

AMERICAN INDEPENDENCE MINES & MINERALS

IBLA 2000-219

Decided September 29, 2004

Appeal from a decision of Administrative Law Judge Nicholas T. Kuzmack, denying an application for award of attorney's fees and expenses under the Equal Access to Justice Act in connection with a Government mining claim contest. IBLA 89-259-EAJA.

Vacated.

1. Attorney Fees: Equal Access to Justice Act: Application and Jurisdiction--Equal Access to Justice Act: Generally

Action on an application for an award of fees and/or other expenses filed prior to final disposition of the proceeding must be stayed pending final disposition of the proceedings. Final disposition is the latter of (1) the date upon which the final Departmental decision is issued, or (2) the date of the order which finally resolves the proceeding, such as an order approving settlement or voluntary dismissal.

APPEARANCES: John M. Marshall, Esq., and David R. Lombardi, Esq., Boise, Idaho, for American Independence Mines & Minerals; Kenneth D. Paur, Esq., Office of the General Counsel, U.S. Department of Agriculture, Ogden, Utah, for the Forest Service.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

American Independence Mines & Minerals (AIMM) has appealed from a March 24, 2000, decision of Administrative Law Judge Nicholas T. Kuzmack, denying its application for attorney's fees and expenses under section 203(a)(1) of the Equal

Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504(a)(1) (2000), and implementing regulations (43 CFR 4.601 through 4.619).^{1/}

This case stems from a Government contest proceeding brought by the Bureau of Land Management (BLM) on behalf of the Forest Service, U.S. Department of Agriculture (Forest Service). In its February 25, 1987, contest complaint, BLM challenged the validity of the Golden Hand Nos. 1 through 8 lode mining claims on the ground that no valuable mineral deposit existed on the claims on January 1, 1984, the date on which the land was withdrawn from mineral entry as a part of the Frank Church-River of No Return Wilderness Area (subject to valid existing rights), or at the time of the hearing.

In 1988, AIMM filed suit in the Federal District Court for the District of Idaho seeking to stay the validity contest and seeking to have the court direct the Forest Service to allow AIMM to do work that would allow AIMM to develop the evidence necessary to defend the validity of its claims. American Independence Mines and Minerals Co. v. United States Department of Agriculture, Civ. No. 88-1250. This suit was stayed by agreement of the parties pending completion of the administrative validity determination.

Following a four-day hearing in August, 1988, Administrative Law Judge Ramon M. Child issued a decision on January 19, 1989, finding that the claimants had demonstrated that there was a discovery of a valuable mineral deposit on the Golden Hand Nos. 2, 3, 4 and 8 claims, but that there was no discovery on the Golden Hand Nos. 1, 5, 6 and 7 claims. Both AIMM and the Forest Service appealed Judge Child's ruling to this Board.

^{1/} We note that 5 U.S.C. § 504(c)(1) (2000) provides, in part: "If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code." "When an appeal to [a] Court is taken, the forum for deciding fees shifts to [this provision of] the * * * statute." Scafar Contracting, Inc. v. Secretary of Labor, 325 F.3d 422, 425 (3rd Cir. 2003). The Court acknowledged its authority to "award fees for both the agency adjudication and the civil action, if we reach the underlying merits," but the Court had declined to do so previously "because we did not reach the merits of the appeal, and instead remanded to the Commission." Id. As noted in greater detail below, in its decision on the appeal of our AIMM decision, the Court remanded the matter to the Department. Therefore, § 501(c)(1) does not preclude the Department from acting on AIMM's petition. See also, Dole v. Phoenix Roofing Co., 922 F.2d 1202, 1208-09 (5th Cir. 1991).

On appeal, the Board issued its decision in United States v. American Independence Mines & Minerals, 122 IBLA 177 (1992), affirming Judge Child's decision in part and reversing it in part. The Board held that no discovery existed on the Golden Hand Nos. 1, 2, 5, 6 and 7 lode claims, and affirmed Judge Child's finding that a discovery existed on the Golden Hand Nos. 3 and 4 lode claims.^{2/} The Board set aside Judge Child's ruling with respect to the Golden Hand No. 8 lode claim and remanded the case to the Hearings Division for a further hearing regarding the price of silver at the time of the hearing and a redetermination of whether that claim was supported by a discovery. 122 IBLA at 189. Following additional briefing upon remand, Judge Kuzmack issued an order dated September 27, 1999, granting a Forest Service motion to dismiss its contest complaint with respect to the Golden Hand No. 8 claim with prejudice.

Less than 30 days from the date of the order dismissing the contest with respect to the Golden Hand No. 8 lode claim, AIMM filed its EAJA application for attorney's fees and expenses incurred in connection with its defense of the Department's contest of the validity of the Golden Hand Nos. 3, 4, and 8 lode claims.

Subsequent to its filing of its EAJA application, AIMM filed a motion to reactivate the lawsuit it had filed with the Federal District Court to allow AIMM to appeal IBLA's decision regarding the Golden Hand Nos. 1 and 2 lode claims. The Federal District Court granted AIMM's motion and ordered that the lawsuit be assigned a new docket number, Civ. No. 00-291-S-BLW.

On March 24, 2000, which was after the District Court had granted AIMM's motion, but before it had taken any other action having an impact on this case, Administrative Law Judge Nicholas T. Kuzmack issued his decision denying AIMM's EAJA application. As noted above, AIMM has appealed that decision to this Board. It also now seeks the additional attorney's fees and expenses which it has incurred in pursuing its EAJA application before Judge Kuzmack and this Board. (Statement of Reasons for Appeal (SOR) at 14.)

In a memorandum decision issued on August 9, 2002, the court granted AIMM's motion for summary judgement. American Independence Mines and

^{2/} During the hearing AIMM acknowledged that the Golden Hand Nos. 6 and 7 lode claims were not supported by a discovery of a valuable mineral deposit. On appeal to this Board, AIMM did not challenge the ALJ's findings regarding the validity of the Golden Hand Nos. 5, 6, and 7 lode claims. See United States v. American Independence Mines & Minerals, 122 IBLA at 178-79, 181.

Minerals Co. v. U.S. Department of Agriculture, Civ. No. 00-291-S-BLW, slip op. at 6 (D. Idaho, Aug. 9, 2002). In its memorandum decision the court noted that when AIMM reactivated its suit in the Federal District Court, the Forest Service argued that the appeal of our decision in U.S. v. American Independence Mines & Minerals, *supra*, was untimely and that AIMM should have appealed our decision regarding the Golden Hand Nos. 1 and 2 lode claims rather than waiting until after Judge Kuzmack had granted the FS motion to dismiss, with prejudice, its contest complaint with respect to the Golden Hand No. 8. The Court did not agree with this argument, stating that “[t]he validity determination originated in a single proceeding involving all eight claims. It was not finally resolved until 1999, when the Forest Service dismissed its complaint against claim 8. [AIMM] then promptly filed suit within the time frame dictated by 28 U.S.C. § 2401(a).” (Aug. 9, 2002, Memorandum Decision at 6.)

The court further noted that the case before it contained three claims: (1) an appeal of the IBLA’s decision invalidating the Golden Hand Nos. 1 and 2 lode claims; (2) an appeal of the Forest Service denial of AIMM’s 1987 request to do further work on the Golden Hand Nos. 1 and 2 lode claims in preparation for its defense at the validity hearing; and (3) AIMM’s request that the court compel the Forest Service to take action on its proposed operating plan. *Id.* The court then reversed this Board’s finding that the Golden Hand No. 1 claim was invalid because there was no present exposure of a mineral deposit on that claim. *Id.* at 8-9. The court also reversed the Board’s finding that the Golden Hand No. 2 lode claim was invalid for lack of evidence of marketability, finding the decision arbitrary and capricious in view of the actions the Forest Service had taken to limit further sampling.^{3/} *Id.* at 9.

Citing U.S. v. Albert Parker, 82 IBLA 344, 348 (1984), the court found the Forest Service’s denial of AIMM’s 1987 request to do work deemed necessary to make a case for claim validity to be arbitrary and capricious. It then remanded the issue of the validity of the Golden Hand Nos. 1 and 2 lode claims to the Hearings Division, U.S. Department of the Interior for a rehearing, that was to be conducted following AIMM’s work on the claims to gather the information necessary to support its case regarding the validity of those claims (characterized in the decision as assessment

^{3/} The court reversed the Board decision rather than vacating it. A properly located and maintained mining claim is presumed valid unless and until there is a final determination that the claim is invalid. See U.S. v. Miller, 138 IBLA 246 (1997). A mining claim is a property right that may not be extinguished without the due process afforded by the Fifth Amendment to the U.S. Constitution. Swanson v. Babbitt, 3 F.3d 1348, 1350 (9th Cir. 1993); United States v. O’Leary, 63 I.D. 341, 344-345 (1956).

work), pursuant to an agreement AIMM and the Forest Service were directed to work out. *Id.* at 8-9. The court remanded the second and third claims to the Forest Service and directed the Forest Service to allow AIMM to do the work necessary to support validity (subject to reasonable and necessary mitigation and protective stipulations). It then stated that “[t]he court contemplates that the parties will, if necessary, schedule a rehearing before an administrative law judge to resolve the validity issues on claims 1 and 2 in accordance with the rules set forth above [in the Memorandum Decision].” (Aug. 9, 2002, Memorandum Decision at 11.)

The net result was that the case is now lodged with the Hearings Division, U.S. Department of the Interior. The Forest Service has been directed to allow AIMM to open mine workings and do such other work that is reasonably deemed necessary to build a case in support of validity, and AIMM is to conduct the work in a manner that will not unreasonably jeopardize the wilderness characteristics of the area. The court stated that if, as a result of the work AIMM undertakes, the parties are mutually satisfied that a discovery does or does not exist on the claims, they are to seek a dismissal of the case with the Hearings Division reflecting their mutual understanding, but if they are unable to agree, a hearing will be necessary, and the Forest Service should initiate the necessary action. The court noted that when a final decision is reached by the Administrative Law Judge, that decision will be appealable to this Board. Of importance to this decision is the fact that there has yet to be a final disposition of the proceeding before the ALJ in accordance with the court’s directive.

[1] The Department’s regulations applicable to the EAJA are found at 43 CFR Part 4, Subpart F. The time for submitting an application is found at 43 CFR 4.611(a), which provides that “[a]n application must be filed no later than 30 days after final disposition of the proceeding. Action on an application for an award of fees or other expenses filed prior to final disposition of the proceeding shall be stayed pending such final disposition.” (Emphasis added.). Further, subsection (b) of the same code section provides that “final disposition” is the “latter of (1) the date upon which the final Departmental decision is issued, or (2) the date of the order which finally resolves the proceeding, such as an order approving settlement or voluntary dismissal.”

We must construe the Department’s regulations in a manner that is consistent with the meaning of “final disposition” in the EAJA. See *Adams v. SEC*, 287 F. 3d. 183, 190 (D.C. Cir. 2002). In *BLM v. Cosimati*, 131 IBLA 390, 398-99 (1995), we noted that the Department’s regulations had not been updated when the EAJA was amended by the Act of August 5, 1985, P.L. 99-80, 99 Stat. 183, and held that current statutory provisions must be given effect. To resolve a perceived ambiguity in the statutory term “final disposition,” courts have looked to the interpretation

advanced by the Administrative Conference of the United States Courts to which Congress assigned the task of developing model rules to implement the statute. See Scafar Contracting, Inc. v. Secretary of Labor, 325 F.3d 422, 427 (3rd Cir. 2003); Adams v. SEC, 287 F.3d. at 189. In Scafar, 325 F.3d at 427-28 the Court stated:

The Conference specifically addressed the confusion over “final disposition” and created a model rule such that “final disposition means the date on which a decision or order disposing of the merits of the proceeding, such as a settlement or a voluntary dismissal, become a [sic] final and unappealable, both within the agency and to the courts.” Administrative Conference of the United States, Model Rule § 315.204, 51 Fed.Reg. 16659, *16668 (1986) (emphasis added). Thus, the Conference intended “final disposition” to mean final and unappealable. The Conference explained that they hoped to “provide consistency among agency proceedings as well as with court cases, and . . . avoid the confusion that sometimes arises as to whether an application must be filed with an agency to preserve rights even though some portion of the case is being appealed to the courts.” Id. at *16662.

On the basis of the statement by the Administrative Conference and its own analysis of other court decisions, the Court in Scafar rejected an interpretation of the statutory term “final disposition” under which “a prevailing party would face multiple deadlines and multiple applications.” 325 F.3d at 431. It would not be appropriate to construe or apply the Department’s regulation in a manner inconsistent with this interpretation of the statutory provision.

It is clear from the Federal District Court’s discussion above that it did not consider the date that the Board issued its decision to be the final disposition of the proceedings. We agree. As the Court of Appeals noted in Dole v. Phoenix Roofing, 922 F.2d 1202, 1206 (5th Cir. 1991):

[W]hen a party appeals only part of an ALJ’s decision, the entire decision is on review; the failure to appeal the decision on a particular citation item does not make the ALJ’s disposition of that item a “final disposition” of that item for EAJA purposes. * * * [T]he issue of finality is very important because under section 504(a)(2) the thirty day deadline for filing a fee application is a jurisdictional prerequisite. See Clifton v. Heckler, 755 F.2d 1138, 1144-45 (5th Cir. 1985).

(Footnote omitted.) See also Adams v. SEC, 287 F.3d at 186-91. There is no question that the proceedings in this case continue. The case has been remanded to the Hearings Division and no final decision or order resolving the proceeding has been issued. The regulation provides that action on the application shall be stayed pending final disposition of the proceeding. The course of action that Judge Kuzmack should have taken when the petition was received was to stay action on the petition pending final disposition of the proceeding, and the decision addressing the merits of the petition should not have been issued.^{4/} For that reason the March 24, 2000, decision issued by Administrative Law Judge Kuzmack denying costs and attorney's fees must be vacated.^{5/}

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the casefile is returned to the Hearings Division for final determination at such time as there is final disposition of the underlying case.

R.W. Mullen
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

James F. Roberts
Administrative Judge

^{4/} We do not fault Judge Kuzmack. The timing of the application and appeal to the district court could have easily precluded his knowing that the proceedings were not final. However, his knowledge, or lack thereof is not material to the outcome. The regulatory requirement that action on the application be stayed pending final disposition is clear and binding.

^{5/} This decision does not preclude AIMM from amending its application for attorney's fees to include additional fees that it has incurred, and present further arguments in support of an award when there is final disposition of the underlying case.