UNITED STATES OF AMERICA
U.S. DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES COAST GUARD
Complainant

vs.

CLINT WALKER DAVIS JR
Respondent

Docket Number 2013-0068
Enforcement Activity No. 4528365

INITIAL DECISION

Issued: June 05, 2014

Issued by: Chief Administrative Law Judge
Walter J. Brudzinski

Appearances:

Mr. Brian C. Crockett
Sector New York

For the Coast Guard

BRIAN MCEWING, Esq.

For the Respondent

INITIAL DECISION

SUMMARY

Clint Walker Davis, Jr. (Applicant) filed this action for attorney fees and expenses under the Equal Access to Justice Act (EAJA) after the undersigned dismissed with prejudice suspension and revocation proceedings against his Merchant Mariner Credential.[1] To award attorney fees and expenses under EAJA it must be shown there was an adversarial adjudication allowing for the recovery of attorney fees and expenses and that the applicant is an eligible individual. Further, the applicant must be the prevailing party in that adversarial adjudication. Finally, it must be shown that the position of the agency in that proceeding was not substantially justified. Because the undersigned finds the Agency's position was substantially justified, the application for attorney fees is **DENIED**.

PROCEDURAL HISTORY

A. Underlying Adversarial Adjudication

The Coast Guard initiated the underlying adversarial adjudication seeking to revoke Clint Walker Davis, Jr.'s Merchant Mariner Credential for alleged use of dangerous drugs in violation of 46 U.S.C. § 7704(c) and 46 C.F.R. § 5.35. See *Complaint*.

In its Complaint, the Coast Guard alleged the following:

> 1. On 01/11/2012 Respondent, an active duty Coast Guard Petty Officer, took a random Coast Guard drug test in accordance with Commandant Instruction Manual 1000.10 (the Coast Guard Drug and Alcohol Abuse Program Manual).
>
> 2. On 01/11/2012, Respondent was the holder of a Coast Guard issued Merchant Mariner Credential.

[1] For the purpose of these administrative proceedings, the Equal Access to Justice Act is found at 5 U.S.C. § 504 and the Agency implementing regulations are found at 49 C.F.R. Part 6. In this Initial Decision, the terms "Applicant" and "Respondent" both refer to Mr. Davis. Although the U.S. Coast Guard is technically a Respondent in this EAJA application it is referred to as "Coast Guard" or "Agency.

> 3. Respondent was observed providing a urine specimen by Petty Officer Christopher Eischun and a urine specimen was collected by Chief Petty Officer Kori Heath of U.S. Coast Guard Sector New York Detachment Sandy Hook.
>
> 4. Respondent signed a Urinalysis Provider's Checklist and the unit's Urinalysis Ledger.
>
> 5. The urine specimen was analyzed by Tripler Army Medical Center, 1 Jarrett White Road, Bldg 40, Honolulu, HI, 96859, using procedures approved by the Department of Defense and the Surgeon General of the U.S. Army.
>
> 6. That specimen subsequently tested positive for cocaine metabolites as determined by Laboratory Certifying Official, Jennifer Fort.
>
> 7. Respondent has been a user of cocaine, a dangerous drug, as contemplated by 46 U.S.C. § 7704(c).
>
> See *Complaint*.

During discovery, Respondent moved for the production of "[t]he specimen bottle identified as containing the urine provided by Respondent on January 11, 2012," among other things. See Respondent's *Notice of Motion for a Request for Production and Discovery of Documents or Things for Inspection* dated April 1, 2013, Request No. 14 at pp. 5-6. The Coast Guard objected to Respondent's request stating:

> "[s]hipping of a merchant mariner's specimen for purposes of administrative suspension and revocation proceedings is not within the normal course of practice for such proceedings. Furthermore, in accordance with 33 CFR 20.601(d), Respondent's [sic] has not explained why any information he seeks about the specimen is not otherwise obtainable, why such information has *significant* probative value, why any potential relevant information obtained would neither be cumulative nor repetitious to the Coast Guard Exhibits already provided, or why the method or scope of discovery is not unduly burdensome and is the least burdensome method available." See *Complainant's Response to Respondent's Motion for Further Discovery asking for Production of Documents or Things for Inspection*, dated April 5, 2013 at p. 5 (emphasis in original).

I denied the motion because "Respondent has not shown that the requested materials have significant probative value; that the request will not unreasonably delay the proceeding; and, that the information sought is not otherwise obtainable or is neither cumulative nor repetitious." See Order, dated April 12, 2013 at p.4.

On April 23, 2013, Respondent filed an "Emergency Motion" seeking to obtain Respondent's specimen bottle from the drug test at issue. He states, "the production and examination of Respondent's bottle at trial will make the existence of material facts – Coast Guard's alleged conformance with regulation, more or less probable." Respondent further states the "Coast Guard's argument that Dr. Okano will testify as to the handling of Respondent's bottle violates Respondent's due process rights to confront the allegation that the bottle in custody and control of Coast Guard is in fact one and the same as that which was utilized by Respondent in the January 11, 2012 drug test." Finally, Respondent states "the bottle itself has significant probative value concerning the chain of custody and inherent susceptibility to tampering before delivery to Respondent, during the drug testing conducted at Coast Guard Station Sandy Hook on January 11, 2012, or thereafter. Moreover, physical inspection of the bottle will inform conformance with the applicable regulations." See *Emergency Motion of Respondent for Issuance of a Subpoena to Produce Respondent's Specimen Bottle To Respondent's Counsel or in the Alternative Produce Specimen Bottle at Trial* dated April 23, 2013.

On April 25, 2013, the undersigned granted Respondent's motion for the medical center to release the bottle into the custody of the ALJ's office. The day before the hearing commenced, the undersigned's attorney-advisor made the specimen bottle available to both parties for inspection, examination, and photographs. Upon inspection, the label affixed to the specimen bottle did not appear to have the initials of either Respondent or Christopher Eidschun, the drug test observer, but did contain Respondent's Social Security Number.

The Coast Guard decided to proceed with its case at hearing. It presented the testimony of six (6) witnesses and submitted eighteen (18) exhibits. Respondent testified on his own behalf

and submitted eight (8) exhibits.[2] During Respondent's case in chief, he and the observer testified their initials were not on the bottle. After the hearing's second day, the undersigned granted the Coast Guard's motion for a continuance to investigate the newly discovered evidence in light of all the testimony provided at hearing. Approximately thirty (30) days later, I granted the Coast Guard's motion to withdraw the Complaint against Respondent, dismissing the underlying action with prejudice.

B. EAJA Application

Respondent subsequently filed this timely application for attorney's fees alleging he was the prevailing party in the underlying litigation and the Coast Guard's position was not substantially justified. Applicant argues: 1) the Coast Guard did not properly and fully investigate the procedures used in the drug test; 2) the Coast Guard's position was not reasonably based in law; and, 3) the Coast Guard's position was not reasonably based in fact. In response, the Coast Guard does not contest Applicant is the prevailing party but contends its position was substantially justified.

Following the Coast Guard's response to the application for attorney fees, Applicant moved for further proceedings. Ordinarily, EAJA claims are decided on the record.[3] In this case, the parties developed the record sufficiently for the undersigned to decide if the Coast Guard's position was substantially justified. Finding additional proceedings unnecessary to decide whether the Agency's position was substantially justified, I denied the motion.

ANALYSIS

The Equal Access to Justice Act appears at 5 U.S.C. § 504 and 28 U.S.C. § 2412. Both provisions are identical except the former applies to adversarial administrative proceedings and

[2] For purposes of this Decision and Order, Hearing Transcript citations are referred to as "Tr." followed by the page number (e.g. Tr. at 45). Coast Guard Exhibits are referred to as "CG Ex." followed by the number (e.g. CG Ex. 01). Respondent's Exhibits are referred to as "R Ex." followed by a letter (e.g. R. Ex. A).
[3] See 49 C.F.R. § 6.31.

the latter applies to civil actions in federal district courts. For the purpose of this Decision and Order, 5 U.S.C. § 504 controls but case law construing either statute is authoritative.

The EAJA provides "[a]n 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 the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. 504(a)(1); see also 49 C.F.R. § 6.1. Pursuant to 49 C.F.R. § 6.5 "Coast Guard suspension or revocation of licenses, certificates or documents under 46 U.S.C. 7701, *et seq*." are deemed to be "adversary adjudications" subject to EAJA.

Adjudicating an EAJA claim pursuant to 5 U.S.C. § 504 requires the following findings:

1) the underlying case is an administrative adjudication subject to EAJA claims;
2) applicant is an "eligible individual" within the meaning of 49 C.F.R. § 6.7;
3) applicant was the "prevailing party;"
4) the agency's position was not "substantially justified;" and,
5) there are no special circumstances making the award unjust.

See 5 U.S.C. § 504(a)(1); 49 C.F.R. § 6.9(a).

In this case, findings one (1) through three (3) are not in contention. Coast Guard Suspension and Revocation Hearings are specifically enumerated in 49 C.F.R. § 6.5 as adversary adjudications; Applicant is an EAJA eligible individual pursuant to 49 C.F.R. §6.7; and, Applicant was the prevailing party in the underlying adjudication. Although the parties do not contest whether Applicant is the "prevailing party," a brief discussion of what that means is warranted. The only issue in contention in this case is element four (4): whether the agency's position was substantially justified. The prevailing party issue and substantial justification issue are discussed below.[4]

A. Prevailing Party

The inquiry to determine the "prevailing party" is whether there has been a "material alteration" in the parties' legal relationship at the end of the litigation. See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598 (2001). A dismissal with prejudice establishes a "change in legal relationship" creating a "prevailing party." See Highway v. FECO, Ltd. 469 F.3d 1027 (Fed. Cir. 2006) (holding a dismissal with prejudice bore the necessary "judicial imprimatur" to constitute a judicially sanctioned change in the legal relationship of the parties); Power Mosfet Techs., L.L.C. v. Siemens AG, 378 F.3d 1396 (Fed. Cir. 2004) (holding a dismissal of a claim with prejudice is a judgment on the merits). In the instant case, Applicant was the beneficiary of a dismissal with prejudice, resulting in termination of the Coast Guard's claim against him, which materially altered the legal relationship of the parties. Therefore, the undersigned finds Applicant is the "prevailing party."

B. Substantial Justification

The Agency's position is "substantially justified" if it is "justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person." Pierce v. Underwood, 487 U.S. 552, 563-5 (1988). This standard is "no different from the reasonable basis both in law and fact formulation." Id. at 565. (Internal quotation omitted). "To be substantially justified means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." Id. (Internal quotation omitted).

The undersigned need only to make a single finding that the Agency's position is "substantially justified." See Commissioner, I.N.S. v. Jean, 496 U.S. 154, 159 (1990). Further, citing Congress' 1985 amendment to EAJA the Supreme Court in Jean states "[t]he fact that the

[4] Because the undersigned finds the Coast Guard's position was substantially justified there is no need to discuss whether there are special circumstances making an award unjust.

'position' is again denominated in the singular, although it may encompass both the agency's prelitigation conduct and the Department of Justice's subsequent litigation positions, buttresses the conclusion that only one threshold determination for the entire civil action is to be made." Id. at 159. Any given civil action can have numerous phases. While the parties' postures on individual matters may be more or less justified, the EAJA – like other fee shifting statutes – favors treating a case as an inclusive whole, rather than as atomized line-items. Id. at 161-2. This logic applies to EAJA claims under 5 U.S.C. § 504 as well because the statute requires the "position of the agency" to be substantially justified.

To be substantially justified, the Agency's position must be reasonably based in law and fact. See Pierce 487 U.S. at 556. To meet this burden, the Agency must show 1) a reasonable basis in law for the theory it propounded; 2) a reasonable basis in truth for the facts alleged; and, 3) a reasonable connection between the facts alleged and the legal theory advanced. See Morgan v. Perry, 142 F.3d 670, 684 (3d Cir. 1998); Smith v. NTSB, 992 F.2d 849, 852 (8th Cir. 1993). The Agency's loss of the case does not raise a presumption that the government's position was not substantially justified. See SEC v. Fox, 855 F.2d 247, 252 (5th Cir. 1988).

1) Reasonable Basis in Law

In the underlying case, the Agency proceeded on a legal theory that Respondent, an active duty Coastguardsman, tested positive for cocaine on a Coast Guard random drug test in violation of 46 U.S.C. § 7704. Applicant argues the Agency's position is not reasonably based in law because the drug test at issue was not conducted in accordance with regulations governing drug testing of merchant mariners at 46 C.F.R. Part 16 and 49 C.F.R. Part 40.

The Coast Guard's legal theory in this case was sound. A drug test in compliance with Parts 16 and 40 are required for the Agency to obtain the presumption of drug use in 46 C.F.R. § 16.201(b). However, the Coast Guard is not limited to bringing cases of dangerous drug violations only when a Part 16 and Part 40 drug test are involved. "The Coast Guard, following

the procedures of 46 C.F.R. [Part] 5, may offer evidence *from any source*, not only a drug test carried out pursuant to Part 16, to establish drug use in violation of 46 U.S.C. 7704." Appeal Decision 2542 (DEFORGE) (1991) (emphasis and brackets added). Therefore, the Coast Guard may bring a case, as it did here, based on an alleged violation of 46 U.S.C. § 7704 without the benefit of a Part 16 and Part 40 drug test.

To find otherwise would undermine the Coast Guard's regulatory purpose for administrative actions "to help maintain standards for competence and conduct essential to the promotion of safety at sea." 46 C.F.R. § 5.5. The Coast Guard may not ignore evidence of drug use simply because the evidence may not carry the benefit of the regulatory presumption.

2) Reasonable Basis in Fact

a. Coast Guard's Evidence

The Coast Guard's documentary evidence showed Applicant tested positive for cocaine during a Coast Guard drug test. His Social Security Number was on the specimen bottle. Further, his Social Security Number was contained in the documentation from the lab which conducted the testing. Moreover, the Coast Guard's evidence includes a document Respondent signed on the date of the drug test stating:

> I certify that I have complied with items 1 through 8 and that the Batch Number, Specimen Number, and *my Social Security Number written on this sheet match the Sample Container,* the Drug Urinalysis Sample Ledger, and the Urine Sample Custody Document.
> See CG Ex. 05 (emphasis added).

This document provided the link between Respondent and the positive sample. Because the Coast Guard had evidence showing Respondent verified his own Social Security Number on the specimen bottle, the Coast Guard had no reason to disassociate Respondent from the specimen bottle containing the sample which tested positive for cocaine metabolites. All of the laboratory documentation was connected to Respondent's Social Security Number, which he verified was on his sample container. As such, the Coast Guard's documentary evidence

provided a reasonable basis to determine the urine sample that tested positive for cocaine belonged to Respondent.

The Coast Guard relied on witness testimony that provided no reason for it to question the test's validity or the sample's integrity - specifically, the testimony of Chief Kori Heath, the urine specimen collector. At the hearing, she testified to the specific procedures she used when conducting the specimen collection. See Tr. at 32-76; 103-108; and 114-116. Even after confronted with the initials on the specimen bottle, Chief Heath maintained that she had used proper procedures and there were no issues with the urine specimen collection. See Tr. at 121-133. The Coast Guard also had additional evidence and testimony regarding lack of problems or issues arising from the specimen testing conducted by Tripler Army Medical Center. Finally, the Coast Guard had testimony consisting of circumstantial evidence of drug use on the date of the specimen collection. See Tr. at 203-211.

The Coast Guard need only show a reasonable basis in law and fact. In an EAJA case, the undersigned must look at the Coast Guard's positions "in the light in which they would have appeared prior to trial." See Fox, 855 F.2d at 252. Here, the documentary evidence and witness testimony sufficiently justify the factual allegations to a degree that would satisfy a reasonable person.

b. Respondent's Arguments

Respondent argues the Coast Guard did not perform an adequate investigation and "the Agency simply relied on the Coast Guard's negiligently administered drug test as support for the S&R complaint." See *Respondent's Motion to Recover Attorney Fees and Costs Pursuant to 5 U.S.C.A. § 504 and 49 CFR 6*, at page 18. 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. See CG Ex. 05. 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. See *Coast Guard Investigative Service (CGIS) Report of Investigation (ROI)*, attached to the *Coast Guard's Response to Respondent's Various Motions* dated April 26, 2013. For example, when presented with the positive drug test result, Respondent explained he had been out at a local bar and someone could have slipped cocaine in his drink. Id., at pp. 6-7 and 9-11. The record shows CGIS investigated Respondent's statements to determine if he could have unknowingly ingested cocaine. Id., at 22-23. The record directly contradicts Respondent's claim regarding Coast Guard's lack of investigation.

Respondent also argues the Coast Guard ignored his exonerating evidence, specifically the results of a subsequent hair drug test and polygraph test. He claims "[t]his contrary evidence required that the Agency investigate all possible avenues for the contrary results." See Id. at 19. First, a subsequent negative hair test and polygraph test do not disprove the positive urine test. Second, as stated above, the Coast Guard did investigate other causes for the positive drug test. The record demonstrates that Respondent never informed the Coast Guard of any discrepancies with his specimen bottle or a potentially negligent urine specimen collection.

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. See CG Ex. 05. 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.

3. Reasonable Connection Between the Alleged Facts and Legal Theory

As stated above, the 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. See Fox, 855 F.2d at 252.

ULTIMATE FINDINGS AND CONCLUSIONS

1. The underlying proceeding was an adversarial adjudication allowing for the recovery of attorney fees and expenses.

2. Applicant was an eligible individual within the meaning of 49 C.F.R. § 6.7.

3. Applicant was the prevailing party in the underlying proceeding.

4. The Agency's position in the underlying adjudication was substantially justified.

DECISION

Having found there was an adversarial adjudication allowing for the recovery of attorney fees and expenses and Applicant to be the prevailing party and having further found the Agency's position was substantially justified, the application for attorney fees under EAJA is **DENIED**.

Attachment "A" details the parties' appellate rights.

SO ORDERED.

_____

Walter J. Brudzinski
Chief Administrative Law Judge
U.S. Coast Guard

Date: June 05, 2014

ATTACHMENT "A"

APPEAL RIGHTS

TITLE 33 - NAVIGATION AND NAVIGABLE WATERS
CODE OF FEDERAL REGULATIONS

PART 20 RULES OF PRACTICE, PROCEDURE, AND EVIDENCE FOR FORMAL ADMINISTRATIVE PROCEEDINGS OF THE COAST GUARD

SUBPART J - APPEALS

§ 20.1001 General.

Any party may appeal the ALJ's decision by filing a notice of appeal. The party shall file the notice with the U. S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022. The party shall file the notice 30 days or less after issuance of the decision, and shall serve a copy of it on the other party and each interested person.

No party may appeal except on the following issues:

Whether each finding of fact is supported by substantial evidence.
Whether each conclusion of law accords with applicable law, precedent, and public policy.
Whether the ALJ abused his or her discretion.
The ALJ's denial of a motion for disqualification.

No interested person may appeal a summary decision except on the issue that no hearing was held or that in the issuance of the decision the ALJ did not consider evidence that that person would have presented.

The appeal must follow the procedural requirements of this subpart.

§ 20.1002 Records on appeal.

The record of the proceeding constitutes the record for decision on appeal.

If the respondent requests a copy of the transcript of the hearing as part of the record of proceeding, then, --

If the hearing was recorded at Federal expense, the Coast Guard will provide the transcript on payment of the fees prescribed in 49 CFR 7.45; but,
If the hearing was recorded by a Federal contractor, the contractor will provide the transcript on the terms prescribed in 49 CFR 7.45.

§ 20.1003 Procedures for appeal.

Each party appealing the ALJ's decision or ruling shall file an appellate brief with the Commandant at the following address: U.S. Coast Guard Administrative Law Judge Docketing Center; Attention: Hearing Docket Clerk; Room 412; 40 S. Gay Street; Baltimore, MD 21201-4022, and shall serve a copy of the brief on every other party.

(1) The appellate brief must set forth the appellant's specific objections to the decision or ruling. The brief must set forth, in detail, the --

Basis for the appeal;
(ii) Reasons supporting the appeal; and
(iii) Relief requested in the appeal.

(2) When the appellant relies on material contained in the record, the appellate brief must specifically refer to the pertinent parts of the record.

(3) The appellate brief must reach the Docketing Center 60 days or less after service of the ALJ's decision. Unless filed within this time, or within another time period authorized in writing by the Docketing Center, the brief will be untimely.

Any party may file a reply brief with the Docketing Center 35 days or less after service of the appellate brief. Each such party shall serve a copy on every other party. If the party filing the reply brief relies on evidence contained in the record for the appeal, that brief must specifically refer to the pertinent parts of the record.

No party may file more than one appellate brief or reply brief, unless --

The party has petitioned the Commandant in writing; and
The Commandant has granted leave to file an added brief, in which event the Commandant will allow a reasonable time for the party to file that brief.

The Commandant may accept an *amicus curiae* brief from any person in an appeal of an ALJ's decision.

§ 20.1004 Decisions on appeal.

(a) The Commandant shall review the record on appeal to determine whether the ALJ committed error in the proceedings, and whether the Commandant should affirm, modify, or reverse the ALJ's decision or should remand the case for further proceedings.

(b) The Commandant shall issue a decision on every appeal in writing and shall serve a copy of the decision on each party and interested person.