Exh. A

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALDON SMITH,
Claimant-Appellant

v.

ROBERT WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee

2018-1483

Appeal from the United States Court of Appeals for Veterans Claims in No. 17-2787, Judge Joseph L. Toth.

ON APPLICTION

Before DYK, REYNA and TARANTO, *Circuit Judges*.

PER CURIAM.

O R D E R

Aldon Smith filed the underlying petition for a writ of mandamus at the United States Court of Appeals for Veterans Claims seeking to compel the Secretary of Veterans Affairs to reinstate his benefits and provide a predetermination hearing before any benefit reduction. The Veterans Court denied his petition. After Mr. Smith

filed his opening brief before this court, the Secretary determined that the initial notice of proposed benefits reduction may have gone to an address for Mr. Smith that was not current when the notice was sent, though Mr. Smith had not so alleged in his appeal. Based on that determination, the Secretary voluntarily reinstated Mr. Smith's benefits and provided Mr. Smith with notice that he could have a predetermination hearing before any future action to reduce his benefits was taken. Having been provided all the relief he sought on appeal, this court, over Mr. Smith's objections, granted the Secretary's motion to dismiss his appeal on mootness grounds. Mr. Smith now asks for $11,385 in attorney fees under the Equal Access to Justice Act, ("EAJA"), largely for the work done in preparing his opening brief.

We deny that request. Under the EAJA, a party may not be awarded fees unless it is the "prevailing party." 28 U.S.C. § 2412(d)(1)(A). In *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601–02 (2001), the Court rejected the "catalyst theory" for awarding fees, under which a plaintiff "prevailed" if he achieved "the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." A defendant's voluntary change, even one precipitated by litigation, the Court explained, does not amount to "a court-ordered change in the legal relationship" between the plaintiff and defendant, as required to establish prevailing party status. *Id.* at 604. This court has recognized that *Buckhannon*'s analysis applies in the EAJA setting. *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371, 1383 (Fed. Cir. 2002).

This court's dismissal order in the present case—the only order issued by this court aside from two prior orders granting each party an extension of time to file their merits briefs—was nothing like an "enforceable judgment[] on the merits" or "court-ordered consent decree," that could establish prevailing party status. *Rice Servs.,*

Ltd. v. United States, 405 F.3d 1017, 1026 (Fed. Cir. 2005) (citing *Buckhannon*, 532 U.S. at 604). Far from materially altering the legal relationship between the parties, the dismissal order left undisturbed the Veterans Court's denial of relief to Mr. Smith. This court's order merely recognized that Mr. Smith's appeal could no longer continue after the Secretary voluntarily restored Mr. Smith's benefits and promised a predetermination hearing. In these circumstances, we conclude that Mr. Smith was not a prevailing party and therefore may not receive fees under EAJA.

Accordingly,

IT IS ORDERED THAT:

The application is denied.

FOR THE COURT

Mar. 12, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s24