

UNITED STATES COURT OF VETERANS APPEALS

No. 91-2006

KEVIN G. CLEARY, APPELLANT,

V.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before HOLDAWAY, IVERS, and STEINBERG, *Judges*.

ORDER

On October 5, 1995, the Court, in a panel opinion, granted the appellant under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), fees for the merits of the appeal and for a portion of the time spent litigating the amount for fees. *Cleary v. Brown*, 8 Vet.App. 305 (1995). On October 26, 1995, counsel for the appellant filed a motion for reconsideration of the Court's decision. On December 15, 1995, the Secretary filed a response to the appellant's motion for reconsideration, questioning parts of the appellant's fee application. At the direction of the Court, the appellant filed a reply which addressed the questions raised by the Secretary.

In his motion for reconsideration, the appellant raises three separate issues. First, he stated that of the 120.75 hours of work for which he sought an award of fees, 18 rather than 20 hours were for representation before the Board on remand for which fees were disallowed. It appears that both parties agree that a miscalculation occurred due to a typographical error in the appellant's EAJA application. The Court will reconsider this issue and award an additional two hours of fee compensation.

The appellant also disagreed with the Court's decision that he was entitled to only one-third of the 38.5 hours he requested for litigating entitlement to fees. The amount of the EAJA award was reduced from the amount requested because the appellant did not prevail on the disputed issue of postremand fees. *See Commissioner, INS v. Jean*, 496 U.S. 154, 163 n.10 (1990) ("Fees for fee litigation should be excluded to the extent that the applicant ultimately fails to prevail in such litigation."). The Court declines to reconsider the percentage of reduction in the appellant's attorney fees.

Insofar as the motion seeks reconsideration of statements made by Judge Ivers in his separate concurring opinion, the motion is denied. A concurring view is not a proper subject for reconsideration by a panel, but is a matter left to the discretion of the individual member.

On consideration of the foregoing, it is

ORDERED that the motion for reconsideration is granted in part and denied in part. It is further

ORDERED that the appellant shall receive an additional two hours of fee compensation. It is further

ORDERED that a conference be scheduled and conducted by an attorney with the Court's Central Legal Staff, at the convenience of the parties, in order to facilitate an agreement as to the amount of the monetary award.

DATED: June 25, 1996

PER CURIAM.

IVERS, *Judge*, concurring: Judge Steinberg elevates an obscure footnote (n.37) from his original dissent to a key element in his brief dissent to this Order and makes much of my earlier reference to the consideration of equitable principles in determining an award of fees under the EAJA. Based upon the representations of both counsel in the course of considering the motion now before the Court, it has become apparent that counsel was apprised and aware of the veteran's claim below. That does not change the fact that the Court was not advised, nor does it, in my opinion, divest counsel of the obligation to advise the Court of such actions where, as in this case, the outcome of that action does or could affect the Court's actions. *See Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring) ("This Court must rely on counsel to present issues fully and fairly, and counsel have a continuing duty to inform the Court of any development which may conceivably effect an outcome.").

I see no reason to modify my earlier statements, but I will comment that those statements were made in a broad context and were not and are not intended to single out "appellant's public-interest counsel" any more than any other counsel, counsel for the Secretary included, in discussing the duty of counsel to inform the Court of "the action below . . . [that] could have affected the appellant's ability to recover" *Cleary v. Brown*, 8 Vet.App. 305, 311 (1995) (Ivers, J., concurring).

I also continue to adhere to my position that, in this case, appellant's counsel bore "the lion's share of the responsibility for keeping the Court and VA advised under the facts in this case," as it was counsel's client who was pressing the action below. *Ibid.* As it turns out, counsel *did* inform VA and neither counsel saw fit to advise the Court.

STEINBERG, *Judge*, concurring in part and dissenting in part: I concur in the order to the extent that it awards two hours of additional fee compensation and orders a conference to resolve

any remaining fee issues. However, for the reasons stated in my earlier separate opinion, *Cleary v. Brown*, 8 Vet.App. 305, 326 (1995) (Steinberg, J., concurring in part and dissenting in part), I dissent to the denial of reconsideration of the percentage reduction of the 38.5 hour "fees for fees" request. Also, although I agree that "a concurring view is not a proper subject for reconsideration by a panel", I wish to reiterate my view that there was "no justification for the suggestion that the appellant's public-interest counsel may have had 'unclean hands' in the manner in which representation of the appellant was conducted", and the appellant's motion makes that conclusion even more clear. *Id.* at 326 n.37.