

ARMED SERVICES BOARD OF CONTRACT APPEALS

Application Under the Equal Access)
to Justice Act of --)
)
Oscar Narvaez Venegas) ASBCA No. 54164
)
Under Contract No. 4128-161055-FBO)

APPEARANCES FOR THE APPELLANT: Eduardo Peña, Jr., Esq.
Peña & Associates, P.C.
Washington, DC
Emilio Martínez, Esq.
Laredo, TX

APPEARANCE FOR THE GOVERNMENT: John C. Sawyer, Esq.
Attorney/Advisor
Department of State
Rosslyn, VA

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON RESPONDENT'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

Applicant seeks to recover attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, incurred in the appeals of *Oscar Narvaez Venegas*, ASBCA No. 49291 (entitlement) and ASBCA No. 54164 (quantum).

Respondent moves to dismiss that EAJA application on the grounds that the applicant did not: (1) file the EAJA application within 30 days after the "final disposition" of the aforesaid appeals, depriving this Board of subject matter jurisdiction to entertain the application, and (2) submit a detailed Net Worth Exhibit sufficient to show its eligibility under the EAJA. Applicant responded to the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

1. In *Oscar Narvaez Venegas*, ASBCA No. 49291, 98-1 BCA ¶ 29,690, *recons. denied*, 98-2 BCA ¶ 29,887, the Board sustained appellant's claim for breach of lease and remanded the appeal to the parties for resolution of quantum. 98-1 BCA at 147,142.

2. After the parties were unable to agree on quantum, the Board reinstated the appeal under the new docket No. 54164 on 17 April 2003.

3. On 26 June 2003 both parties signed a “SETTLEMENT AGREEMENT” in which the parties stipulated --

. . . [T]o entry of a judgment by the ASBCA to resolve the appeal of Oscar Narvaez Venegas in ASBCA No. 54164 in the amount of . . . (\$750,000.00) inclusive of all interest, and complete compensation for any and all liability under Contract Number. [sic] 4128-161055-FBO and the Board’s Decisions in ASBCA Nos. 49291 and 54164.

4. The Board’s unpublished decision in *Oscar Narvaez Venegas*, ASBCA No. 54164, signed by the Board judges and dated 27 June 2003, sustained the appeal and stated: “In the nature of a consent judgment, the Board makes a monetary award to appellant in the amount of \$750,000.00.”

5. The ASBCA Recorder’s 30 June 2003 certified mail letter issued an authenticated copy of the Board’s 27 June 2003 decision in *Oscar Narvaez Venegas*, ASBCA No. 54164, with payment forms to each party in accordance with Board Rule 28.

6. The Board’s certified mail receipt form shows that on 1 July 2003 Eduardo Peña, appellant’s attorney, signed for receipt of the ASBCA’s 30 June 2003 letter.

7. On Monday, 28 July 2003, applicant filed at the Board an EAJA application that averred that Mr. Narvaez was eligible and appended a “CONFIDENTIAL FINANCIAL STATEMENT” reciting his assets and liabilities, from which his net worth is readily derived.

DECISION

I.

Movant argues that the statutory 30-day period in which the applicant could file this EAJA application commenced on 27 June 2003, when the ASBCA judges signed the consent judgment decision in ASBCA No. 54164. Since the application was filed on 28 July 2003, movant concludes that it was not timely. Applicant argues that the EAJA statutory 30-day period commenced on 1 July 2003, when it received the aforesaid decision, and concludes that its 28 July 2003 application was timely.

The EAJA provisions applicable to agency boards of contract appeals (BCA), 5 U.S.C. § 504(a)(2), state 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” Assuming, without deciding, that the 30-day period to file an EAJA application began on 27 June 2003, the date of the Board decision, as movant contends, the

30th calendar day thereafter was Sunday, 27 July 2003. By application of ASBCA Rule 33(b), the last day for filing Mr. Narvaez's application was Monday, 28 July 2003. Therefore, applicant's filing on that date was timely.

Board Rule 33(b) states: "In computing any period of time, the day of the event from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period shall run to the end of the next business day." Board rule 33(b) is analogous to Rule 6(a) of the Federal Rules of Civil Procedure, which provides:

(a) Computation. In computing any period of time prescribed or allowed by . . . any applicable statute . . . [t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

Movant argues, however, that Rule 33 is "procedural" and cannot extend the Board's jurisdiction. In *Gavette v. Office of Personnel Management*, 785 F.2d 1568, 1571 (Fed. Cir. 1986), the court applied Fed. R. App. P. 26(a) (which is based upon Fed. R. Civ. P. 6(a)) to the 28 U.S.C. § 2412(d)(1)(B) requirement to file an EAJA application within 30 days of final judgment. Fed. R. App. P. 26(a) provides that when the final day for filing an appeal falls on a Saturday, Sunday or legal holiday, the filing deadline automatically becomes the next day that is not a Saturday, Sunday or legal holiday. In *Gavette* the court stated: "Gavette was required to file the EAJA application within 30 days of February 1, 1985, the date of the Federal Circuit decision. Since the thirtieth day after the decision fell on Sunday March 3, 1985, the deadline for filing the application was automatically extended to the following Monday, March 4, 1985. Gavette timely filed the application . . . on March 4, 1985." 785 F.2d at 1571. We see no reason not to apply Board Rule 33(b) to EAJA applications under the agency EAJA statute, 5 U.S.C. § 504(a)(2).

II.

Mr. Narvaez's EAJA application not only averred that he was eligible, but also appended a "CONFIDENTIAL FINANCIAL STATEMENT" reciting his assets and liabilities (from which his net worth is readily derived). Respondent questions the applicant's statement of zero liabilities and the completeness of his listing of assets.

When an EAJA application contains averments addressing each of the statutory requirements, including eligibility, the alleged insufficiency of the applicant's net worth

exhibit to show his EAJA eligibility does not negate our jurisdiction to entertain this EAJA application. Any deficiency in such a net worth exhibit may be “fleshed out or corrected” by amendment of its application. *See Scarborough v. Principi*, 273 F.3d 1087, 1092 (Fed. Cir. 2001) (“While the statute requires that the application address each of the requirements of the EAJA within the thirty-day period, the statutory language does not mandate strict compliance or foreclose supplementation where the details of the stated jurisdictional averments remain to be fleshed out or corrected,” citing *Bazalo v. West*, 150 F.3d 1380, 1383 (Fed. Cir. 1998) in which Bazalo was given some latitude to supplement his application to flesh out the missing details of his net worth).

We deny respondent’s motion to dismiss for lack of jurisdiction.

Dated: 10 November 2003

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals on an application for fees and other expenses incurred in connection with ASBCA No. 54164, Appeal of Oscar Narvaez Venegas, rendered in accordance with 5 U.S.C. § 504.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals