above captioned matter by filing a Complaint against John P. Love, Jr., charging him with the *use of a dangerous drug* in violation of 46 U.S.C. § 7704(c). The complaint alleged that Appellant took a drug test and tested positive for marijuana metabolite. On October 27, 1999, the then assigned Administrative Law Judge, Judge H.J. Gardner, granted Appellant's motion and dismissed the Complaint ruling on the basis of the parties' written submissions. In accordance with Department of Transportation (DOT) Equal Access to Justice Act, 5 U.S.C. 504 (EAJA) settlement procedures, agency counsel agreed to enter into a settlement with Appellant on an appropriate award for attorneys' fees and expenses. On December 23, 1999, Appellant filed with the Chief Administrative Law Judge (CALJ) (who assumed responsibility for the case upon the retirement of Judge Gardner) a Stipulation for Attorneys Fees and Expenses along with an application for attorney fees and expenses. On April 28, 2000, the CALJ issued an Order to Show Cause why the fee application should not be denied. On June 16, 2000, the CALJ issued an Order approving the settlement stipulation in the amount of $10,000. On July 6, 2000, Appellant filed a letter with the CALJ requesting

some revisions to the text of the fee decision, specifically, the deletion of perceived inaccurate statements. Appellant's letter did not make a supplemental EAJA application. On July 18, 2000, the CALJ issued an order denying this request. On August 14, 2000, Appellant filed a supplemental EAJA application for attorney fees. On November 15, 2000, the CALJ issued an order denying the supplemental EAJA application for attorney's fees.

The CALJ Order Denying the Application for Supplemental Attorney's Fees and Expenses was served on Appellant on November 15, 2000. Appellant filed a notice of appeal on December 8, 2000. Appellant perfected this appeal on January 9, 2001. This appeal is properly before me.

BASIS OF APPEAL

Appellant contends that the CALJ Order Denying Respondent's Supplemental Application for Attorney's Fees and Expenses should be vacated, that his latest Supplemental Application for additional attorneys' fees at reasonable market rates and costs should be granted, and that the CALJ should be ordered to revise the text of his Order of June 16, 2000 to omit language Appellant contends is unnecessary to the decision.

OPINION

To narrow the issues in this appeal, reviewing the timeline for a possible EAJA award in this case is useful. Once Judge Gardner dismissed the Complaint against Appellant, he was entitled to *apply* for attorney's fees and expenses under EAJA subject to the approval of the CALJ (who had been assigned the case following Judge Gardner's retirement). Rather than apply to the ALJ for an award, Appellant entered into negotiations with agency counsel and ultimately agreed to settle his EAJA claim for $10,000. The settlement agreement was submitted to the CALJ for approval. Before approving the settlement, the CALJ issued an order, directing Appellant to provide documentation to support the EAJA application. The CALJ also issued to the parties an Order to Show Cause why the EAJA application should not be denied. After the CALJ approved the settlement, Appellant submitted another EAJA application requesting an award of attorney's fees and costs associated with responding to the CALJ's Show Cause

Order, with his request for a revision of the CALJ's order of June 16, 2000, and with other post-settlement proceedings associated with the case. The principal issue in this appeal therefore is whether, having received his EAJA settlement, Appellant is entitled to an EAJA award for expenses incurred in supporting the settlement agreement.

As a result of Judge Gardner's decision dismissing the Complaint, Appellant was a prevailing party in an adversarial proceeding conducted by the Department of Transportation and was therefore eligible to *apply* for an EAJA award pursuant to 5 U.S.C. § 504 and 49 C.F.R. Part 6; however, 'no award of fees is "automatic".' *Commissioner, Immigration and Naturalization Service v. Jean*, 496 U.S. 154, 163 (1990). The Department of Transportation's (DOT's) standards for making an award are found at 49 C.F.R. § 6.9.

Before a decision is made on an EAJA application, the applicant or agency counsel may request, or the assigned ALJ on his or her own initiative may order further proceedings. 49 C.F.R. § 6.31. The ALJ then must issue an initial decision. 49 C.F.R. § 6.33. In making an initial decision of any type, an ALJ must include in the record a statement of findings and conclusions and the basis therefore with regard to any material issues of fact, law or discretion. 5 U.S.C. § 557(c). If neither the applicant nor the agency counsel request agency review within 30 days, the decision becomes final. 49 C.F.R. § 6.35.

In this case, the parties agreed to a stipulated settlement to avoid the hazards of a contested proceeding. Each side had an incentive to settle. For the Coast Guard, Appellant was agreeing to take less than the full claim he was asserting. For Appellant, he would receive nothing if the CALJ found that the agency's position in bringing the complaint was substantially justified. The agency does not have to prevail for its position to be substantially justified; its position need only be "justified to a degree that would satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552 (1988). In accordance with DOT regulations, the proposed settlement agreement was submitted to the CALJ for his approval. 49 C.F.R. § 6.29. The Coast Guard's administrative hearing settlement procedures are found at 33 C.F.R. § 20.502.

When a prevailing party and agency counsel reach a settlement agreement before the EAJA application has been submitted, the application "shall be filed with the proposed settlement." 49 C.F.R. § 6.29. An EAJA application must contain certain information including a net worth exhibit and documentation of fees and expenses. 49 C.F.R. Part 6 Subpart B. Appellant's application contained no supporting documentation with regard to attorneys' fees and expenses so the CALJ issued an order to produce the necessary documentation on February 7, 2000. Appellant responded on February 19, 2000 by supplying the necessary documentation. In his cover letter, Appellant gave no indication that he was planning to change the amount he was seeking under the settlement agreement by supplementing his EAJA application.

The role of the ALJ 'is "functionally comparable" to that of a judge.' *Butz v. Economou*, 438 U.S. 478, 513 (1978). Furthermore, the administrative procedures system is structured so that the ALJ "exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency." *Id.* He cannot engage in any *ex parte* consultations with parties, including agency officials, except on notice and with the opportunity of all parties to participate. 5 U.S.C. § 554(d)(1). Significantly for this case, the ALJ is not subject to the supervision or direction of any agency employee engaged in the performance of prosecution functions for the agency. 5 U.S.C. § 554(d)(2); 33 C.F.R. § 20.206. In other words, agency counsel cannot direct the ALJ to take any specific action, including the approval of a settlement of an EAJA claim. Much as a judge approving a settlement agreement, the ALJ must make an independent judgment that the settlement agreement is both in accordance with the law and public policy and is fair, reasonable, and in the best interests of the parties. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2nd Cir. 1995). *See also, United States, ex rel. Sharma v. Uni. Of Southern Cal.*, 217 F.3d 1141 (9th Cir. 2000) (court may modify attorney fee settlement agreement to ensure it complies with False Claims Act); *Eifler v. Peabody Col Co. et. al.*, 13 F.3d 236 (7th Cir. 1993) (award of attorneys' fees in compensation case requires administrative or judicial approval even if both parties agree on award). Among the factors to consider is the likelihood of success on the merits. *Maywalt,* 67 F.3d at 1079.

The settlement agreement in this case consisted of a Stipulation for Attorneys' Fees and Expenses that noted the complaint had been dismissed, a statement of net worth, that Appellant had incurred an amount in excess of $10,000 in attorneys' fees and expenses, that the agency was satisfied with the documentation of expenses, and an agreement that Appellant was entitled to an award of $10,000. With only this information in the record, as noted above, the ALJ requested documentation supporting the fees and expenses and Appellant produced documents showing that his expenses totaled $27,794.55.

In order to evaluate the merits of the proposed settlement and reach an independent decision, the CALJ felt it was necessary to issue a Show Cause Order seeking additional information with regard to merits of Appellant's EAJA claim. Such proceedings are permitted under 49 C.F.R. § 6.31. It is worth noting again that the CALJ was not originally assigned to the case, but was assigned the case after Judge Gardner retired. After reviewing the record, the CALJ had questions regarding the key issue of whether the Coast Guard's decision to bring the complaint was substantially justified, including whether the Coast Guard agreed with Appellant's allegation that its position was not substantially justified. Since this would have been the principal issue in dispute if the EAJA application were litigated, the CALJ needed a good understanding of the merits of the Coast Guard's position in bringing the complaint to evaluate the settlement proposal. For example, if the Coast Guard was completely without justification and was acting in bad faith when it brought the complaint, settling for a little more than a third of his claimed expenses would have been unfair to Appellant. (A significant portion of this difference can also be explained by the fact that under DOT's regulations, the maximum billing rate is $125/hour.)

In issuing the two orders prior to making his decision, the CALJ was acting in an independent role, much as a judge, to create a record for possible later review and to gather sufficient evidence to reach an independent decision. In doing so, he was fulfilling his independent role under the Administrative Procedures Act, not acting as agency counsel contesting an EAJA application. In fact, the merits of the EAJA application were

never litigated in this case; instead they were compromised by both parties in the settlement agreement to avoid further litigation and costs.

After reviewing submissions from both the Coast Guard and Appellant, the CALJ approved the settlement proposal on June 16, 2000, by his Order Granting Respondent's Request for Attorneys' Fees and Expenses Pursuant to the Equal Access to Justice Act. On July 6, 2000, Appellant wrote to the CALJ requesting revisions to this Order; again this letter makes no mention of a supplemental EAJA application. The CALJ denied the request on July 18, 2000. On July 24, 2000, Appellant requested payment of the settlement, agreed not to seek review of the CALJ's Order Granting Respondent's Request (apparently the June 16, 2000 order), and, for the first time, reserved the right to seek an additional EAJA award as a result of the April 28, 2000 Show Cause Order. Appellant submitted such an application on August 15, 2000.

On November 15, 2000, the CALJ denied Appellant's "supplemental application." As explained above, Appellant is not eligible to receive an EAJA award for the attorneys' fees and expenses associated with responding to the Show Cause Order because this Order was an action of the independent CALJ both to build a record and to decide whether to approve the settlement agreement, not an action of an adverse party in litigation. Despite the statutory scheme creating the ALJ as an independent actor, Appellant claims that the CALJ's actions should be ascribed to the Agency without providing any support for this position. Although a respondent may under certain circumstances recover the costs associated with EAJA fee litigation in addition to the costs of the underlying litigation, in this case there was no EAJA fee litigation because of the settlement. Having received the benefit of the settlement bargain and having agreed not to contest the CALJ's decision, Appellant cannot try to reopen the settlement through this supplemental application.

Even if Appellant were allowed to supplement the settlement agreement with a new EAJA application, he would still have to meet all the requirements for an award including that the agency's position in the underlying litigation was not substantially justified. Despite Appellant's contention that the Coast Guard is estopped from asserting that its position was substantially justified by its failure to appeal the dismissal of the

complaint, the failure of the agency to prevail in the litigation does not even create a presumption that its position was not substantially justified. 49 C.F.R. § 6.9(a). Furthermore, in responding to the CALJ's Show Cause, the Coast Guard clearly stated that the settlement stipulation was not an admission that it was not substantially justified in filing a Complaint. This statutory requirement for an EAJA award has never been litigated in this case despite extensive discussion of the issue in Appellant's pleadings. To the extent that he addressed the issue, the CALJ indicated he believes the Coast Guard's position was substantially justified.

Since this decision denies Appellant's application, there is no need to address his request for attorney's fees above the regulatory maximum except to note that the power to make such a rulemaking rests with the DOT.

CONCLUSION

The Order of the Chief Administrative Law Judge dated November 15, 2000, is AFFIRMED.

ORDER

The Decision and Order of the Chief Administrative Law Judge dated November 15, 2000, is AFFIRMED.

T. H. Collins

T. H. COLLINS
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 11th day of September, 2001.