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Are All of the Act's Requirements for Attorney Fee Applications Jurisdictional in Nature?

by Jay E. Grenig

PREVIEW of *United States Supreme Court Cases*, pages 245-247. © 2004 American Bar Association.

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ISSUE

Is an award of fees under Section 2412(d) of the Equal Access to Justice Act barred solely because the applicant's timely filed fee application did not initially allege that the position of the U.S. government in the underlying litigation lacked substantial justification?

FACTS

After prevailing in litigation against the U.S. Department of Veterans Affairs regarding his claim for disability benefits, Randall Scarborough submitted an application to the United States Court of Appeals for Veterans Claims under the Equal Access to Justice Act (EAJA) in October 1999, stating that: (1) he had prevailed in the litigation; (2) his net worth did not exceed the \$2 million limit for filing under the EAJA; (3) his attorney had represented him in the matter; and (4) his attorney had incurred fees and expenses during this representation that were enumerated in an attachment to the application.

On December 3, 1999, the government filed a motion to dismiss the EAJA application for lack of subject matter jurisdiction. The government claimed that Scarborough had failed to satisfy the jurisdictional requirements under the EAJA because he had not alleged in his application that the government's position in the underlying litigation lacked substantial justification. Scarborough then filed an amendment to his EAJA application on December 9, 1999, alleging that the government's position lacked substantial justification.

Examining the EAJA, the Veterans Claims court held that each of the required parts of an EAJA fee application is a jurisdictional requirement that must be met within the 30-day filing period, including the requirement that the applicant allege that the government's position is "not substantially justified." The Veterans Claims court then dismissed Scarborough's EAJA applica-

(Continued on Page 246)

SCARBOROUGH V. PRINCIPI
DOCKET NO. 02-1657

ARGUMENT DATE:
FEBRUARY 23, 2004
FROM: THE FEDERAL CIRCUIT

Case at a Glance

The Supreme Court is asked whether an award of attorney fees under the Equal Access to Justice Act is barred if the applicant fails to file a timely fee application alleging that the United States government's position in the case was not substantially justified.

tion for lack of subject matter jurisdiction based on his failure to satisfy this latter requirement.

The U.S. Court of Appeals for the Federal Circuit affirmed the dismissal. 273 F.3d 1087 (Fed. Cir. 2001). Scarborough petitioned the Supreme Court for review. The Supreme Court granted certiorari, vacated the Federal Circuit's decision, and returned the case to the Federal Circuit for reconsideration in light of the Supreme Court's decision in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002).

After additional briefing from the parties, the Federal Circuit once again affirmed the decision of the Veterans Claims court dismissing the application. 319 F.3d 1346 (Fed. Cir. 2003). The Federal Circuit explained that the plain language of the EAJA requires not only that an application be filed by the 30-day deadline, but that it contain averments addressing each of the four other requirements enumerated in the statute. Although it noted that the EAJA neither mandates strict compliance nor forecloses supplementation when the details of the stated jurisdictional averments remain to be "fleshed out" or corrected, the Federal Circuit ruled that when the application completely fails to address one of the four statutory requirements by the 30-day deadline, more than a "fleshing out of the details" remains and the application will be deemed jurisdictionally defective.

Scarborough then petitioned the Supreme Court for review of this latest decision of the Federal Circuit and the Supreme Court granted Scarborough's petition for certiorari. 124 S.Ct. 45 (2003).

CASE ANALYSIS

The EAJA makes the United States liable for attorney fees for which it would not otherwise be liable.

The statute provides that a party seeking an award of attorney fees against the United States:

shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney. stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1)(B).

In *Edelman v. Lynchburg College*, the case the Supreme Court directed the Federal Circuit to consider, Edelman was denied tenure at Lynchburg College. Edelman filed a timely charge with the Equal Employment Opportunity Commission alleging gender-based discrimination, exacerbated by discrimination on the basis of national origin and religion in violation of Title VII of the Civil Rights Act of 1964. Although Edelman's charge initially did not include an oath or affirmation as required by Title VII, he supplemented his original submission by filing a verified form approximately two weeks after the deadline. The district court dismissed the case, concluding that the late-filed verified form could not relate back to and provide Edelman with a timely filing date. The Fourth Circuit affirmed, holding that Title VII required the charge to be veri-

fied within the specified time period. The Supreme Court disagreed and reversed.

According to the Supreme Court, the purposes behind the verification requirement and the timeliness requirement are quite different. While the timeliness requirement encourages prompt filing of claims and speedy resolution of discriminatory behavior, the verification requirement is intended to protect employers from frivolous claims.

It is Scarborough's position that the EAJA's 30-day time limit is not jurisdictional, but is a statute of limitations subject to various equitable doctrines such as "relation back" and tolling, under which his fee application should have been considered timely and complete. Even if the 30-day time limit is an absolute bar to an untimely fee application, Scarborough says it does not bar timely, but incomplete, fee applications that are promptly amended to supply missing information or allegations.

Scarborough argues that his amendment of the application to allege that the government's position was not substantially justified relates back to his timely filed fee application under both the Federal Rules of Civil Procedure and *Edelman*. Additionally, Scarborough claims that the 30-day period should have been equitably tolled because he actively pursued his judicial remedies by filing a pleading during the statutory period, and because the government's failure to respond to his fee application as required by the applicable Veterans Claims court rule induced him into allowing the filing deadline to pass.

Even if the 30-day time limit is an absolute bar to consideration of an untimely fee application,

Scarborough contends it is not a jurisdictional bar to a timely (but incomplete) application. Scarborough says the Federal Circuit's decision is at odds with the Supreme Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001). The Court in that case held that an amendment supplying a missing signature to a timely filed notice of appeal must be allowed, even if the time to appeal has expired, so long as the amendment is filed promptly after the defect is brought to the appellant's attention. Scarborough also disagrees with the Federal Circuit's interpretation of the EAJA, pointing out that, unlike the other three application requirements, the sentence concerning the "no substantial justification" requirement does not contain any limitations period at all.

According to Principi, however, the 30-day deadline is jurisdictional and is not subject to equitable extension. He argues that the EAJA requirements are conditions on a waiver of sovereignty and must be strictly construed. Principi also claims that the relation-back rule suggested by Scarborough is not supported by the text of the EAJA or the Federal Rules of Civil Procedure.

Principi says that this case is distinguishable from *Edelman*, asserting that *Edelman* involved the application of an agency regulation to private litigation rather than a waiver of sovereign immunity. In addition, Principi notes that Title VII is a remedial scheme in which laypersons rather than lawyers are expected to initiate the process. He argues that whereas *Edelman's* permissive "relation back" of the verification requirement ensures that lay complainants will not forfeit their rights inadvertently, the EAJA is directed to attorneys seeking attorney fees. Accordingly, Principi

declares that the protection of *Edelman* is not required under the EAJA. In addition, Principi contends that, unlike the verification requirement of *Edelman*, the required allegation that the government was "not substantially justified" is not simply a tool to weed out frivolous claims, but rather is a portion of the basis of the attorney fee award itself.

With respect to the Federal Circuit's interpretation of the EAJA, Principi points out that the sentence requiring an allegation that the government's position lacked substantial justification immediately follows, and refers back to, the sentence containing the 30-day deadline and other content requirements for a fee application.

SIGNIFICANCE

The question of whether the individual requirements of the EAJA are jurisdictional and must be satisfied within the 30-day period has been addressed by other circuit courts in addition to the Federal Circuit. In *Dunn v. United States*, 775 F.2d 99 (3d Cir. 1995), the Third Circuit held that a failure to itemize the amount sought under the EAJA could be corrected after the 30-day time limit if no prejudice to the government would arise. In effect, the Third Circuit divided the EAJA into two distinct components—a filing deadline and a standard for pleading.

The Eleventh Circuit in *Singleton v. Apfel*, 231 F.3d 853 (11th Cir. 2000), adopted the reasoning of the Third Circuit in *Dunn* and found that an EAJA application may be supplemented after the 30-day time limit to satisfy both the requirement regarding net worth and the requirement regarding the government's position not being "substantially justified." The Eleventh Circuit explained that, while it appears from the legislative history that

Congress intended the filing requirement to be jurisdictional, it is far from apparent that Congress intended that strict compliance with the pleading requirements be accomplished within the same time frame as filing.

In *Scarborough*, on the other hand, the Federal Circuit read the plain language of the EAJA to require not only that an application be filed by the 30-day deadline, but that it contain averments addressing each of the four other requirements enumerated in the statute.

This case presents the Supreme Court with the opportunity to resolve the dispute among the circuits as well as to clarify the scope of its decision in *Edelman*. A decision reversing the Federal Circuit will provide a more liberal rule, making it somewhat easier to recover attorney fees from the government. A decision affirming the Federal Circuit's decision will require persons seeking attorney fees under the EAJA to strictly comply with the application requirements.

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