FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20001

March 4, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. EAJ 2001-2
ADMINISTRATION (MSHA)	:	
	:	
v.	:	
	:	
COLORADO LAVA, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 (2004), and the Commission's Procedural Rules implementing EAJA, 29 C.F.R. § 2704.100 et seq. (2004). Administrative Law Judge Avram Weisberger denied an application by Colorado Lava, Inc. ("Colorado Lava") for attorneys' fees under these provisions. 25 FMSHRC 667, 672 (Nov. 2003) (ALJ). We granted Colorado Lava's petition for discretionary review challenging the judge's decision. For the reasons set forth below, we affirm the judge's decision.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

In October 1999, Andrew Garcia, who was employed at the Mountain West Colorado Aggregates ("MWCA") bagging facility in Antonito, Colorado, made safety complaints to his supervisor regarding certain equipment. 25 FMSHRC at 668. Subsequently, Garcia complained to MSHA about the condition of this equipment. *Id*. In June 2000, Colorado Lava purchased the Antonito site and rehired all of the MWCA employees except for Garcia and a mechanic. *Id*.

The Secretary filed a complaint of discrimination on behalf of Garcia against Colorado Lava, alleging that the operator discriminated against him in violation of section 105(c) of the Mine Act. 23 FMSHRC 213 (Feb. 2001) (ALJ). At the conclusion of the Secretary's case, Colorado Lava made a motion to dismiss, which the judge granted. On appeal, the Commission vacated the judge's dismissal of the discrimination complaint and remanded the case for further proceedings. 24 FMSHRC 350, 356 (Apr. 2002). In his decision on remand, the judge found that the Secretary failed to establish that Colorado Lava discriminated against Garcia in violation of section 105(c) and dismissed the case. 25 FMSHRC 144, 152 (Mar. 2003) (ALJ). Garcia, proceeding without the Secretary, filed a petition for discretionary review. No two Commissioners voted to grant review. Notice, Apr. 29, 2003. He then appealed the decision to the Tenth Circuit Court of Appeals. 25 FMSHRC at 668 n.1. Subsequently, Garcia and Colorado Lava filed a stipulation to dismiss the appeal. *Id*.

B. The EAJA Proceeding

On March 14, 2001, Colorado Lava filed an Application for an Award of Fees and Expenses under EAJA. C.L. Appl.[1] In support of its application, Colorado Lava asserted that the Secretary's decision to proceed against it was not substantially justified. *Id*. at 6. On April 15, 2003, Colorado Lava filed an amended application for fees and expenses in the amount of $49,574.13.[2] C.L. Amend. Appl. at 7-8. In its amended application, Colorado Lava also argued that under Commission EAJA regulation 29 C.F.R. § 2704.105(b), it should be awarded fees and expenses because the demand of the Secretary was substantially in excess of the decision of the Commission and unreasonable when compared with such decision. *Id*. at 6. It claimed that prior to the hearing, the Secretary had demanded that it pay Garcia $50,000 in exchange for dismissing the case, in addition to the Secretary's proposed penalty of $10,000. *Id*. at 6-7.

The judge ruled that Colorado Lava was not entitled to an award of fees and expenses under EAJA and denied the application. 25 FMSHRC at 672. He concluded that the Secretary's position in the case was substantially justified. *Id*. at 671. He also held that an award under section 105(b) of the Commission's EAJA regulations (providing for fees and expenses where the Secretary's demand is substantially in excess of the Commission's decision and is unreasonable compared to that decision) was only available to entities who did not prevail. *Id*. at 672. Finding that Colorado Lava was the prevailing party, he concluded that it was not entitled to any award under this provision. *Id*. Colorado Lava filed a petition for discretionary review, which the Commission granted.

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[1] The judge stayed the proceeding pending the final disposition of the underlying discrimination case. Order, Apr. 20, 2001. On June 3, 2003, he issued a second order, continuing to stay the case.

[2] Colorado Lava also asked that it be awarded additional amounts (to be invoiced in the future) for the preparation and defense of the fee application. C.L. Amend. Appl. at 8.

II.

Disposition

This case presents a question of first impression for the Commission: can a *prevailing* party in an administrative proceeding obtain attorneys' fees and expenses based on the 1996 amendments to EAJA? These amendments expand the basis for recovering fees and expenses to include certain adversary proceedings against private parties where the government's demand is excessive and unreasonable. EAJA Amendments, Pub. L. No. 104-121, 110 Stat. 847, 862 (1996).

Section 504(a)(4), the pertinent portion of EAJA, provides:

> If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

5 U.S.C. § 504(a)(4).

Although the judge's analysis focused almost exclusively on the Commission's EAJA regulations, it is the interpretation of section 504(a)(4) of the statute that ultimately governs the disposition of this case, as the regulations must be consistent with this statutory authority. *Adams v. SEC*, 287 F.3d 183, 190 (D.C. Cir. 2002), *citing Sec'y of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320 (D.C. Cir. 1990). Consequently, we first address whether this section of EAJA permits a fee award[3] to Colorado Lava as a prevailing party, before analyzing the Commission's governing regulations.

A. The Language of Section 504(a)

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). Turning to the term at issue here, section 504(a)(4) does not specify whether the "party" seeking fees may

[3] In addition to attorneys' fees, the 1996 EAJA amendments permit the award of certain litigation expenses. 5 U.S.C. §§ 504(a)(4) and 504(b)(1)(A). The use of the term "fees" herein also includes such costs.

be a prevailing party or a party that has not prevailed.[4]

As a threshold matter, we need not address whether the language in section 504(a)(4) is plain or ambiguous. Because EAJA is a statute of general applicability and not administered by the Secretary, the choice between the two varying interpretations of the statute is a question of law committed to the Commission for decision. Accordingly, no deference is due to the Secretary's construction. *Contractor's Sand and Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1339 (D.C. Cir. 2000); *Scafar Contracting, Inc. v. Sec'y of Labor*, 325 F.3d 422, 428 (3rd Cir. 2003).

The language of section 504(a)(4) itself strongly supports the Secretary's argument that Congress did not intend prevailing parties to receive fees under this provision inasmuch as it requires that a demand by an agency be "substantially in excess of the decision of the adjudicative officer" to trigger a fee award. 5 U.S.C. § 504(a)(4). The wording of the statute does not meaningfully apply to cases in which the fee applicant has prevailed and there is no penalty, as the concept of "excessive demand" only becomes significant when the baseline comparison is a number other than zero. Virtually every demand in cases where the fee applicant prevails on liability will not only be "in excess of" zero (the amount the prevailing party ultimately owes), but could be viewed as "substantially in excess" of zero, whether it is one hundred dollars, one thousand dollars, ten thousand dollars, or more. Thus, if this section applied to prevailing parties, they could argue that they meet the requirements of the "excessive demand" prong of section 504(a)(4) in nearly every instance, rendering it essentially meaningless (although the Secretary's demand must also be determined to be "unreasonable").

Moreover, the fact that section 504(a)(4) denies fees to a party who has "committed a willful violation of law" further supports the position that section 504(a)(4) does not apply to prevailing parties. This provision could only apply where there was a violation in the underlying merits proceeding. If a party is found to have willfully violated the law in a given matter, it could not also prevail. Indeed, the reference in section 504(a) to "violation" – be it willful or not – is inapposite in a matter where the fee applicant prevails and ultimately no violation is found. Consequently, the language of section 504(a)(4) indicates that Congress did not contemplate permitting prevailing parties to obtain fees under this provision.

In addition, if a prevailing party could obtain fees under section 504(a)(4), section 504(a)(1) of EAJA would be compromised. Section 504(a)(1) explicitly provides a mechanism for prevailing parties to obtain fees, stating in pertinent part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that

[4] The definition of "party" in EAJA, rather, focuses on an applicant's net worth. *See* 5 U.S.C. § 504(b)(1)(B).

> the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). Nothing in the text of section 504(a)(1) would prevent a prevailing party from including in its application under this provision the claim that it should obtain fees because the government made an excessive monetary demand.

The Commission has noted, in the preamble to the 1998 amendments to the Commission's EAJA regulations, "the showing of reasonableness of the Secretary's demand is analogous to the Secretary's burden of providing substantial justification." 63 Fed. Reg. 63172, 63173 (Nov. 12, 1998).[5] Under Colorado Lava's theory, if a prevailing party is not able to obtain fees and expenses under section 504(a)(1) (because the agency position was substantially justified),[6] it would nonetheless be eligible for fees under section 504(a)(4)'s "excessive and unreasonable" standard.[7] This would give the prevailing party two opportunities for collecting fees under EAJA, with the determination for both claims essentially being whether the government acted reasonably. Thus, the party's argument that the government's demand was "excessive and unreasonable" would necessarily prove unsuccessful if the agency's position had already been held to be substantially justified.

Here, the judge found the Secretary's position "substantially justified." 25 FMSHRC at 671. Colorado Lava did not appeal this determination. However, because of this finding by the judge, even if the Commission were to hold that Colorado Lava was initially eligible to apply for fees under section 504(a)(4), to obtain a fee award the operator would have to prove not only that the Secretary's demand was excessive but that it was unreasonable. 5 U.S.C. § 504(a)(4). *See American Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321, 327 (D.C. Cir. 2004) ("*AWC*") ("the Secretary's initial demand only appear[ed] 'unreasonable' to the extent that her position in litigation and before the agency was not 'substantially justified'"). Colorado Lava cannot meet the requirement that the Secretary's demand was "unreasonable" because the Secretary's position has already been found to be substantially justified.

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[5] This overlap between findings made under section 504(a)(1) and section 504(a)(4) was noted by the National Transportation Safety Board in an EAJA proceeding. *See Administrator v. Lee H. Allen*, NTSB Order No. EA-4617, slip op. at 6 n.6 (Jan. 23,1998), *aff'd, Allen v. National Transp. Safety Bd.*, 160 F.3d 431 (8th Cir. 1998) (even assuming section 504(a)(4) applied to administrative action, applicant would fail to meet standard for showing "unreasonable" action where NTSB found action to be "substantially justified").

[6] The Supreme Court has defined "substantially justified" as a position that has a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).

[7] However, under section 504(a)(4), a party's fees and expenses are limited to those incurred defending against the excessive demand, while those awarded to a prevailing party under section 504(a)(1) are not restricted in this manner.

We note also that EAJA sets forth different financial eligibility requirements for applicants under section 504(a)(1) and those under section 504(a)(4). 5 U.S.C. § 504(b)(1)(B). Generally, parties seeking fees pursuant to section 504(a)(1) must either be individuals with a net worth of two million dollars or less, or corporations or other organizations with a net worth of seven million dollars or less and which had not more than 500 employees at the time the adversary adjudication was initiated. *Id*. In contrast, parties seeking fees under section 504(a)(4) must be "small entities" as set forth in 5 U.S.C. § 601, which in turn defines "small entities" as small businesses under the Small Business Act, certain non-profit enterprises, and small governmental bodies with a population of less than fifty thousand. 5 U.S.C. § 601(3), (4) & (5). It is unlikely that Congress would have established different financial standards if a prevailing party could seek fees under section (a)(1) and/or section (a)(4).

Finally, in *L & T Fabrication & Construction, Inc*., 22 FMSHRC 509 (Apr. 2000), the Commission characterized section 504(a)(4) as "expand[ing] the basis for recovering fees and expenses to include certain claims against private parties *who did not prevail* against the government." *Id.* at 513 (emphasis added). The case, which presented the Commission with its first opportunity to interpret the 1996 EAJA amendments, involved the entitlement of a losing party to fees under section 504(a)(4).[8]

B. The Statutory Context

Our construction of section 504(a)(4) is supported by the entire statutory scheme of EAJA, including 28 U.S.C. § 2412(d)(1)(D).[9] That section, enacted in the same public law as

[8] Colorado Lava relies on an unreviewed decision by an administrative law judge for the Occupational Safety and Health Review Commission, *Sec'y of Labor v. Wolkow Braker Roofing Corp*., Nos. 97-1773 and 98-0245, 2000 WL 1466087 (OSHRC-ALJ Sept. 13, 2000). That decision has no precedential impact here.

[9] 28 U.S.C. § 2412(d)(1)(D) provides:

> If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of *the judgment finally obtained by the United States* and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

(emphasis added).

5 U.S.C. § 504(a)(4), applies to court-awarded fees. We recognize that "each part or section [of a statute] should be construed in connection with every other part or section so as to produce a harmonious whole. . . . [A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole . . . ." 2A Norman J. Singer, *Sutherland Statutory Construction*, § 46.05 (6th ed. 2000). *See also Meredith v. FMSHRC*, 177 F.3d 1042, 1053-54 (D.C. Cir. 1999).

Section 504(a)(4) is referenced in section 2412(d)(1)(D), which states that the court shall award fees and expenses related to defending an excessive and unreasonable demand in a civil action "or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5." 28 U.S.C. § 2412(d)(1)(D). Thus, section 504(a)(4) is linked with a corresponding provision of EAJA whose language explicitly limits awards to non-prevailing parties. *See Scafar Contracting, Inc.*, 325 F.3d at 425 (provisions in 5 U.S.C. § 504 and those in 28 U.S.C. § 2412 "are closely intertwined"). In holding that the term at issue ("final disposition") was ambiguous, *id*. at 426, and should be construed to mean in section 504 what Congress explicitly stated it meant in the amended (and clearly-written) section 2412, the *Scafar* Court stated that "[t]his construction also creates continuity within the EAJA by aligning the meaning of the term 'final disposition' in § 504 with its counterpart in § 2412." *Id*. at 432. *See also Adams*, 287 F.3d at 189 (noting that its interpretation of the term "final disposition" "will provide consistency among agency proceedings as well as with court cases"). Thus, under the Court's reasoning, the limitation of section 2412(d)(1)(D) to non-prevailing parties should be found in the language of section 504(a)(4).

In interpreting 28 U.S.C. § 2412(d)(1)(D), a provision analogous to section 504(a)(4), the District of Columbia Circuit, in *AWC,* commented on the overlap of EAJA's "substantial justification" and "excessive demand" prongs under 28 U.S.C. § 2412(d) as a basis of recovery.[10] In *AWC,* the Court held that the Secretary's position was not "substantially justified" in some but not all aspects of the litigation (which involved violations of regulations of the Occupational Safety and Health Administration). 364 F.3d at 323, 326-27. The Court stated that, "[t]he function of § 2412(d)(1)(D) is merely to permit *non*-prevailing parties to recover fees and expenses where the United States obtained a judgment that was substantially – and unreasonably – exceeded by its initial demand." *Id*. at 328 (emphasis in original).

Colorado Lava argues that if Congress had intended to exclude prevailing parties from proceeding under section 504(a)(4), it would have said so. PDR at 8; C.L. Br. at 4. It bases this claim on the fact that in the corresponding section of EAJA relating to court-awarded fees, 28 U.S.C. § 2412(d)(1)(D), Congress did just that by stating that parties were entitled to recover fees and expenses only where the United States obtains a "judgment" that was substantially and

[10] 28 U.S.C. § 2412(d)(1)(A), the counterpart to 5 U.S.C. § 504(a)(1), permits a court to award fees and expenses to a prevailing party unless the position of the United States was substantially justified or special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A).

unreasonably exceeded by its initial demand. *AWC*, 364 F.3d at 328. However, Colorado Lava's argument that Congress intended prevailing parties to be eligible for awards under section 504(a)(4) because it used the phrase "substantially in excess of the decision of the adjudicative officer" instead of the language in section 2412(d)(1)(D) ("substantially in excess of the judgment finally obtained by the United States") is explained by the terminology applied in administrative proceedings. Generally, the outcome of an administrative case is disposed of in a "decision" or an "order,"[11] whether the government prevails or not. Therefore, Congress would not have employed the same language "judgment finally obtained" in the EAJA section pertaining to administrative litigation.

Thus, the language of section 2412(d)(1)(D) supports the reading that section 504(a)(4) should also be limited to non-prevailing parties. This interpretation maintains consistency between the two provisions and creates a harmonious, coherent statutory framework guiding fee awards for both agency and court proceedings under the 1996 EAJA amendments.

C. The Legislative History

The legislative history of the 1996 amendments supports the reading that fee awards under section 504(a)(4) are limited to non-prevailing parties.[12] The most compelling section of the legislative history addressing the issue before us is found in a portion of the legislative summary submitted by Representative Henry Hyde, chief sponsor of the bill in the House of Representatives. That summary stated that the legislation would:

> allow parties *which do not prevail* in a case involving the government to nevertheless recover a portion of their fees and cost [sic] in certain circumstances. The test for recovering attorneys fees is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case and is unreasonable when compared to the final outcome (whether a fine, injunctive relief or damages) under the facts and circumstances of the case.

142 Cong. Rec. E571, E573 (Apr. 19, 1996) (emphasis added).

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[11] The Mine Act refers to "orders" and "decisions" in several sections. *See* 30 U.S.C. § § 815(c)(2), 816 & 823(d)(1) (2000).

[12] Colorado Lava argues that the legislative history of EAJA should be disregarded (Reply Br. at 4, 8). We disagree. It is appropriate to examine legislative history to ensure our construction conforms to the statute as a whole and is consistent with its purpose. *See Local Union 1261 UMWA v. FMSHRC*, 917 F.2d 42, 46 (D.C. Cir. 1990) ("[t]he 'traditional tools of statutory construction' include not only the words of the statute, but also its relevant legislative history").

Furthermore, the House Report describing the 1996 amendments states that a "small entity would not be required to prevail in the underlying action; the final outcome must be, however, to require payment of an amount substantially less than what the agency sought to recover." H.R. Rep. No. 500, 104th Cong., 2nd Sess. at 2 (1996). This requires that the party seeking fees ultimately made some payment, which would not be the case for a prevailing party. *See also* 142 Cong. Rec. S2148, S2159 (Mar. 15, 1996) (Committee legislative history for S. 942, the Senate bill containing the 1996 EAJA amendments) (the test for recovering attorneys' fees is "whether the final outcome imposed or ordered in the case (whether a fine, injunctive relief or damages) is disproportionately less burdensome on the small entity than the government's actual demand. . . . The test is whether the demand is out of proportion with the actual value of the violation.").

D. The Commission's EAJA Regulations

Our determination that the statute does not authorize a fee award to a prevailing party leads to the conclusion that the Commission's EAJA regulations must also prohibit such an award. *See Adams*, 287 F.3d at 190 ("[Securities and Exchange] Commission's regulation, ambiguous on its face, must be construed to avoid inconsistency with EAJA"). An analysis of the regulations indicates that this is the case.

Section 105(b) of the Commission's EAJA regulations states in pertinent part:

> If the demand of the Secretary is substantially in excess of the decision of the Commission and is unreasonable when compared with such decision, under the facts and circumstances of the case, the Commission shall award to an eligible applicant the fees and expenses related to defending against the excessive demand . . . .

29 C.F.R. § 2704.105(b).

In the preamble to the final EAJA regulations, the Commission stated that, while the current EAJA rules provide for awards to prevailing parties in cases where the Secretary's position is not substantially justified, the new rule (29 C.F.R. § 2704.305) "eliminate[s] the reference to 'prevailing' party status because an EAJA award is no longer limited to proceedings involving a prevailing party but includes those proceedings in which the Secretary has made a substantially excessive and unreasonable demand." 63 Fed. Reg. at 63174. In agreement with the judge, we note that the regulations delineate between "prevailing applicants" for purposes of an award under the "substantial justification" regulation, 29 C.F.R. § 2704.105(a), and "eligible applicants" for purposes of an award under the "excessive and unreasonable demand" regulation, 29 C.F.R. § 2704.105(b). 25 FMSHRC at 671. The judge emphasized the language setting forth the purpose of the regulations in 29 C.F.R. § 2704.100, comparing the provision that an "eligible party may receive an award *when it prevails*" unless the Secretary's position is substantially

justified, with the statement that an "eligible party" may receive an award under the excessive demand prong. 25 FMSHRC at 671 (emphasis in original). In short, the language of the Commission's regulations supports the Secretary's position and is consistent with our reading of section 504(a).

III.

Conclusion

We thus conclude that a prevailing party in administrative proceedings may not rely on section 504(a)(4) to obtain attorneys' fees under EAJA. We reach this conclusion based on the language of section 504(a)(4), the context of this provision within the overall framework of EAJA, and the legislative history of the 1996 EAJA amendments. In addition, case law and the Commission's implementing regulations applying section 504(a)(4) support limiting this section to non-prevailing parties.

For the foregoing reasons, we affirm the judge's decision.

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Michael F. Duffy, Chairman

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

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