



PACIFIC COAST COAL COMPANY

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

173 IBLA 12

Decided October 22, 2007



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

PACIFIC COAST COAL COMPANY

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 2005-226

Decided October 22, 2007

Appeal from the denial of an application for an award of fees and expenses under the Equal Access to Justice Act. Hearings Division Docket No. DV 2003-1-R (EAJA).

Affirmed.

1. Attorney Fees: Equal Access to Justice Act: Prevailing Party--Equal Access to Justice Act: Generally

In order to qualify for an award of fees and expenses under section 203(a)(1) of the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (2000), an applicant must be a prevailing party in an adversary adjudication. When an Administrative Law Judge grants OSM's voluntary motion to vacate an NOV, without reference to the contested issues or merits of the NOV, and the order vacating the NOV does not materially alter the legal relationship of the parties, the applicant does not qualify as a prevailing party in the matter.

2. Attorney Fees: Equal Access to Justice Act: Substantially Justified--Equal Access to Justice Act: Generally

An application for an award of fees and expenses to a prevailing party under section 203(a)(1) of the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1) (2000), is properly denied when the agency's position in the proceeding is "substantially justified" based on the record as a whole.

APPEARANCES: David J. Morris, General Manager, Black Diamond, Washington, for appellant; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Pacific Coast Coal Company (PCC) has appealed from a July 8, 2005, decision of Administrative Law Judge Harvey C. Sweitzer denying its application for an award of fees and expenses (Application) under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504(a)(1) (2000), and the implementing regulations at 43 C.F.R. § 4.601, *et seq.* Judge Sweitzer ruled that PCC failed to show that it is a prevailing party under 43 C.F.R. § 4.605(a), and that the Office of Surface Mining Reclamation and Enforcement (OSM) demonstrated that its position was substantially justified under 43 C.F.R. § 4.606(a)(1). For the reasons that follow, we affirm Judge Sweitzer's decision in all respects.

BACKGROUND

PCC is a coal company that operates the John Henry Mine (Mine) located near Black Diamond, Washington. PCC's Permit Application Package (PAP), approved by OSM, contained a mining plan for several coal pits. The PAP scheduled removal of topsoil and overburden from open pits known as Pits 1 and 2, placement of the removed material onto spoil piles, and the removal of coal from Pits 1 and 2. The PAP provided that Pits 1 and 2 would be reclaimed contemporaneously with mining operations and that complete reclamation would include backfilling the pits with material from the spoil piles, grading the material, and re-topsoiling and revegetating the areas. *See* ALJ Decision at 2-3.¹

On August 23, 2002, several OSM officials met with PCC's General Manager and consultant David J. Morris to inspect the mine site. The primary purpose for the inspection was to determine whether PCC was in compliance with the permit terms and regulations applicable to contemporaneous reclamation. OSM determined that

¹ Judge Sweitzer noted that the PAP requirement of contemporaneous reclamation is consistent with the applicable statutory and regulatory provisions which generally require that reclamation must be achieved as contemporaneously with mining operations as practicable, and that such reclamation includes backfilling, grading, topsoil replacement, and revegetation on all land disturbed by surface mining activities. ALJ Decision at 3-4; *see* sections 102(e) and 515(b)(16) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1202(e) and 1265(b)(16) (2000), and 30 C.F.R. § 816.100.

PCC had failed to contemporaneously reclaim 5.6 surface acres on the low-wall side of Pit 1. See OSM's Objection to Application for an Award of Attorney Fees and Expenses (OSM's Brief) at 7, Ex. R-3. PCC had done some backfilling and "rough grading" of that area, but had not re-topsoiled or revegetated it, despite the fact that Plate III-8a gives the date for reclamation as "2001."² OSM determined that the area required not only topsoil replacement and revegetation, but also additional backfilling and grading, and that PCC had sufficient spoil material to complete the backfilling and grading process. OSM's Brief, Ex. R-3.

During the inspection, Morris stated that PCC had no obligation to actively reclaim any areas because PCC was not actively mining, having ceased removal of coal approximately 2 years earlier. *Id.* OSM confirmed that PCC's progression of mining appears to have been delayed by low market prices. OSM's Brief at 9-10. Morris based his view that PCC was not obligated to reclaim the mined area under Section 3.5.1 of the PAP, which provides, regarding the schedule for reclamation:

This is an estimated schedule. Reclamation timing directly depends on the progression of mining. Additionally, reclamation activities can be delayed by weather conditions. . . . As mining advances to the west, contemporaneous reclamation will occur as tabulated above and shown on Plate III-8a. Upon the completion of mining, a portion of each stockpile will be backfilled into the pits in conjunction with the reclamation of the pits.

OSM's Brief, Ex. 4-1.

On September 19, 2002, OSM issued NOV No. 02-141-244-4 to PCC for failure to reclaim the low wall side of Pit 1 as contemporaneously as practicable with its mining operations. The NOV specifically charged PCC with failure to comply with provisions of the PAP regarding grading, seeding, reclamation timing, disturbance schedule, and spoil movement, citing 30 C.F.R. §§ 773.17(b) and (c),³

² Plate III-8a of the PAP is a map illustrating different areas within the permit boundaries of the Mine and the estimated year when contemporaneous reclamation is to be achieved.

³ This regulation provides that "[t]he permittee shall conduct all surface coal mining reclamation operations only as described in the approved application, except to the extent that the regulatory authority otherwise directs in the permit" (30 C.F.R. § 773.17(b)), and that "the permittee shall comply with the terms and conditions of the permit, the applicable performance standards of the Act, and the requirements of the regulatory program" (30 C.F.R. § 773.17(c)).

780.18(b)(1),⁴ and 816.100.⁵ The NOV ordered PCC to “immediately begin backfilling and reclamation operations to bring disturbed areas into a state of contemporaneous reclamation to meet the reclamation schedule as described in the approved permit.”

On October 17, 2002, PCC responded by filing a request for review of the NOV. PCC argued in the request that it had complied with the contemporaneous reclamation standard because, prior to issuance of the NOV, it had completed “rough grading” and had begun final grading of the low-wall side of Pit 1. According to PCC, completion of “rough grading” satisfied the contemporaneous reclamation standard. Moreover, argued PCC, the PAP dates for reclamation of the pits were merely estimates, with deviation permissible based upon factors such as the weather, the progression of mining, available materials, and the overall economy of the coal industry. PCC noted that the end of the permit term had been extended to 2006 from the scheduled year of 2005, implying that the progression of mining had been delayed and that reclamation should be delayed as well.

Before an answer to the request for review was due for filing, OSM internally reviewed the case. According to OSM,

whether or not to defend the NOV was a close question. On the one hand, regardless of any ambiguity in the PAP over the timing of reclamation, PCC had materials available to achieve final reclamation of the low-wall side of Pit 1 by 2001 but did not use them. On the other hand, PCC’s progression of mining appeared to have been delayed by low market prices, the 2001 deadline was arguably an “estimate,” and PCC had commenced reclamation work on the subject area by August 2002. OSM decided to err on the side of the regulated and moved to vacate the NOV and dismiss the case.

OSM’s Brief at 10.

On November 1, 2002, OSM filed a motion to vacate the NOV and to dismiss the underlying matter for the stated reason that enforcement of the NOV “is perhaps

⁴ This regulation provides that “[e]ach [reclamation] plan shall contain the following information for the proposed permit area – (1) A detailed timetable for the completion of each major step in the reclamation plan.” 30 C.F.R. § 780.18(b)(1).

⁵ This regulation provides in pertinent part that “[r]eclamation efforts, including but not limited to backfilling, grading, topsoil replacement, and revegetation, on all land that is disturbed by surface mining activities shall occur as contemporaneously as practicable with mining operations” 30 C.F.R. § 816.100.

warranted but nonetheless problematic.” PCC joined in the motion and expressed an intent to file an application for an award of attorney’s fees and costs. OSM indicated that it would object to any such award. By order dated April 23, 2003, Administrative Law Judge Richard L. Reeh granted the joint motion to vacate the NOV.

On November 24, 2003, OSM and PCC each filed briefs regarding the Application. In opposition to the Application, OSM questioned whether an applicant may apply under EAJA for an award of attorney’s fees and costs incurred in an underlying matter involving enforcement of SMCRA and its implementing regulations, given the existence in SMCRA of a separate authorization for the award of costs and expenses, including attorney’s fees. See section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000). Because that issue was pending before this Board in the case docketed as *Pacific Coast Coal Company v. OSM*, IBLA 2004-150, Judge Reeh deferred ruling on PCC’s Application in the instant case. On February 25, 2005, the Board issued its opinion in *Pacific Coast Coal Company v. OSM*, 165 IBLA 52 (2005), ruling that an applicant, in such circumstances, could apply for and receive an award under either EAJA or SMCRA. By order dated May 11, 2005, PCC’s Application herein was reassigned to Judge Sweitzer for decision.

Judge Sweitzer stated that “[u]nder the regulations implementing EAJA, PCC is eligible for an award of fees and expenses if (1) it prevailed over the Department in the adversary adjudication for which it seeks an award and (2) as of the date the adversary adjudication was initiated, it was a corporation with a net worth of not more than \$5 million and not more than 500 employees.”⁶ ALJ Decision at 6, citing 43 C.F.R. § 4.603. He stated that “PCC has the burden of proving compliance with the eligibility standards.” ALJ Decision at 6, citing *Fields v. United States*, 20 Fed. Cl. 376, 377 (1993); *J. Claude Frei and Sons v. BLM*, 145 IBLA 390, 394 (1998).

Further, Judge Sweitzer stated that “[i]f an applicant establishes eligibility, an award may be received unless (1) the position of the Department as a party to the proceeding was substantially justified, or (2) special circumstances make the award sought unjust.” ALJ Decision at 6, citing 43 C.F.R. § 4.606(a). He stated that “[t]he Department has the burden of proving that one of these conditions exists so as to justify reduction or denial of an award.” ALJ Decision at 6, citing *Fields*, 29 Fed. Cl. at 377; *BLM v. Cosimati*, 131 IBLA at 397.

⁶ He noted that the \$5 million limit was not updated when 5 U.S.C. § 504(b)(1)(B) was amended by the Act of August 5, 1985, Pub. L. No. 99-80, 99 Stat. 183, to raise the limit to \$7 million, and that the current statutory limit must be given effect. ALJ Decision at 6, citing *BLM v. Cosimati*, 131 IBLA 390, 398-99 (1995).

Judge Sweitzer ruled as follows: “PCC has established that its net worth and number of employees are lower than the regulatory and statutory limits. However, PCC has not shown that it is a prevailing party and OSM has proven that its position was substantially justified. Therefore, PCC is not entitled to an award of fees and expenses.” ALJ Decision at 6.

ANALYSIS

A. PCC is not a “Prevailing Party” Under EAJA

[1] We will first consider PCC’s contention that Judge Sweitzer erred in ruling that PCC failed to achieve “prevailing party” status and, thus, was not eligible under EAJA for an award of fees and expenses.⁷ EAJA provides: “An agency that conducts an adversary adjudication shall award, to a prevailing party . . . 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) (2000); *see* 43 C.F.R. § 4.601.

PCC contends that it qualified as a prevailing party, reasoning that “if PCC had not filed its Request the consequences would have had dramatic impacts on PCC because it would have been required to resume mining operations on its idle mine even though market conditions did not so warrant.” Statement of Reasons (SOR) at 4. PCC contends that when Judge Reeh vacated the NOV, “PCC was no longer required to involuntarily resume mining and reclamation operations of its idle mine,” and that “[t]his was a profound change in the legal relationship of the parties.” *Id.*

⁷ In a telephone conversation with Judge Sweitzer’s staff, Morris acknowledged that he is not an attorney and that Judge Sweitzer could rely upon that acknowledgment in his decision. Judge Sweitzer stated that “[w]ith respect to most of the fees for which PCC seeks an award, PCC is not entitled to an award for the additional reason that most are fees for legal work performed by a non-attorney.” ALJ Decision at 8 n.5, *citing* *Foremost Mechanical Systems, Inc. v. General Services Administration*, GSBFA 14645-C(13584), 99-1 BCA P 30,352; *Thomas J. Papathomas*, ASBCA No. 50895, 51352, 2000-1 BCA P 30,834; and *Landscaping by Fernia Assoc., Inc.*, VABCA No. 5099E, 99-1 BCA P 30,276. He further stated that “because Mr. Morris is PCC’s General Manager, PCC effectively appeared pro se through Mr. Morris,” and that “[u]nder EAJA, the fees of pro se representatives are not recoverable.” ALJ Decision at 8. Given our determination that Judge Sweitzer correctly ruled that PCC is not a prevailing party and that OSM was substantially justified in issuing the NOV, we do not further address PCC’s argument that Judge Sweitzer improperly cited Morris’ status as a non-lawyer as a reason for denying PCC’s Application.

at 5. PCC states that “[t]here is no evidence that OSM would have voluntarily agreed to vacate the NOV absent PCC’s Request and the facts presented therein.” *Id.* PCC concludes that Judge Reeh’s order materially altered the legal relationship between PCC and OSM.

Judge Sweitzer rejected PCC’s argument that “it prevailed because it achieved the entire benefit which it sought: vacation of the NOV.” ALJ Decision at 6. He stated that “[a]n unspoken premise of PCC’s argument is that it is entitled to an award on the theory that its request for relief was a material factor or acted as a catalyst in bringing about the desired outcome.” *Id.* He rejected this “catalyst theory,” however, as contrary to the U.S. Supreme Court’s ruling in *Buckhannon Board & Care Home, Inc. v. West Virginia Dep’t. of Health & Human Resources*, 532 U.S. 598 (2001). He quoted the following portion of the Ninth Circuit’s opinion in *Perez-Arellano v. Smith*, 279 F.3d 791, 793-94 (9th Cir. 2002), which interprets *Buckhannon*, as authority for his ruling:

[The *Buckhannon* decision] holds that a “party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct” is **not** a “prevailing party” under federal statutes allowing courts to award attorney’s fees and costs to the “prevailing party.”

In *Buckhannon* . . . the Supreme Court repudiated the “catalyst theory” for conferring prevailing-party status on a party seeking attorney’s fees. The Court stated that “enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.” *Buckhannon*, 121 S. Ct. at 1840 (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93, 103 L. Ed. 2d 866, 109 S. Ct. 1486 (1989)). Thus the Supreme Court identified two judicial outcomes under which a party may be considered a “prevailing party” for the purpose of awarding attorney’s fees: (1) an enforceable judgement on the merits; or (2) a settlement agreement enforceable through a court-ordered consent decree. *Id.* . . .

Although the *Buckhannon* case involves the fee-shifting provisions of the Fair Housing Amendments Act of 1988 (“FHAA”), 43 U.S.C. § 3613(c)(2), and the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12205, the Supreme Court’s express rule of decision sweeps more broadly and its reasoning is persuasively applicable to an award of attorney’s fees under the EAJA. . . . [W]e discern no reason to interpret the EAJA inconsistently with the

Supreme Court's interpretation of "prevailing party" in the FHAA and the ADA as explained in *Buckhannon*. [Emphasis in original; footnotes omitted.]

Citing *Robertson v. Giuliani*, 346 F.3d 75, 81 (2nd Cir. 2003), and *Rice Services, Ltd. v. United States*, 404 F.3d 1017, 1025-26 (Fed. Cir. 2005), Judge Sweitzer stated: "After *Buckhannon*, a majority of courts have found that judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees under EAJA so long as such action carries with it sufficient judicial imprimatur to materially alter the legal relationship of the parties." ALJ Decision at 7.

In applying these principles to PCC's Application, we conclude that Judge Sweitzer correctly ruled that PCC did not achieve prevailing party status by virtue of OSM's voluntary motion to vacate the NOV. He correctly states that "the NOV was vacated without any reference to contested issues or the merits pursuant to OSM's voluntary motion to vacate the NOV and dismiss the underlying matter," and that "[t]here was no enforceable judgment on the merits or court-ordered consent decree." *Id.* There is no question but that PCC's request for review was a catalyst for OSM election not to pursue its NOV, but without more, this is an insufficient basis upon which to grant PCC prevailing party status under EAJA. Moreover, the Order dismissing this case merely served to ratify a change in the relationship of the parties wrought by OSM's voluntary decision not to proceed further with enforcement under its NOV. The record is clear that "OSM acted unilaterally and voluntarily to reassess its position that a violation had occurred and to ultimately move for vacation of the NOV," and that "[t]he Order vacating the NOV did not *materially* alter the legal relationship of the parties because OSM had already voluntarily abandoned its position and would have vacated the NOV without OHA involvement if not for the fact that OHA had jurisdiction over the matter." *Id.* at 7-8. We therefore conclude that Judge Sweitzer properly ruled that PCC does not qualify as a prevailing party in this matter.

B. OSM's Position Was Substantially Justified

[2] In addition, Judge Sweitzer ruled that "[e]ven assuming, *arguendo*, that PCC had qualified as a prevailing party, it would not be entitled to an award of fees and expenses because OSM met its burden of establishing that its position was substantially justified." *Id.* at 8. In so ruling, he found that OSM had "establish[ed] that its position had a reasonable basis both in law and fact." *Id.*, citing *BLM v. Ericsson*, 98 IBLA 258, 263 (1987). He concluded that OSM had established that it was substantially justified in its position that PCC was in violation of the contemporaneous reclamation requirements of the PAP and SMCRA and implementing regulations, and that "[t]his conclusion is not altered by the fact that OSM later concluded that the preferable course of action was to

vacate the NOV.” ALJ Decision at 9. Accordingly, he ruled that OSM’s initial decision to issue the NOV was substantially justified.

PCC finds it “mystifying” that Judge Sweitzer concluded that OSM’s position in issuing the NOV was substantially justified. PCC asserts that Judge Sweitzer relied upon information not in the record and otherwise disagrees with his interpretation of key provisions of the PAP. PCC states that what “amounted to a directive from OSM to immediately recommence mining regardless of market conditions and economics” was “not reasonable by any stretch of the imagination.” SOR at 10. According to PCC, had its challenge to the NOV proceeded through discovery and a hearing, it “is confident that it would have demonstrated that OSM, through the citation, was attempting to force PCC to accelerate its final reclamation plan under the guise of the contemporaneous reclamation performance standards and other regulations.” *Id.* at 11. PCC discusses the provisions of 30 C.F.R. §§ 780.18(b)(1), 773.17(b) and (c), and 816.100 in the context of the “facts in the official record” to demonstrate “Judge Sweitzer’s misinterpretation and misuse of those alleged facts.” SOR at 12. According to PCC, Judge Sweitzer’s assumption that “PCC had materials available to achieve reclamation . . . is entirely untrue until such time that PCC recommences mining operations, which it intends to do as markets improve, or unless it revises its permit to allow for the premature removal of out-of-pit spoil or unless it forfeits the \$4.5 million reclamation bond it maintains, which it doesn’t intend to do.” *Id.* at 16. Thus, in PCC’s view, Judge Sweitzer’s conclusion that OSM’s position was substantially justified is “[b]ased on this false understanding of what PCC’s PAP actually required.” *Id.*

The disputed NOV alleged that PCC “failed to contemporaneously reclaim disturbed areas,” as required under SMCRA, its implementing regulations, and the PAP. In response to its request to review that NOV, counsel promptly reviewed the case and advised OSM that it is not “clear that PCC violated the regulations as cited in the NOV,” that the validity of the NOV was uncertain because, *inter alia*, “some questions exist regarding whether or not [enumerated factors which could permissibly delay reclamation activities under the PAP] caused delays in reclamation work on the subject area,” and that PCC had performed some degree of reclamation in that area. Motion to Dismiss at 2. OSM officials concurred, deciding that “further enforcement of the NOV is perhaps warranted but nonetheless problematic.” *Id.* Accordingly, less than 2 weeks after receipt of PCC’s request for review, OSM moved for an order vacating its NOV and dismissing this case.

The fact that OSM’s success was not assured in light of admitted uncertainty over whether it could demonstrate that PCC’s delayed reclamation activities were unjustified (assuming that burden would then be on OSM) does not show that the issuance of this NOV was not substantially justified. Under OSM’s theory of the case, contemporaneous reclamation activities were required before (while backfill

materials from active mining were available) and shortly after PCC ceased mining (if backfill materials were stockpiled and available). Whether that violation could be established is one of the questions that would be addressed and determined in an adjudicatory hearing. Contrary to OSM's claims, PCC now asserts that no stockpiled materials were available for it to engage in contemporaneous reclamation activities. In our view, OSM's decision not to proceed reflects a reasoned exercise of prosecutorial discretion in the face of potentially contested facts, not a recognition or concession by OSM that its NOV was not substantially justified.

Our review of the record confirms that Judge Sweitzer correctly ruled that even if PCC had satisfied the prevailing party standard, we still would not conclude that PCC is entitled to an award under EAJA, inasmuch as the record manifests that OSM was "substantially justified" in its position.⁸ As noted, the statute's use of the word "substantially" in regard to the Government's position has been viewed by the Supreme Court as not meaning "'justified to a high degree,' but rather 'justified in substance or in the main'--that is, justified to a degree that could satisfy a reasonable person." *Heirs of David F. Berry*, 156 IBLA 341, 344 (2002), quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Indeed, "[n]o presumption arises that the Department's position was not substantially justified simply because the Department did not prevail." 43 C.F.R. § 4.606(a). In this case, OSM's position must show a "reasonable basis both in law and fact." *Pierce v. Underwood*, *supra*. The Board has stated that the Government's "position may be substantially justified even if it is not ultimately vindicated by the evidence." *Heirs of David F. Berry*, *supra*; see *BLM v. Ericsson*, 98 IBLA at 263-64. The burden is on the Government to prove substantial justification. *Heirs of David F. Berry*, *supra*; *Barry v. Bowen*, 825 F.2d 1324, 1330 (9th Cir. 1987). As Judge Sweitzer concluded, OSM clearly met its burden of proving substantial justification for issuing the NOV.

⁸ Whether an agency was "substantially justified" in its position is not necessarily based upon the adjudicator's disposition of the matter. As Congress has stated: "The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 11, *reprinted in* 1980 U.S.C.C.A.N. 4984, 4990. As the Board has held: "Even if the Government loses . . . one cannot conclude its position was not substantially justified. Otherwise, the EAJA would be no different from an automatic fee-shifting statute, which Congress clearly did not intend it to be." *Kaycee Bentonite Corp.*, 79 IBLA 182, 196, 91 I.D. 138, 146 (1984) (citations omitted).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Sweitzer's July 8, 2005, decision is affirmed.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge