

**UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD**

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD

v.

MERCHANT MARINER CREDENTIAL

Issued to: CLINT WALKER DAVIS, JR.

DECISION OF THE
VICE COMMANDANT
ON APPEAL
NO.

27 1 4

**DECISION OF THE COMMANDANT ON APPEAL FROM DENIAL OF
APPLICATION FOR ATTORNEY'S FEES FROM THE UNITED STATES COAST
GUARD**

APPEARANCES

For the Government:
Mr. Brian C. Crockett, Esq.
Suspension and Revocation National Center of Expertise

For Applicant:
Mr. Brian McEwing, Esq.
Reeves McEwing, LLP

Administrative Law Judge: Walter J. Brudzinski

This appeal is taken in accordance with 5 U.S.C. § 504 and 49 C.F.R. Part 6.

By order dated June 5, 2014, an Administrative Law Judge (ALJ) of the United States Coast Guard denied the application for attorney's fees and expenses of Clint Walker Davis, Jr. ("Applicant"), incurred as a result of defending himself at a Suspension and Revocation

proceeding (“S&R proceeding”) against a charge of use of or addiction to the use of dangerous drugs brought by the Coast Guard against his merchant mariner credential.

In its Complaint, the Coast Guard alleged that Applicant, an active-duty Coast Guard member, also the holder of a Coast Guard-issued merchant mariner credential, submitted to a Coast Guard-mandated random drug test on January 11, 2012. The urine sample allegedly provided by Applicant subsequently tested positive for the presence of cocaine metabolites.

The hearing in the matter was held on May 2-3, 2013, in New York, New York.

During the presentation of his case-in-chief, Applicant presented evidence to suggest that the urine sample that had tested positive for the presence of dangerous drugs was likely not his. Although Applicant acknowledged that the bottle purporting to contain his urine sample was affixed with a sticker showing his Social Security Number, Applicant showed that the bottle was not marked with either his initials or those of the specimen collector as is required for identification purposes.

Following the presentation of this evidence, on May 24, 2013, the Coast Guard moved for a continuance in order to further investigate the matter. Upon further investigation, the Coast Guard moved to withdraw its complaint. The ALJ granted the Coast Guard’s motion and the matter was dismissed with prejudice.

On June 21, 2013, Applicant, through counsel, filed a timely Motion under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(2) (“EAJA”), for an award of fees and costs against the United States Coast Guard. Applicant seeks an award in excess of \$50,000.00 in attorney fees. The Coast Guard filed an answer that sought to establish substantial justification for filing the Complaint and to relieve the Government of liability for the fees and expenses claimed under EAJA.

On June 5, 2014, the ALJ issued an Initial Decision denying Applicant’s EAJA claim. Applicant appeals.

OPINION

Applicant asserts:

Because Coast Guard failed to investigate whether its own specimen collection procedures were followed before issuing its finding of a “drug incident,” it cannot meet its burden to show that its actions, either before bringing the S&R Complaint, after discovering that Davis and his observer’s initials were not on the specimen bottle, or in proceeding to trial were substantially justified.

[Applicant’s Brief in Support of EAJA Appeal (“Applicant’s brief”) at 3]

Appeal Decision 2701 (CHRISTIAN) (2013) sets forth the legal standards applicable to EAJA claims such as this one. In summary, EAJA mandates an award when an agency fails to prevail in an adversary adjudication, including a Coast Guard S&R proceeding, unless the ALJ determines that special circumstances render an award unjust, or that the position of the agency was substantially justified. The Government bears the burden of demonstrating that fees should not be awarded in a given case. A position is substantially justified if it has a reasonable basis both in law and fact, as determined by the totality of the circumstances. *CHRISTIAN* at 3-4.

Applicant contends that the Coast Guard had no basis in law to bring an S&R Complaint against his merchant mariner credential because the Coast Guard Investigative Service (“CGIS”), which had a duty to investigate whether the collection process outlined in the applicable Commandant Instruction was followed in Applicant’s case, unreasonably failed to do so. [Applicant’s brief at 5-7] Applicant concludes: “Where, as [Applicant] will show here, the collector failed to follow collection procedures outlined in the Commandant Instruction, Coast Guard has no reasonable basis for the S&R Proceeding.” [*Id.* at 7-8]

Applicant also argues that the Coast Guard had no reasonable basis in fact to bring an S&R Complaint against his merchant mariner credential because the presence of “mixed signals, here, the initials of a different donor and observer on a label contained a different member’s social security number should have given the Coast Guard pause, and more importantly reason to

investigate before going to trial.” [*Id.* at 11] Specifically, Applicant contends that a factual basis is lacking for the Coast Guard’s action in this case because the mere fact that Applicant’s Social Security Number was on the specimen bottle provides no link between Applicant and the specimen provided; and Applicant’s signed verification has no value in this case because he signed it before his specimen was collected. [*Id.* at 9-13] Applicant next asserts that the ALJ’s decision should be overturned because “The ALJ’s reliance on the collector’s testimony that she followed procedures is certainly not supported by the facts in the record and the collector’s own further testimony.” [*Id.* at 14] Finally, Applicant argues that the ALJ’s reliance on “circumstantial evidence” (the testimony of one of Applicant’s shipmates) to support the Coast Guard’s assertion of drug use with respect to Applicant was developed after the filing of the Coast Guard’s Complaint and cannot be used to sustain the Agency’s burden here. [*Id.* at 15-16]

In his Initial Decision, the ALJ expressly found that the Coast Guard’s underlying legal theory—that Applicant tested positive for cocaine on a Coast Guard-mandated random drug test—was “sound” and that there was a reasonable basis in fact to support the Complaint. [Initial Decision at 8] The ALJ also addressed the issues raised in Applicant’s appeal:

Respondent argues the Coast Guard did not perform an adequate investigation and the Agency simply relied on the Coast Guard’s negligently administered drug test as support for the S&R complaint. At the time the Coast Guard issued the Complaint, there was no evidence that Respondent’s sample bottle, with his social security number on it, did not contain Respondent’s sample. All documentary evidence demonstrated the sample in the container with Respondent’s Social Security Number tested positive for cocaine metabolites. Respondent certified that his sample bottle contained his Social Security Number. Further, the urine specimen coordinator, Chief Heath, testified she followed the proper procedures even in light of the initials on the specimen bottle. The Coast Guard, therefore, had a reasonable factual basis to proceed on the theory that Respondent’s sample tested positive for dangerous drugs. The inference that the specimen bottle with Respondent’s Social Security Number did not likely contain his sample was not readily apparent from looking at the initials on the bottle. Rather, it was developed over the course of the hearing and depended on the witness testimony of the drug test observer, Chris Eidschun, as well as Respondent.

To the extent Respondent argues the Coast Guard generally failed to investigate the positive drug test, the record demonstrates the Coast Guard conducted an investigation into the drug test including questioning witnesses and

investigating alternative reasons for a positive drug test. For example, when presented with the positive test result, Respondent explained he had been out at a local bar and someone could have slipped cocaine into his drink. The record shows CGIS investigated Respondent's statements to determine if he could have unknowingly ingested cocaine. The record directly contradicts Respondent's claim regarding Coast Guard's lack of investigation.

* * *

Finally, Respondent argues the Investigating Officer improperly proceeded with the hearing after learning the initials on the specimen bottle at issue were likely not Respondent's; the undersigned disagrees. The initials on the specimen was a fact not in the Coast Guard's favor, but it was also a fact directly contradicted by other evidence in the record, specifically the signed document verifying Respondent's specimen bottle contained his Social Security Number. The Coast Guard proceeded because the bottle contained Respondent's Social Security Number. The Coast Guard also had documentary evidence and witness testimony supporting the allegations. The Coast Guard's decision to proceed with the hearing was therefore reasonable.

(citations omitted) [Initial Decision at 10-12]

Thus, despite the fact that there was evidence tending to show that the urine sample that had tested positive for cocaine was likely not Applicant's, the ALJ determined that there was a reasonable basis in law and fact to support the Complaint:

[T]he Coast Guard proceeded on the theory that Respondent's urine specimen tested positive for cocaine and based that theory upon documentary evidence and witness testimony. The lack of Respondent's initials on the specimen bottle at issue did not immediately sever the connection between the Coast Guard's legal theory and the facts. The determination that the positive specimen likely did not come from Respondent was developed over the course of the hearing through witness testimony. The fact that the Coast Guard's position was ultimately wrong does not eliminate the reasonable basis in fact that supported the case.

[Initial Decision at 12]

Applicant's primary assertion on appeal is that a thorough investigation before the commencement of the S&R proceeding would have shown both that Applicant's urine sample was not collected in accordance with the procedures outlined in Commandant Instruction

M1000.10, dated 29 September 2011, Coast Guard Drug and Alcohol Abuse Program Manual, and that the sample responsible for providing the positive test result was likely not Applicant's. Applicant avers that such an investigation would have shown that administrative action against his merchant mariner credential was, therefore, inappropriate. Further, Applicant argues that because his test resulted from a Coast Guard-mandated random drug test—that is, because Applicant was an active duty member—further investigation on the part of the Investigating Officer prior to commencing S&R proceedings was necessary. I do not agree.

A person's status as an active-duty Coast Guard member has no bearing on a Coast Guard S&R proceeding. Contrary to Applicant's assertion, Applicant's status as an active-duty Coast Guard member does not create a heightened duty to investigate. The investigation leading to the allegations contained within the Complaint must—as in any S&R proceeding—be conducted in accordance with 46 C.F.R. Part 5, Subpart D. There is nothing to indicate that the investigation in this case was deficient in that regard.

There is evidence in the record to support the ALJ's conclusion that the Coast Guard was substantially justified in commencing S&R proceedings against Applicant's merchant mariner credential.

The record shows that a urine sample collected in a container affixed with Applicant's Social Security Number and verified, at the time of collection, by Applicant as containing his own sample, tested positive for the presence of dangerous drugs. (There is no evidence suggesting that the testing of the subject urine sample was conducted improperly, and no issue has been raised regarding testing.) Thus, the Coast Guard's allegation that Applicant was a user of or was addicted to the use of dangerous drugs had a reasonable basis both in law and fact, as determined by the totality of the circumstances.

In this case, the hearing served its ultimate purpose and Applicant was exonerated after relevant facts were brought out. Although the action ended in Applicant's favor, the ALJ was, nonetheless, correct to find that the Coast Guard's Complaint was substantially justified and to deny Applicant's motion for fees and costs under EAJA.

ORDER

The ALJ's Initial Decision denying EAJA fees and costs is AFFIRMED.



Charles D. Michel
Vice Admiral, U.S. Coast Guard
Vice Commandant

Signed at Washington, D.C. this 26th day of February, 2016.