

PSBCA No. 6159

APPEALS OF JANET L. FOX AND TODD FOX

Under Contract Nos. HCR 299A9 and HCR 299B3

May 10, 2011

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OPINION OF THE BOARD ON APPLICATION FOR ATTORNEY FEES AND EXPENSES [FN1]

Appellant Todd Fox has filed an Application under the Equal Access to Justice Act ("EAJA" or "the Act"), 5 U.S.C. § 504, for attorney fees and expenses incurred in connection with his litigation of the captioned appeal and prosecution of his Application. Familiarity with the Board's Opinion in Janet L. Fox and Todd Fox, PSBCA Nos. 6159, 6169, 09-1 BCA ¶ 34,082, aff'd. 366 Fed. Appx. 161 (Fed. Cir. 2010), is presumed, and the facts found therein, summarized below, will be addressed only as necessary to explain this decision.

Respondent, United States Postal Service, terminated for default two mail delivery contracts—one awarded to Todd Fox and one awarded to Janet L. Fox. The default terminations occurred on different dates, about a week apart, and the two contractors filed separate appeals with this Board, approximately two months apart. The contractors were represented by the same counsel, and at the contractors' request, without objection by Respondent, the Board later consolidated the two appeals "for processing and decision." (Board Order of June 3, 2008). In an Opinion dated February 26, 2009, covering both appeals, the Board sustained the termination of the contract awarded to Janet Fox (PSBCA No. 6159), but overturned the termination of the contract awarded to Todd Fox (PSBCA No. 6169).

Janet Fox appealed the Board's decision to the Court of Appeals for the Federal Circuit. The court captioned the appeal as "Todd Fox and Janet Fox, Appellants v. John E. Potter, Postmaster General." In a Judgment dated February 17, 2010, the court affirmed the Board's decision.

Respondent did not appeal the Board's decision overturning the termination of Todd Fox's contract.

Appellant Todd Fox filed his EAJA Application on March 19, 2010, the thirtieth day after the Federal Circuit issued its Judgment. In his initial Application, Appellant reported that he and Janet Fox had incurred a total of \$53,616.09 in attorney fees, paralegal and legal assistant costs, and expenses in the principal litigation. With only a few exceptions, the incurred fees, costs, and expenses were not separately recorded with respect to each of the appeals. Appellant sought payment of half of the total amount, on the basis that he had prevailed on one of the two appeals. On April 15, 2010, Respondent filed an Opposition to the Application.

On April 30, 2010, Appellant filed a response to Respondent's Opposition and a Supplemental Application, seeking the award of additional attorney fees and expenses allegedly incurred in the preparation of the Application and Appellant's response.

In its Opposition to the Application, Respondent's first argument raised the issue of the jurisdiction of the Board to entertain the Application, arguing that it was not timely filed. Respondent also raised several arguments with regard to the substance and form of the Application, but inasmuch as we dismiss the Application for lack of jurisdiction, we do not address the latter arguments.

DECISION

Under 5 U.S.C. § 504, the Equal Access to Justice Act, [FN2] an agency that conducts an "adversary adjudication" is to award to a prevailing party other than the United States, fees and other expenses incurred by that party "in connection with that proceeding." 5 U.S.C. § 504(a) (1). The term "adversary adjudication" is defined to include "... any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978... before an agency board of contract appeals...." [FN3] 5 U.S.C. § 504(b) (1) (C). The Act further provides that a party seeking an award of such fees shall, "... within thirty days of a final disposition in the adversary adjudication," submit an application to the agency. 5 U.S.C. § 504(a) (2).

The Postal Service regulations implementing the Act are found at 39 C.F.R. Part 960. Under those regulations, "adversary adjudications" include "Appeals of decisions of contracting officers made pursuant to section 6 of the Contract Disputes Act of 1978... before the Postal Service Board of Contract Appeals...." 39 C.F.R. § 960.3(a) (2).

With regard to the timing of applications under the Act, the Postal Service regulations provide that,

"(a) An application may be filed whenever the applicant has prevailed in the proceeding or in a significant and discrete substantive portion of the proceeding, but in no case later than 30 days after the Postal Service's final disposition of the proceeding.

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the later of... (6) In proceedings before the Board of Contract Appeals, the Board of Contract Appeals decision on quantum. When the Board decides only entitlement and remands the issue of quantum to the parties, the final disposition occurs when the parties execute an agreement on quantum...."

(emphasis added).

39 C.F.R. § 960.12.

The requirement to file an EAJA application within thirty days of final disposition of an adversary adjudication or proceeding is jurisdictional and may not be waived by the Board. See *J.M.T. Machine Co., Inc. v. United States*, 826 F.2d 1042, 1048 (Fed. Cir. 1987); *SAWADI Corp., ASBCA No. 52973*, 01-2 BCA ¶ 31,582 at 156,002; *Griffin Services, Inc. v. General Services Administration*, GSBICA 11735-C(11171), 94-2 BCA ¶ 26,624 at 118,752. Respondent's untimeliness argument, simply put, is that Appellant Todd Fox, as the prevailing party in PSBCA No. 6169, was required to file an EAJA application within 30 days after the proceeding became final, but that he failed to do so. Respondent argues that the proceeding in PSBCA No. 6169 became final for EAJA purposes on June 26, 2009, when the 120-day appeal period expired without Respondent having filed an appeal. Respondent contends that Appellant's EAJA Application, which was not filed until March 19, 2010, was, therefore, untimely.

Appellant relies primarily on *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202 (5th Cir. 1991) in opposition to Respondent's argument. In that case, two citations had been issued to Phoenix following an inspection of its work site, alleging that it had violated two safety standards promulgated under the Occupational Safety and Health Act. In May 1988, an Administrative Law Judge (ALJ) from the Occupational Safety Health Review Commission (OSHRC) sustained one of the violations but vacated the other. *Secretary of Labor v. Phoenix Roofing, Inc.*, 1988 WL 212603 (O.S.H.R.C.A.L.J.). Phoenix appealed the violation that had been sustained by the ALJ to the Court of Appeals for the Fifth Circuit, and in June 1989, the court affirmed that a violation had occurred. *Phoenix Roofing, Inc. v. Dole*, 874 F.2d 1027 (5th Cir. 1989).

In July 1989, [FN4] Phoenix applied to the OSHRC under the EAJA for fees and expenses related to the violation that the ALJ vacated in May 1988, and in December 1989, the ALJ granted Phoenix's application. *Secretary of Labor v. Phoenix Roofing, Inc.*, 1989 WL 223509 (O.S.H.R.C.A.L.J.). The Secretary of Labor then appealed the EAJA award to the Fifth Circuit, arguing, among other things, that the ALJ lacked jurisdiction to award fees and expenses related to the citation vacated by the ALJ in May 1988, because Phoenix's July 1989 application was untimely with respect to that element of the case. The 5th Circuit rejected the Secretary's argument concerning jurisdiction, ruling that

"... when a party appeals only part of an ALJ's decision, the entire decision is on review; the failure to appeal the decision on a particular citation item does not make the ALJ's disposition of that item a 'final disposition' of that item for EAJA purposes."

Phoenix Roofing, 922 F.2d at 1206.

In *Phoenix Roofing*, the court treated the individual citations that were litigated as parts of a single proceeding before the ALJ. In that case the citations had been issued to a single entity as a result of a single inspection of that entity's work site. In contrast, the appeals filed by Janet Fox and Todd Fox were clearly separate proceedings when they were first filed with the Board. The appeals related to separate contracts with separate contractors. The contracts were terminated at different times and the two contractors, Todd Fox and Janet Fox, filed appeals at different times. The question before us, then, is whether, as argued by Appellant, the two appeals became part of a single proceeding by virtue of their consolidation. If not, then, as argued by Respondent, final disposition of the proceeding in PSBCA No. 6169 (Todd Fox) occurred on or about June 26, 2009, and Mr. Fox's EAJA Application, filed in March 2010, was untimely and must be dismissed for lack of jurisdic-

tion.

Having considered the parties' arguments, we see nothing related to consolidation that changed the fundamental nature of these appeals as separate proceedings. There was no claim or evidence of a commonality of legal interests that intertwined the two appeals or that mandated that they be heard and decided together. Rather, consolidation was requested and granted as an administrative matter in the interests of efficiency and judicial economy because of a commonality of witnesses and, to some degree, facts in the two appeals. We conclude that consolidation, by itself, did not serve to create a single proceeding for EAJA purposes. See, e.g., Bogue Electric Mfg. Co., ASBCA Nos. 25184, 29606, 89-3 BCA ¶ 21,951; International Foods Retort Co., ASBCA Nos. 37110, et al., 93-3 BCA ¶ 26,249.

In addition, we attribute no significance to the fact that Janet Fox's appeal of the Board's decision in PSBCA No. 6159 was captioned by the Federal Circuit under both names and docket numbers, as in the Board's Opinion. Notwithstanding the Federal Circuit caption, there is no claim or indication that Appellant Todd Fox actually appealed the Board's decision in his favor to the court or that his contract was in any way implicated in the proceedings before the court. [FN5] Appellant Janet Fox was the sole party whose appeal was actually considered by the court, and the court's proceedings did not affect or delay the final disposition of Appellant Todd Fox's appeal before the Board.

That Todd Fox and Janet Fox were represented by the same attorney and that the attorney did not maintain separate billings for each appeal also does not compel a conclusion that the two appeals constituted a single proceeding. The right afforded by the Act to file an application for and recover attorney fees belongs to the litigant, in this case Todd Fox, and not his attorney. *Astrue v. Radcliff*, 130 S. Ct. 2521, 2525-2526 (2010). Counsel's representation of Janet Fox and Todd Fox and the failure (or inability) to segregate legal services and costs between the two Board appeals, did not result from their consolidation. The failure to identify the fees and costs to each appeal would have posed the same difficulty of identifying reasonable attorney fees for the successful appeal, whether the appeals were consolidated before the Board or not.

The Board is often called upon to apportion attorney fees in EAJA applications among different issues based on a party's success or lack thereof in distinct claims or issues or phases of litigation. See, e.g., *Overflo Public Warehouse, Inc.*, PSBCA No. 4531, 06-1 BCA ¶ 33,160; *Karcher Environmental, Inc.*, PSBCA Nos. 4085, 4093, 4282, 02-1 BCA ¶ 31,787; *Lee McLaughlin*, PSBCA No. 2199, 89-3 BCA ¶ 22,178; *American Federal Contractors, Inc.*, PSBCA No. 1359, 88-2 BCA ¶ 20,526. This is a process common to EAJA proceedings, and the difficulty of apportioning such costs is not a basis for concluding that the two appeals became one for purposes of determining Todd Fox's time for filing an application for attorney fees.

Because two distinct litigants are involved in this consolidated appeal, a determination that Todd Fox was required to file his EAJA Application within 150 days after the Board's decision also does not run afoul of the Fifth Circuit's admonition in *Phoenix Roofing* that "piecemeal" litigation of attorney fee claims is to be avoided. *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1207 (5th Cir. 1991). Had Janet Fox prevailed in her appeal to the Federal Circuit and then timely applied to the Board for attorney fees, the Board would in any event have had to consider the two applications separately as to, e.g., each applicant's eligibility, whether Respondent was substantially justified in each appeal, and whether special circumstances in each appeal made an award unjust. Each application would have been decided separately, just as the initial Board appeals were, and each applicant would have had to meet the requirements of the Act. Treating each fee application on its own merits would not be piecemeal adjudication.

We conclude that consolidation of the two appeals did not cause them to become

parts of a single proceeding or adversary adjudication for the purposes of the Act. Therefore, final disposition of the proceeding in PSBCA No. 6169 (Todd Fox) occurred on or about June 26, 2009, and Mr. Fox's EAJA Application, which was filed more than 30 days after that date, was untimely. Accordingly, the Board lacks jurisdiction to consider the merits of the Application and it is, for that reason, dismissed.

David I. Brochstein

Administrative Judge

Vice Chairman

I Concur:

William A. Campbell

Administrative Judge

Chairman

FN1. Administrative Judge Gary E. Shapiro took no part in the Board's consideration of this matter.

FN2. Pub. L. 96-481, Title II, §§ 201, 203(a)(1), Oct. 21, 1980, as amended.

FN3. The reference to "section 6 of the Contract Disputes Act of 1978," in effect when Appellant filed his Application, was changed, effective January 4, 2011, to refer to "section 7105 of Title 41." Pub. L. No. 111-350, Sec 5(a)(1)(A), 124 Stat. 3677 (2011).

FN4. *Dole v. Phoenix Roofing, Inc.*, 922 F.2d 1202, 1204 (5th Cir. 1991).

FN5. While not directly on point, it is illustrative that the court's practice, at least with respect to appeals from United States district courts, is to docket appeals from consolidated cases using the title from the case below, and to include in the caption all parties that participated in the court below, even if they are not participating in the case on appeal. See Fed. Cir. R. 12 (Practice Notes). (The court's rules are silent in this regard with respect to docketing appeals from administrative agencies. See Fed. Cir. R. 15 and Practice Notes.) DD