

CURT L. WILLSIE

IBLA 2002-316

Decided October 28, 2004

Interlocutory appeal from a ruling by Administrative Law Judge Andrew S. Pearlstein, upholding the timeliness of an application for attorney fees and expenses in mining claim contest No. AZA-23448-1. AZA-23448-1/EAJA.

Affirmed; case record returned for adjudication of the merits of the application.

1. Equal Access to Justice Act: Application

An application for attorney fees and expenses is timely filed, under the Equal Access to Justice Act, as amended, 5 U.S.C. § 504 (2000), and 43 CFR 4.611, when it is filed within 30 days of a final disposition in the administrative adjudication. “Final disposition” is defined in 43 CFR 4.611(b) as the later of (1) the date on which the final Department decision is issued; or (2) the date of the order which finally resolves the proceeding. When the Board issues a decision resolving a mining claim contest in favor of the contestee, and the contestant files a timely petition for reconsideration, an Equal Access to Justice Act application filed by the contestee within 30 days of the Board’s order denying the petition will be considered timely filed.

APPEARANCES: Jerry L. Haggard, Esq., Phoenix, Arizona, for Curt L. Willsie; Richard R. Greenfield, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On May 17, 2002, the Bureau of Land Management (BLM) filed an interlocutory appeal from an April 18, 2002, decision of Administrative Law Judge Andrew S. Pearlstein, holding that Curt L. Willsie, the successful contestee in a mining claim contest resolved by this Board's decision in United States v. Willsie, 152 IBLA 241 (2000), had timely filed his application for attorney fees and expenses, under the Equal Access to Justice Act (EAJA), as amended, 5 U.S.C. § 504 (2000).

Pursuant to 43 CFR 4.28, by notice dated May 15, 2002, Judge Pearlstein requested, *sua sponte*, an interlocutory ruling by the Board on the legality of his April 18, 2002, decision. He made the request because he believed that the issue decided by him was appropriate for an interlocutory ruling by the Board, and because, although no interlocutory appeal had yet been filed, the purpose of an interlocutory appeal is equally fulfilled in an appropriate case regardless of whether the appeal is initiated by a party or the administrative law judge.

Regulation 43 CFR 4.28 is the regulatory provision governing interlocutory appeals to the Board from rulings of administrative law judges in cases such as the present one.<sup>1/</sup> It provides that no such appeal shall occur unless the Board first grants permission and the administrative law judge certifies or abuses his discretion by refusing to certify the ruling which is being appealed. There is no provision allowing for an administrative law judge to, *sua sponte*, request an interlocutory ruling from the Board or to file an "appeal" of his own ruling.<sup>2/</sup> The filing of an interlocutory appeal by a party is necessary to afford the Board jurisdiction under 43 CFR 4.28 over an interlocutory ruling by an administrative law judge. Absent the filing of such an appeal, there is nothing over which the Board could assume jurisdiction on an interlocutory basis. Accordingly, we deny Judge Pearlstein's *sua sponte* request for an interlocutory ruling.

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<sup>1/</sup> That regulation provides as follows:

"There shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from an Appeals Board and an administrative law judge has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Board."

<sup>2/</sup> But see 43 CFR 4.1124 allowing certification by administrative law judges of rulings in surface mining cases.

However, we accept jurisdiction over BLM's timely interlocutory appeal filed on May 17, 2002, which was certified to the Board by Judge Pearlstein on May 21, 2002. BLM has made the necessary showing required by 43 CFR 4.28.

Willsie was the successful contestee in a mining claim contest brought by BLM on May 3, 1994, challenging the validity of all or part of four association placer mining claims, the C&W Nos. 1, 12, 15, and 16, which were located for gypsum, in secs. 3 and 4, T. 41 N., R. 14 W., Gila and Salt River Meridian, Mohave County, Arizona, and for which he sought patent.<sup>3/</sup>

On May 8, 2000, the Board issued a decision, United States v. Willsie, 152 IBLA 241, reversing a March 29, 1996, order by Administrative Law Judge S.N. Willett, and, following de novo review, dismissing BLM's May 3, 1994, contest complaint against Willsie's four mining claims.<sup>4/</sup> Judge Willett had dismissed BLM's contest complaint based on her conclusion that BLM had failed to establish a prima facie case of invalidity of the claims at a February 1996 hearing. In our May 2000 decision, we concluded that Judge Willett had erred in dismissing BLM's contest complaint on that basis, holding that BLM had established a prima facie case of the invalidity of the four claims. We then reviewed all of the evidence offered at the February 1996 hearing and held that Willsie had overcome BLM's prima facie case by a preponderance of the evidence. Accordingly, we dismissed the complaint. We also concluded that Willsie had demonstrated the existence of a valuable mineral deposit on all four claims and thus established the validity of the claims.

On July 6, 2000, BLM sought reconsideration of the Board's May 2000 decision pursuant to 43 CFR 4.403. BLM also sought a stay of the effect of the

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<sup>3/</sup> BLM did not contest, and later patented, portions of the C&W Nos. 12 and 16 claims to Willsie by Patent No. 02-96-0014 on Apr. 15, 1996. All of the C&W Nos. 1 and 15 claims and the unpatented portion of the C&W Nos. 12 and 16 claims were contested by BLM. On Dec. 9, 1997, after the administrative law judge acted on the Government's contest complaint, but before any action by the Board on an appeal from the judge's ruling, Willsie transferred his interest in the four unpatented claims (or portions thereof) to the Sierra Pacific Gypsum Corporation (later changed to Sierra Pacific Industries and then Arizona Gypsum Mining Company).

<sup>4/</sup> Judge Pearlstein properly notes that BLM filed a "motion for limited reconsideration" concerning our May 2000 decision. (Decision at 2.) BLM styled its motion as seeking limited reconsideration, since it challenged only the Board's ultimate holding that Willsie had overcome BLM's prima facie case of invalidity, and not our initial determination that BLM had established a prima facie case.

decision, which we took under advisement. By order dated February 20, 2001, the Board denied BLM's petition for reconsideration and denied BLM's motion for a stay as moot.

On March 16, 2001 (amended December 4, 2001), Willsie filed his EAJA application for attorney fees and expenses with the Hearings Division, Office of Hearings and Appeals (OHA), in Phoenix, Arizona, pursuant to 5 U.S.C. § 504(a)(1) (2000) and its implementing regulations, 43 CFR 4.601 through 4.619.<sup>5/</sup> Willsie asserted that he was the prevailing party in the Department's adjudication of the validity of his placer mining claims. Judge Pearlstein held that Willsie did not file his EAJA application within 30 days of the Board's May 8, 2000, decision, but that he had filed his application "within 30 days of the date of the Board's denial of [BLM's] motion for limited reconsideration \* \* \* ." (Decision at 2.) Judge Pearlstein concluded that, since the Board's February 2001 order denying reconsideration finally resolved the mining claim contest proceeding, Willsie's application for attorney fees and expenses was filed within 30 days of the final disposition of the proceeding, as required by 43 CFR 4.611. (Decision at 6.)

[1] Section 203(a)(1) of EAJA, as amended, 5 U.S.C. § 504(a)(1) (2000), directs the Department to award fees and expenses to the prevailing party in an "adversary adjudication" conducted by the Department, unless the Department's position was substantially justified or special circumstances would make an award unjust.<sup>6/</sup> "[A]dversary adjudication" is defined by both the statute and the Department's implementing regulations as an "adjudication under section 554 of [Title 5 of the U.S. Code] \* \* \* in which the position of the United States is

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<sup>5/</sup> Willsie also filed an application with the Board, and, by decision dated Aug. 7, 2001, we referred Willsie's application for attorney fees and expenses to the Hearings Division, for assignment to and adjudication by an administrative law judge pursuant to 43 CFR 4.601 through 4.619. United States v. Willsie, 155 IBLA 296 (2001). Willsie asserts that the dual filing was a precaution because the Board had previously entertained an EAJA application filed directly with it. (Answer at 2.)

<sup>6/</sup> We note that EAJA provides that the Department and other Federal agencies "shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses," "[a]fter consultation with the Chairman of the Administrative Conference of the United States [ACUS]." 5 U.S.C. § 504(c)(1) (2000).

represented by counsel or otherwise[.]” 5 U.S.C. § 504(b)(1)(C) (2000); see 43 CFR 4.602(b).<sup>7/</sup>

Most importantly for our present purposes, 5 U.S.C. § 504(a)(2) (2000) further provides, in relevant part, that “[a] party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section \* \* \* . The statute does not define “final disposition.” However, the Department’s implementing regulations similarly provide that an application for fees and expenses “must be filed no later than 30 days after final disposition of the proceeding” and that “[a]ction 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.”<sup>8/</sup> 43 CFR 4.611(a). In addition, the regulations define “final disposition” to mean “the later of (1) the date on which the final Department decision is issued; or (2) the date of the order which finally resolves the proceeding, such as an order approving settlement or voluntary dismissal.” (Emphasis added.) 43 CFR 4.611(b). Further, 43 CFR 4.615(a) provides that no extension of time may be granted for the filing of an EAJA application.

BLM argues that “final disposition” occurred when the Board issued its May 8, 2000, decision dismissing BLM’s contest complaint. Willsie asserts, on the other hand, that the Board’s February 20, 2001, order denying BLM’s petition for reconsideration constituted “final disposition” of the case.

The question for resolution here is whether the Board’s May 2000 decision or the Board’s February 2001 order is a “final disposition” for purposes of EAJA. It is undisputed that the timely filing of an EAJA application is necessary to establish the jurisdiction of the Department to adjudicate the applicant’s eligibility for and entitlement to an award of attorney fees and expenses. As the court stated in Dole v. Phoenix Roofing, Inc., 922 F.2d 1202, 1206 (5<sup>th</sup> Cir. 1991): “[T]he thirty day deadline for filing a fee application is a jurisdictional prerequisite.” See Long Island Radio Co. v. National Labor Relations Board, 841 F.2d 474, 477-78 (2<sup>nd</sup> Cir. 1988); J.M.T. Machine Co., Inc. v. United States, 826 F.2d 1042, 1046-47 (Fed. Cir. 1987).

<sup>7/</sup> “Fees and expenses are available under EAJA to mining claim contestees in the proper circumstances.” United States v. Willsie, 155 IBLA at 297; see Collord v. United States Department of the Interior, 154 F.3d 933, 936 (9<sup>th</sup> Cir. 1998).

<sup>8/</sup> The regulations render the word “proceeding” synonymous with an “adversary adjudication” as defined in both the statute and the regulations. 43 CFR 4.602(e).

Thus, absent the timely filing of an EAJA application in compliance with 5 U.S.C. § 504(a)(2) (2000) and 43 CFR 4.611, the Department has no jurisdiction to entertain it.

It is clear from a reading of 43 CFR 4.611(b) that a final disposition of a proceeding before the Department, which may give rise to an EAJA application for attorney fees and expenses, occurs when either a decision or an order is issued by the Department which “finally resolves the proceeding.” However, by including the phrase “the later of,” the Department implied that there could be both a final Department decision and an order finally resolving the proceeding in the same case. As Judge Pearlstein stated at page 6 of his decision:

Indeed, an order on a motion for reconsideration is practically the only type of order that comes readily to mind that would ordinarily be issued after a final Department decision. While the intent of 43 CFR §4.611(b)(2) is not crystal clear, an order on a motion for reconsideration does fit within the plain meaning of the language of the regulation as an order which finally resolves a proceeding issued later than a final Department decision.

In a proposed model rule issued in March 1981, 0.402(a), the ACUS Chairman provided that “final agency action on the proceeding” generally constituted final disposition for purposes of triggering the 30-day time period for filing EAJA applications, but also stated that the filing of a petition for reconsideration or the time for filing such a petition would extend the triggering point until the petition was resolved or the time had lapsed. 46 FR 15895, 15904 (Mar. 10, 1981). The provisions extending the deadline to file applications in order to take into account the filing of a petition or the opportunity for such a filing were carried through to the final model rule, 0.204, which stated:

(b) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the later of (1) the date on which an initial decision or other recommended disposition of the merits of the proceeding by an adjudicative officer or intermediate review board becomes administratively final; (2) issuance of an order disposing of any petitions for reconsideration of this agency’s final order in the proceeding; (3) if no petition for

reconsideration is filed, the last date on which such a petition could have been filed; or (4) issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration. [Emphasis added.]

46 FR 32900, 32914 (June 25, 1981).

The Chairman explained in the preamble to the final rule:

Since the 30-day deadline may well be interpreted by the courts as an unwaivable statutory bar to late filing, \* \* \* we think the fairer practice is to permit the filing of an application up until 30 days after the last date on which petitions for reconsideration could have been filed. If another party seeks reconsideration, the award proceeding would ordinarily be delayed in any event, pending an agency decision on reconsideration \* \* \*.

46 FR at 32908.

In later issuing its own EAJA implementing regulations, the Department stated that it had “followed” the model rule. 48 FR 17595 (Apr. 25, 1983) (citing 46 FR 32900 (June 25, 1981)).<sup>2/</sup> However, despite that statement, the Department did not expressly address the time period for filing petitions for reconsideration or the effect of the filing of such a petition. Nevertheless, the Department did include the phrase “the later of” in 43 CFR 4.611(b).

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<sup>2/</sup> The Chairman issued a revised model rule on May 6, 1986, following the Department’s promulgation of its EAJA regulations. See 51 FR 16659 (May 6, 1986). That model rule defines final disposition as “the date on which a decision or order disposing of the merits of the proceeding or any other complete resolution of the proceeding, such as a settlement or voluntary dismissal, become[s] \* \* \* final and unappealable, both within the agency and to the courts.” Id. at 16668, emphasis added. It thus renders administrative action not final, for EAJA purposes, until the matter is no longer appealable not only within the agency, but also to the courts. See id. at 16662; Safar Contracting, Inc. v. Secretary of Labor, 325 F.3d 422, 431 (3<sup>rd</sup> Cir. 2003); Adams v. Securities & Exchange Commission, 287 F.3d 183, 191 (D.C. Cir. 2002); J.M.T. Machine Co., Inc. v. United States, 826 F.2d at 1048.

BLM asserts that the Department's construction of "final agency action" in 43 CFR 4.403 is controlling for purposes of determining the meaning of "final disposition" under EAJA. Following promulgation of the Department's EAJA regulations and issuance of the revised model rule, the Department promulgated 43 CFR 4.403, effective July 6, 1987. See 52 FR 21307 (June 5, 1987). That regulation provides that "[a] decision of the Board shall constitute final agency action and be effective upon the date of issuance, unless the decision itself provides otherwise." The right to seek reconsideration of the Board's decision, by filing a petition for reconsideration within 60 days after the date of the decision, is also provided for by the regulation.<sup>10/</sup> However, the regulation also states that the filing of such a petition is not necessary "to exhaust administrative remedies," for purposes of seeking relief before a Federal court, and that "[t]he filing, pendency, or denial of a petition for reconsideration shall not operate to stay the effectiveness or affect the finality of the decision involved unless so ordered by the Board." Id.

BLM contends that the "plain meaning" of 43 CFR 4.403 is that the filing of a petition for reconsideration does not "affect the finality of the decision involved." Thus, BLM would equate "final agency action" in 43 CFR 4.403 with "final disposition" under 43 CFR 4.611, dictating that the 30-day time period for filing an EAJA application in this case ran from the May 8, 2000, date of the Board's decision, rather than the later date of our order disposing of the petition for reconsideration. (Statement of Reasons at 12.)

While 43 CFR 4.403 clearly establishes the date for "final agency action" for purposes of judicial review, it does not dictate the interpretation of "final disposition" for the purposes of EAJA filings, particularly in light of the phrase "the later of," included in 43 CFR 4.611(b). It is a fundamental rule of construction that a statute should be read so as to give meaning to all of its parts. Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307-08 (1961). Such a rule has also been extended to the interpretation of regulations, so that, when possible, no part is superfluous. United States v. Hassanzadeh, 271 F.3d 574, 582 (4<sup>th</sup> Cir. 2001). In this case, the regulation in question is 43 CFR 4.611(b), which, the Department stated, followed the model

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<sup>10/</sup> Prior to the Department's 1987 promulgation of 43 CFR 4.403, the applicable regulation was 43 CFR 4.21(c) (1986), which provided that "[n]o further appeal will lie in the Department from a decision of \* \* \* an Appeals Board of the Office of Hearings and Appeals." See 52 FR at 21307. It further stated that, except where otherwise provided by regulation, requests for reconsideration of Board decisions "must be filed promptly," but that "[t]he filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision \* \* \* unless so ordered by the Director [of OHA] or an Appeals Board."

rule. The model rule expressly addressed petitions for reconsideration; 43 CFR 4.611(b) does not. Nevertheless, in order to give meaning to the phrase “the later of,” the regulation must be interpreted as providing for the possibility that the date of disposition of a petition for reconsideration could constitute the “final disposition” for purposes of EAJA. This is true because even though “final disposition” can be the date on which the final Department decision is issued, it can also be, even in the same case, a later date, *i.e.*, the date of the order finally resolving the proceeding. In the underlying mining contest, the Board issued a final decision on May 8, 2000. It also issued an order denying BLM’s petition for reconsideration on February 20, 2001. The later of those two dates is February 20, 2001, the date of the order finally resolving the proceeding.

We agree with Judge Pearlstein that the time period for filing an EAJA application for attorney fees and expenses in this case ran from the February 20, 2001, date of the Board’s order disposing of the petition for reconsideration, rather than the May 8, 2000, date of the Board’s decision. Accordingly, Willsie’s application was timely filed.<sup>11/</sup>

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the interlocutory ruling appealed from is affirmed. The case record is returned to Judge Pearlstein for an adjudication of the merits of the application for attorney fees and expenses.<sup>12/</sup>

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge

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<sup>11/</sup> We need not decide what the appropriate commencement date for the 30-day EAJA application filing period would have been if no petition for reconsideration had been filed because a timely petition for reconsideration was, in fact, filed by BLM in this case.

<sup>12/</sup> H. Barry Holt, Chief Administrative Judge of this Board, took no part in the consideration or disposition of this appeal.