

UNITED STATES COURT OF VETERANS APPEALS

MISC. NO. 2-94

IN RE:

RULES 36 and 39

Before NEBEKER, Chief Judge, and KRAMER, FARLEY,  
MANKIN, HOLDAWAY, IVERS, and STEINBERG, Judges.

O R D E R

Pursuant to 38 U.S.C. § 7264(a) and consistent with 28 U.S.C. §2071(b) and (e), the Court has determined that there is an immediate need to amend Rules 36 and 39 of this Court's Rules of Practice and Procedure (Rules). This action is prompted by the Court's precedential panel opinion issued today in *Stillwell v. Brown*, \_\_ Vet.App. \_\_, No. 92-205 (Mar. 11, 1994).

The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), was made applicable by Public Law No. 102-572, § 506 (1992), to any case pending before this Court on October 29, 1992, to any appeal filed in this Court on or after such date, and to any appeal from this Court that was pending on such date in the United States Court of Appeals for the Federal Circuit. Rule 36(b) of this Court's Rules, which was adopted as a final rule on June 1, 1993 (following adoption in a slightly different form as an interim rule on February 1, 1993), facilitated the retention by the Court of a limited form of jurisdiction over a remanded matter in order to permit the subsequent filing of an application for an award of attorney fees under the EAJA following agency action on remand. Pursuant to Rule 36(b), the judgment entered by the Clerk in a remanded matter was qualified and did not terminate the appeal because the Court retained jurisdiction.

Subsequently, on June 24, 1993, in *Shalala v. Schaefer*, 113 S. Ct. 2625 (1993), the Supreme Court held that a remand of a Social Security appeal pursuant to sentence four of 42 U.S.C. § 405(g) "is a judgment for the plaintiff" (113 S. Ct. at 2631) which terminates the litigation:

We have since made clear, in *Finkelstein*, that that retention of jurisdiction, that failure to terminate the case, was error: Under § 405(g), "each final decision of the Secretary [is] reviewable by a separate piece of litigation," and a sentence-four remand order "terminate[s] the civil action" seeking judicial review of the Secretary's final decision. 496 U.S., at 624-625.

113 S. Ct. at 2630. However, the Supreme Court also ruled that appellant's application for EAJA fees was timely filed in *Schaefer*

because a proper final judgment had yet to be entered. "By entering a sentence-four remand order, the District Court did enter a judgment; it just failed to comply with the formalities . . . ." 113 S. Ct. at 2632 n.6.

Consistent with the holding of the Court of Appeals for the Federal Circuit in *Travelstead v. Derwinski*, 978 F.2d. 1244, 1248 (Fed. Cir. 1992) (the precedential effect of the Supreme Court's jurisprudence in this area is not to be limited to Social Security appeals under 42 U.S.C. § 405(g)), this Court in *Stillwell, supra*, today decides that *Schaefer* controls remands ordered by this Court. Since the provisions of Rule 36(b) are inconsistent with *Schaefer*, the Rule must be rescinded. Further, since judgments entered by the Clerk pursuant to Rule 36(b) expressly retained jurisdiction and did not terminate the case, such judgments "failed to comply with the formalities" established in *Schaefer*. Accordingly, it is

ORDERED that, effective this date, Rule 36(b) of the Court's Rules of Practice and Procedure is rescinded. It is further

ORDERED that, effective this date, Rule 36(a) is redesignated as Rule 36 and the word "Generally" is deleted. It is further

ORDERED that, effective this date, Rule 39(b)(3) is amended to read as follows up to the colon: "(3) an itemized statement from the applicant's attorney as to each type of service which was rendered, describing:". It is further

ORDERED that the Clerk will terminate, by entering a new, unqualified judgment, any appeal which remains pending by virtue of the entry of a qualified judgment pursuant to the first sentence of Rule 36(b) prior to its rescission by this order. It is further

ORDERED that the Clerk will transmit to counsel of record copies of such judgments with a copy of this Order and will advise counsel by letter that, to be timely filed, applications for the award of attorney fees under the EAJA must be received by the Court within thirty days (30) days after the judgment becomes final, i.e., non-appealable. See 28 U.S.C. § 2412(d)(1)(A), (d)(2)(G). In the absence of an appeal to the U. S. Court of Appeals for the Federal Circuit, a judgment becomes final sixty (60) days after the date of entry of judgment. See 38 U.S.C. § 7291(a); Fed. R. App. P. 4(a)(1). It is further

ORDERED that public comment on the rescission of Rule 36(b) is invited. Such comment must be submitted to the Clerk of this Court at 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004-2950, by May 10, 1994.

DATED: March 11, 1994

BY THE COURT:



FRANK Q. NEBEKER  
Chief Judge