PENN ENVIRONMENTAL CONTROL, INC.

CONTRACT NO. V513C-220 **VABCA-3726E**

VA MEDICAL CENTER
BATAVIA, NEW YORK

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OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

Penn Environmental Control, Inc. (PEC or Applicant), has submitted a timely application for $34,304.82 in attorney fees and expenses under the *Equal Access to Justice Act* (*EAJA*), 5 U.S.C. § 504, in relation to the appeal in VABCA-3726.

The Board issued its original decision in VABCA-3726 on March 9, 1994 which decision found that PEC was entitled to an equitable adjustment in the amount of $19,620.53 plus *Contract Disputes Act* interest. ***Penn Environmental Control, Inc.***,VABCA-3726, 94-2 BCA ¶ 26,790. PEC filed a MOTION FOR RECONSIDERATION which was denied on June 16, 1994. ***Penn Environmental Control, Inc.***,VABCA-3726R, 94-3 BCA ¶ 26,999. PEC appealed the Board's decision to the United States Court of Appeals for the Federal Circuit (Federal Circuit). The Federal Circuit, in a non-precedential decision, vacated the Board's decision and remanded the appeal in VABCA-3726 to the Board to determine a specific factual issue. ***Penn Environmental Control, Inc. v. Brown***, 66 F.3d 345 (Fed. Cir. 1995). On February 26, 1996, the Board issued its decision on the remand, making the specific factual finding as directed by the Federal Circuit and reiterating its decision that PEC was entitled to an equitable adjustment in the amount of $19,620.53 plus *Contract Disputes Act* interest. ***Penn Environmental Control, Inc.***, VABCA-3726E/R, 96-1 BCA ¶ 28,213. PEC again appealed the Board's decision to the Federal Circuit; on May 14, 1997, the Federal Circuit affirmed the Board's decision. ***Penn Environmental Control, Inc. v. Brown***, 113 F.3d 1258 (Table) (Fed. Cir. 1997). This application followed the Federal Circuit's action in the second appeal.

BACKGROUND

As affirmed by the Federal Circuit, the Board held that PEC was entitled to an equitable adjustment in the amount of $19,620.53 under Contract No. V513C-220 ("Contract"), due to the unanticipated concrete ceiling, brick walls, speed tile walls, and acoustical tile encountered by PEC in the course of its performance of the Contract at the Department of Veterans Affairs Medical Center in Batavia, New York ("VAMC Batavia"). PEC's original claim was $90,616.00.

PEC seeks to recover attorney fees and expenses for the initial litigation before the

Board, the litigation of the MOTION FOR RECONSIDERATION, the litigation of the first appeal at the Federal Circuit, and the litigation before the Board on the remand; PEC seeks no recovery for the litigation of the second appeal to the Federal Circuit.

The Board's original opinion and its opinion on the remand from the Federal Circuit thoroughly discuss the facts relevant to PEC's entitlement to an equitable adjustment and the amount of the award. Familiarity with those decisions is presumed. However, the gravamen of PEC's position in all the litigation subsequent to the Board's decision in the initial litigation has consistently depended on the existence of a double wall condition wherever speed tile walls existed. It is on this basis that PEC has supported its claim that the Board should have awarded approximately $51,000 more than it did for PEC's work on the speed tile. The Board expressly rejected the existence of the double wall condition as a matter of fact in its initial decision on VABCA-3726, a fact the Board reiterated in the decision on the MOTION FOR RECONSIDERATION and the decision following the Federal Circuit's remand.

DISCUSSION

PRELIMINARY MATTERS

This application involves PEC's request for fees and expenses related to its litigation before the Board and its litigation before the Federal Circuit. The initial question we must resolve is whether the Board has jurisdiction to consider an application for fees and expenses incurred in the litigation before the Federal Circuit.

In ***Dole v. Phoenix Roofing, Inc.***, 922 F. 2d 1202, 1209 (5th Cir. 1991), the Court, with regard to an *EAJA* application to the Occupational Safety and Health Review Commission ("OSHRC") that included attorney fees and costs for proceedings both before the OSHRC and the Court, stated:

Therefore, we hold that the OSHRC did indeed have jurisdiction to consider Phoenix's EAJA application for attorney's fees, even though the First Citation was appealed to the Court. The plain language of Section 504(a)(2) indicates that OSHRC retains jurisdiction to make fee awards in cases that have been appealed. The analogous statutory structure found in Title 28, which courts have interpreted as allowing district courts to award fees even if the decision was reviewed on appeal coupled with the fact that courts have repeatedly held that Congress intended to treat the OSHRC as a district court, support this interpretation.

In so holding, the Court examined the apparent contradiction between *EAJA* Sections 504 (a)(2) and 504(c)(1) and concluded, as a matter of statutory construction, that harmonizing the Section 504(c)(1) enjoinder that award of attorney fees and expenses where a court has reviewed the agency adjudication be made solely pursuant to the "judicial *EAJA*," 28 U.S.C. § 2412(d)(3), with the Section 504(a)(2) instruction providing for the agency to act on an application after final disposition of any appeal, results in a conclusion that Congress intended that both the OSHRC and the Court had jurisdiction to consider the *EAJA* application. The Court also analogized the circumstances with which it was presented to the structure for dealing with *EAJA* applications pursuant to 28 U.S.C.

§ 2412 wherein either the district court or the appellate court could decide *EAJA* applications with regard to a matter that had been appealed.

The General Services Board of Contract Appeals (GSBCA) has held that it had no jurisdiction to consider an *EAJA* application that included fees and expenses for litigation before the Federal Circuit. The GSBCA offers no analysis of its conclusion other than to point out that 28 U.S.C. § 2412 is a "separate statutory provision for recovery of costs for court cases." ***Tele-Sentry Security, Inc.***, GSBCA No. 11639-C(10945(7703)-REIN), 93-2 BCA ¶ 25,816 at 128,529. The Federal Circuit has not addressed this issue.

We consider the Fifth Circuit's analysis in ***Dole v. Phoenix Roofing, Inc.*** to be a reasoned approach, both as a matter of law and as a matter of judicial economy. Since the Board, under 41 U.S.C. Chapter 9, is in essentially the same position as an adjudicative body as the OSHRC, we conclude that we have jurisdiction to decide PEC's application with regard to the proceedings in the Federal Circuit relative to this appeal.

Assuming that an applicant meets the size standard to be awarded attorney fees and expenses under *EAJA*, an applicant must surmount four hurdles in order to receive fees and expenses:
1) The application is timely filed and supported by an itemized statement; 2) The applicant prevailed in the action; 3) The Government's position was not substantially justified; and, 4) the award of attorney fees is not unjust. ***Commissioner, Immigration and Naturalization Service v. Jean***, 496 U.S. 154, 158 (1990); ***Doty v. United States***, 71 F.3d 384

(Fed. Cir. 1995).

TIMELINESS AND ITEMIZATION OF APPLICATION

This application is timely and we find it to be sufficiently itemized to support an award of fees and expenses pursuant to *EAJA*.

SIZE ELIGIBILITY FOR RECOVERY OF ATTORNEY FEES AND EXPENSES

The Government has not questioned PEC's eligibility, under *EAJA* statutory size standards, to recover fees and expenses in the litigation of its appeal in VABCA-3726. Based on the certified net worth statements submitted by PEC, we find the Applicant eligible to recover attorney fees and other expenses in this applications.

PREVAILING PARTY

We have four separate and distinct elements of the litigation for which PEC seeks recovery of fees and expenses: 1) The original litigation of VABCA-3726; 2) PEC's MOTION FOR RECONSIDERATION of the Board's original decision in VABCA-3726; 3) The litigation of PEC's first appeal to the Federal Circuit; and, 4) The litigation of VABCA-3726 before the Board on the Federal Circuit's remand.

In order to recover fees and expenses incurred in litigating this appeal, PEC must be a "prevailing party" in the litigation. PEC need not have prevailed totally on all of its

claims; it need only show that it obtained some significant relief from the litigation. The "generous formulation" standard established by the Supreme Court in ***Hensley v. Eckerhart***, 461 U.S. 424, 433 (1983) simply requires that the legal relationship between the Government and non-Government party must be materially altered in favor of the non-Government party. ***Farrar v. Hobby***, 506 U.S. 103 (1992); ***Warbonnet Electric, Inc.***, VABCA-3731E, 3875-3880E, 96-2 BCA ¶ 28,480; ***Penn Environmental, Inc.***, VABCA-3599E, 3600E, 3725E, 94-1 BCA ¶ 26,326.

PEC asserts that it was a prevailing party throughout the course of this litigation through the Board's decision on the remand. PEC bases this assertion on the fact that, in its view, it obtained significant relief throughout the litigation of this action. The VA maintains that PEC was a prevailing party only in the original litigation before the Board. In the VA's view, the fact that all of the litigation between the parties following the Board's original decision, in the end, did not materially alter the legal relationship between the parties means that PEC could not be a prevailing party in any phase of that litigation.

Although there are four distinct and separate elements or phases to the litigation in this action, we are constrained to consider the litigation as a whole and as a single entity in our determination of whether PEC is a prevailing party. Under the standard discussed above, we find that PEC's achievement of substantive recovery on its claims, when the action is viewed in its entirety, carries it across the prevailing party statutory threshold. The fact that PEC's ultimate recovery was not changed in its favor after our original decision in VABCA-3726 does not affect its status as prevailing party in the litigation as a whole. ***Jean***, 496 U.S. at 160-162.

We do not mean to indicate that, where there are separate appeals consolidated for hearing or there are clearly distinct, separate claims in a appeal, separate determinations as to whether an applicant is a prevailing party for each appeal or claim can not be made. Neither of those circumstances are present here; consequently, we follow the instructions of the Supreme Court and look at this action as an "inclusive whole, rather than as atomized line-items." ***Jean***, 496 U.S. at 162.

SUBSTANTIAL JUSTIFICATION

As the prevailing party in the action, PEC may recover its attorney fees and expenses if the Government's position during the course of the actions was not substantially justified. 5 U.S.C. § 504(a)(1); ***Warbonnet***, 96-2 BCA ¶ 28,480. Once, as is the case here, an applicant avers in what respect the Government's position in the litigation was not substantially justified, the Government carries the burden of showing that its position was "substantially justified" in order to avoid the assessment of the applicant's allowable and reasonable fees and expenses against it. ***Delfour, Inc.***, VABCA-2049E, et al., 90-3 BCA ¶ 23,066.

The VA makes no assertion that it was substantially justified in its position in the initial litigation of this appeal; however, the VA avers that its position was substantially justified in all elements of the litigation after the Board's first decision in VABCA-3726.

The Government knew that speed tile walls would be encountered by PEC during its work at VAMC Batavia and, notwithstanding that knowledge, indicated that only plaster

hollow walls would be encountered. When confronted with PEC's claim for the additional costs of removing the speed tile walls that were encountered the VA, throughout the course of its initial consideration of PEC's claims, the Final Decision, and the initial litigation of this appeal, refused to concede any liability for the costs. In our view, the VA's actual knowledge concerning the existence of the speed tile walls and its failure to discharge its duty to provide that information results in its implied acknowledgement that it was not substantially justified in its position in the initial litigation.

Our determination of whether the VA's position was substantially justified is guided by the same standard of looking at the action as a whole as is applicable to determining whether PEC was a prevailing party. ***Jean***, 496 U.S. 154 at 160; ***C&C Plumbing and Heating***, ASBCA No. 44270, 95-2 BCA ¶ 27,806.

While the positions taken by the VA in elements of this action were reasonable, the Federal Circuit requires us "to look at the entirety of the Government's conduct and make a judgment call whether the government's overall position has a reasonable basis in both law and fact." ***Chiu v. United States***, 948 F.2d 711, 715 (Fed. Cir. 1991) *citing* ***Pierce v. Underwood***, 487 U.S. 552 (1988). Recognizing the discretionary nature of such a determination, the ***Chiu*** Court observed that "[i]t is for the trial court to weigh each position taken and conclude which way the scale tips. . . ." ***Chiu***, at 715 n.5. After reviewing the entire record, our decisions on the merits, the appellate pleadings and decisions, and the application, we find that the Government's position overall, for the reasons discussed above, was not substantially justified. To the extent this Board previously may have indicated that it would be willing to make separate determinations as to substantial justification for discrete phases or portions within the same appeal or civil action, we wish to clarify our intention henceforth to make a single threshold determination on whether the Government's position for the entire civil action was substantially justified.

FEES AND EXPENSES

Thus, PEC, as an eligible small business presenting a timely and properly itemized application has successfully negotiated the threshold statutory barriers to recovery of attorney fees and expenses under *EAJA*. It is a prevailing party in the litigation and the Government's position was not substantially justified during the action.

PEC has applied for the recovery of fees and expenses in the amount of $34,304.82 which includes fees and expenses for the litigation of VABCA-3726 and the litigation of the *EAJA* application. However, it is clear that award of fees where the threshold *EAJA* conditions are met is not automatic upon an applicants' surmounting the thresholds. The Supreme Court and the Federal Circuit have also clearly provided that the amount of fees to be awarded is a matter for the Board's discretion. ***Jean***, 496 U.S. at 163; ***Neal & Company v. United States***, 121 F.3d 683 (Fed. Cir. 1997); ***Chiu***, 948 F.2d 711 (Fed. Cir. 1991).

We weigh the statutory instructions with regard to determining fees and we look to applicable precedent. The statute provides for the award of "reasonable" fees and expenses which may be reduced or denied where the applicant unduly protracts the final

resolution of the action or where "special circumstances make the award unjust." 5 U.S.C. §§ 504(a)(1), (3), (b)(1)(A). We may also weigh the applicant's degree of success in the action. ***Jean***, 496 U.S. 154; ***Hensley***, 461 U.S. 424 (1983); ***Chiu***, 948 F.2d 711 (Fed. Cir. 1991); ***Integrated Clinical Systems, Inc. (American Monitor Corporation)***, VABCA-3745E & 3914E-3917E, 96-2 BCA ¶ 28,425; ***Sage Construction Company***, ASBCA No, 34284, 92-1 BCA ¶ 24,493.

This application involves a rather unique set of circumstances in which we see a successful appellant take appeals of the Board's decisions granting it money to the Federal Circuit twice. While it achieved a procedural victory in the first appeal with the Federal Circuit's vacation of the Board's decision and the remand for very narrow additional fact finding, PEC, in the end, obtained essentially nothing more than it had achieved from the Board's initial decision. The Federal Circuit's affirmation of the Board's decision in the PEC's second appeal to the Federal Circuit resulted in PEC receiving a judgment of $19,620.53 plus interest; the exact amount it was awarded in the Board's original decision in VABCA-3726 on March 9, 1994.

We do not hold that PEC unduly protracted this litigation by the exercise of its appellate rights. However, since PEC achieved nothing more than it already had after the initial litigation before the Board, we find PEC's fees and expenses for the initial litigation of the appeal and the fees and expenses for preparation of the *EAJA* application to be the only reasonable basis for award of fees and expenses in this case.

The VA has not contested the hours of legal services for the initial litigation of VABCA-3726; we find the 127.9 hours claimed for legal services for the period April 4, 1992 to July 26, 1993 to be reasonable. We also find the 19.7 hours charged for preparation of the *EAJA* application to be reasonable. Thus, we will allow PEC to recover for 147.6 hours of legal services.

PEC has requested $150 per hour for legal services. We may grant awards of attorney fees only at the rate of $75 per hour in this case because the litigation in VABCA-3726 was commenced prior to March 29, 1996. The statutory rate for attorney fees awarded under *EAJA* for actions commenced after that date increased to $125 per hour. The VA has not promulgated any regulations under which we could award fees at a rate in excess of the $75 per hour statutory rate. 5 U.S.C. § 504(b)(1)(A) *as amended by* Pub.L. 104-121, §§ 231(b)(1), 233 (1996); ***Fletcher & Sons, Inc.***, VABCA-3248E, 93-1 BCA ¶ 24,472; ***Buckley Roofing Co., Inc.***, VABCA-3347E, 92-2 BCA ¶ 24,826.

Consequently, at the statutory rate, we find that PEC is entitled to $11,070 (147.6 X $75) in attorney fees for the initial litigation of VABCA-3726 and related application preparation effort.

With the exception of one item, the VA does not contest PEC's expenses related to the initial litigation of VABCA-3726. However, the VA takes exception to a consultant fee of $105. The VA questions this expense on the basis that the application does not identify the purpose for which the expense was incurred. Although the application does not specify the purpose of this fee, the record in VABCA-3726 includes an affidavit by the consultant in question; thus the purpose of the incurrence of this fee is clear and we will allow it. We find the expenses for which PEC has applied to be reasonable and rounding

to the nearest dollar, we will allow $704 for *per diem*, deposition, and consultant expenses for the initial litigation of VABCA-3726.

DECISION

For the foregoing reasons, the Applicant, Penn Environmental Control, Inc., is awarded fees and other expenses under the *EQUAL ACCESS TO JUSTICE ACT* under the application in VABCA-3726E as follows:

Category	Amount
Attorney Fees	$11,070
Expenses	704
Total	$11,774

DATE: **November 4, 1997**

RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur.

MORRIS PULLARA, Jr.
Administrative Judge

JAMES K. ROBINSON
Administrative Judge