CASE NOT SET FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Thomas ROBERTS, **Appellant**	
v.	
Hon. Pete GEREN, **Secretary of the Army, et al.**	**No. 07-5072**
Appellees	

APPELLANT'S OPPOSITION TO APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

Appellant Thomas Roberts opposes Appellee's motion for summary affirmance. The resolution of the issue in this case -- the continued viability of this Court's opinion in Waterman S.S. Corp. v. Mar. Subsidy Bd., 901 F.2d 1119 (D.C. Cir. 1990) -- is certainly not so clear as to make summary affirmance proper, nor is it such that no benefit will be gained by further briefing and argument.

I. Background

On December 20, 2005, Plaintiff Roberts brought suit under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* against Appellees seeking judicial review ("APA") of the denial by the Army Board for the Correction of Military Records ("ABCMR") of his pro se application to upgrade his 1969 Army discharge to an Honorable

or a General Discharge. R 1.[1] In an August 3, 2006, order, the District Court granted in part Plaintiff's Cross-Motion for Summary Judgment and denied Defendants' Motion to Dismiss and for Summary Judgment and ordered the matter remanded to the ABCMR consistent with the District Court's accompanying Memorandum Opinion. R 18. Mr. Roberts had argued that his 1969 discharge proceeding and resulting Undesirable Discharge were defective because he waived his rights to counsel and a hearing while under duress and because he was misled by an Army attorney into agreeing to be discharged. In the merits phase of his litigation, the District Court's Memorandum Opinion found that the ABCMR's failure to address Mr. Roberts' argument rendered its May 16, 2002, decision arbitrary and required a remand for a more fully reasoned explanation by the agency. R 19 at 16.[2]

On September 1, 2006, Mr. Roberts' counsel filed an application for attorney's fees and expenses under the Equal Access to Justice Act ("EAJA") (R 20); Defendants/Appellees filed an opposition (R 22); Mr. Roberts filed a reply brief (R 24) and a supplemental application for attorney's fees and expenses (R 25). In a January 4, 2007, Memorandum Opinion and Order (R 26), the District Court denied Mr. Roberts' application for attorney's fees and expenses, ruling that he was not a "prevailing party" as required by 28 U.S.C. § 2412(d)(1))A). It is this decision that is the subject of this appeal.

The District Court's January 4, 2007, Memorandum Opinion and Order (R 26) relied upon Waterman S.S. Corp. v. Mar. Subsidy Bd., 901 F.2d 1119 (D.C. Cir. 1990),

[1] Appellant will follow Appellees' convention with "R" followed by a number referring to the document corresponding to that number in the Docket Sheet of the District Court and "AR" followed by a number referring to the page of the administrative record before the District Court.

[2] On December 5, 2006, the Board reconsidered the specific issue remanded by the District Court and denied Mr. Roberts' application. Mr. Roberts and his attorney only learned of this decision on March 9, 2007, after several telephone calls to the agency.

which the District Court described as "the primary case in the D.C. Circuit on the issue whether attorney's fees may be awarded under the EAJA based on remand to an administrative agency." R 26 at 3 n. 1.

II. Argument

A. Waterman's viability is compromised by its heavy reliance upon Sullivan v. Hudson, a decision subsequently described by the Supreme Court as inapplicable to ABCMR-type proceedings.

In Waterman, a panel of this Court held that two shipping companies, the Waterman Steamship Corp. and Farrell Lines, Inc., were not EAJA prevailing parties when they secured a remand that permitted them to contest a Maritime Administration grant of authority to another shipping company, United States Lines, to conduct around-the-world shipping service with unsubsidized ships. *Id*. at 1120. The Waterman panel relied upon a Social Security Act case, Sullivan v. Hudson, 490 U.S. 877 (1989), a decision that is cited several times in Appellees' Motion for Summary Affirmance ("Appellees' Motion"). However, as the Court pointed out in Melkonyan v. Sullivan, 501 U.S. 89, 96 (1991):

> The issue in Hudson was whether, under [28 U.S. C] § 2412(d), a "civil action" could include administrative proceedings so that a claimant could receive attorneys' fees for work done at the administrative level following a remand by the district court. We explained that certain administrative proceedings are "so intimately connected with judicial proceedings as to be considered part of the 'civil action' for purposes of a fee award." [citing Hudson at 892] We defined the narrow class of qualifying administrative proceedings to be those "where 'a suit (has been) brought in a court,' and where a 'formal complaint within the jurisdiction of a court of law' *remains pending and depends for its resolution upon the outcome of the administrative proceedings*." ... [emphasis in original] Hudson thus stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative level. ... "*We did not say that proceedings on remand to an agency are 'part and parcel' of a civil action in federal district court for*

> *all purposes....*" Sullivan v. Finkelstein [496 U.S. 617, 630-631 (1990)][emphasis added].

Melkonyan, 501 U.S. at 966.

In Shalala v. Schaefer, 509 U.S. 292, 300 (1993), the Court, speaking through Justice Scalia, continued to clarify and limit its holding in Hudson: "We specifically noted in Melkonyan that Hudson was limited to a 'narrow class of qualifying administrative proceedings' where 'the district court retains jurisdiction of the civil action' pending the completion of the administrative proceedings. 501 U.S. at 97." Indeed, while the concurring Justice Stevens argued in Schaefer that Hudson was specifically overruled, Justice Scalia, speaking for the Court, noted that "Hudson remains good law as applied to remands ordered pursuant to sentence six." Schaefer, 509 U.S. at 300 n. 4 and 310.

Justice Scalia's reference to sentence six is the so-called sentence six type of remand specifically authorized by 42 U.S.C. § 405(g)(sentence 6). As this Court noted in Krishnan v. Comm'r, 328 F.3d 685, 691 (D.C. Cir. 2003):

> The 'principal feature' that distinguished the two type of remands is that in a sentence-four remand, the district court disposes of the action by a final judgment and relinquishes jurisdiction, whereas in a sentence-six remand, the district court retains jurisdiction over the action pending further development by the agency. A sentence-four remand is therefore appealable, while a sentence-six remand is considered interlocutory and thus non-appealable. Accordingly, in a sentence-six remand, there is no final judgment until SSA returns to the district court to file SSA's 'additional or modified findings of fact and decision,' 42 U.S. C. § 405(g) and the district court enters a judgment.

Id at 691 (citations to Finkelstein and Melkonyan omitted).

"A sentence six remand 'may be ordered in only two situations: where the Secretary [of Health & Human Services] requests a remand before answering the complaint, or where new, material evidence is adduced that was for good cause not presented before the agency.'

Schaefer [507 U.S. at 297 n.2; Melkonyan [501 U.S. at 100]. Under any other circumstances, a remand is presumed to be a sentence four remand. See Schaefer, [297 U.S. at 297 & n.2]." Outlaw v. Chater, 906 F.Supp. 1, 3 (D.D.C. 1995). "Immediate entry of judgment (as opposed to entry of judgment after post-remand agency proceedings have been completed and their results filed with the court) is in fact the principal feature that distinguishes a sentence-four remand from a sentence-six remand." Schaefer, 509 U.S. at 297.

Schaefer's finding of prevailing party status was based on a district court order that reversed the administrative decision and remanded the case to the agency "for further consideration in light of this Order" – the same resolution ordered by the District Court in Mr. Roberts' case: the so-called sentence four remand described by Schaefer is no different from the remand in Mr. Roberts' case. See Schaefer, 509 U.S. at 294; R 18.

Another case cited by Waterman (901 F.2d at 1122) and by Appellees' Motion (at 6) for the proposition that a party awarded a remand cannot be a prevailing party, Hanrahan v. Hampton, 446 U.S. 754 (1980), addresses interlocutory appeals of district court decisions, not remands to administrative agencies. As the Court in Hudson pointed out (490 U.S. at 952), Hanrahan is limited to "procedural and evidential rulings" between the district court and the court of appeals. See Hanrahan, 446 U.S. at 759. "Hanrahan ... rejected an assertion of prevailing party status, not by virtue of having secured a remand, but by virtue of having obtained a favorable procedural ruling (the reversal on appeal of a directed verdict) during the course of judicial proceedings." Shalala v. Schaefer, 509 U.S. 292, 301 (1993).

In other words, the viability of Waterman must be questioned because of its heavy reliance upon Hudson before that decision was clarified and limited by Finkelstein,

Melkonyan , and Schaefer and because of its reliance on Hanrahan before that decision was clarified and limited by Hudson and Schaefer.

B. This Circuit has effectively ignored Waterman.

The District Court's January 4, 2007, Memorandum Opinion dealt with the issue of Waterman's validity after Finkelstein, Melkonyan, and Shaefer by arguing in a footnote that the Waterman panel noted that although Hudson was not directly on point, the Waterman court nonetheless adopted Hudson's reasoning. The District Court also asserted that Waterman continues to be good law in this Circuit even after Schaefer and Melkonyan, citing Role Models America, Inc. v. Brownlee, 353 F.3d 962 (D.C. Cir. 2004), Envtl. Def. Fund, Inc. v. Reilly, 1 F.3d 1254 (D.C. Cir. 1993), and Ridgeley v. Marsh, 1996 WL 525316 (D.D.C. Sept. 10, 1996). See R 26 at 3 n. 1 and Appellees' Motion at 5 n.5.

In Role Models, this Court found prevailing party status for a plaintiff who secured an injunction and an order directing "the Secretary of the Army to correct certain procedural errors he committed in disposing of excess military property, errors that deprived the [plaintiff] of an opportunity to compete for the property." Although Waterman was cited by the Government, the Court refused to apply it, noting that "Waterman is very different from this case." The Role Models court held that whether the plaintiff ever actually acquired the property was immaterial because the plaintiff secured from the Court the right to compete for the property. 353 F.3d at 966. The Role Models court said that its case was more like Reilly, "a post-Waterman case in which we held that the Environmental Defense Fund was a prevailing party because it had obtained an order vacating a rule that the Environmental

Protection Agency promulgated after inadequate notice and comment." Role Models, 353 F.3d at 966.

In Reilly, after the parties settled and the EPA agreed to publish notice of a new comment period, the EPA reviewed the new comments and promptly promulgated the old pre-litigation rule. Although citing Waterman, the Reilly court found prevailing party status because the comment period gave the petitioner and the public an opportunity to persuade the EPA not to adopt the proposed rule, even though that persuasion was unsuccessful and the proposed rule ultimately adopted. Reilly, 1 F.3d at 1258-59.

The opportunity to bid, even if unsuccessful, in Role Models, and the opportunity to comment, even if unsuccessful, in Reilly is, of course, exactly what Mr. Roberts obtained from his successful litigation – the opportunity to present his case to the agency that heretofore had ignored him. The Reilly Court's statement on the opportunity to comment to an agency can just as well apply to the opportunity to make an argument to the agency: "In the real world of the APA, an opportunity for comment – which the EDF did get – is not to be denigrated. While it does not assure that the petitioner will be able to persuade the agency to change its proposal, of course, it does give the petitioner a chance. And if that chance were not in itself something of value in the real world, then there would be no need for the notice and comment procedures of the APA." Reilly, 1 F.3d at 1257-58. Again, in Mr. Roberts' case, if a remand to force an agency to consider his argument is not of value in the real world, then there would be no need for the judicial review provisions of the APA.

Directly contrary to Role Models and Reilly, is an unpublished district court decision, Ridgely v. Marsh, 1996 WL 525316 (D.D.C. Sept. 10, 1996), the third Waterman citing case noted by the District Court's January 4, 2007, Memorandum Opinion. However,

Ridgely stands in stark contrast to a number of this Circuit's district court decisions that have found prevailing party status. For example, in Kean for Congress Committee v. FEC, 2006 U.S. Dist. LEXIS 2563 (D.D.C. Jan. 13, 2006), even though the district court retained jurisdiction while it remanded the cause to the agency for further proceedings, it noted:

> Plaintiff satisfies the elements of the "prevailing party" inquiry. To begin with, the Court's remand order caused a change in the legal relationship between the parties because it required FEC to do something it otherwise would not have been under an obligation to do -- reconsider the plaintiffs administrative complaint in light of McConnell [v. FEC, 540 U.S. 93 (2003)] within 60 days of the Court's order. ... Beyond all this, the Court's conclusion is consistent with the premise that a remand predicated upon administrative error -- as this one was -- confers prevailing party status upon the plaintiff. See Lynom v. Widnall, 222 F. Supp. 2d 1, 4-5 (D.D.C. 2002). ... The remand in this case constitutes relief that is 'concrete,' 'irreversible,' and incapable of being diminished through later proceedings.

Kean, 2006 U.S. Dist. LEXIS 2563 at 3.

Lynom, cited by Kean, is an Air Force Board for the Correction of Military Records ("AFBCMR") case is which an Air Force officer won a remand to the AFBCMR. The Lynom court noted: "[P]laintiff clearly secured a judgment from this Court on her APA claim. The Court provided plaintiff with 'some relief on the merits' by remanding her case to the Board. This Court's actions undeniably resulted in a change in the legal relationship of the parties." Lynom, 222 F.2d at 7. The court in Lynom went on to note: "In a civil action brought pursuant to the APA, remand to the administrative agency is commonly the only available or appropriate remedy. ... This Court's remand was clearly based on its finding that the Board had erred in its consideration of plaintiff's petition. Further, the remand principally changed the legal relationship of the parties to this litigation." Lynom, 222 F.2d at 9-10.

Another District of Columbia district court AFBCMR case is Gentry v. Roche, 2005 U.S.Dist.LEXIS 18899 (D.D.C. Aug. 31, 2005), which cited Role Models, holding: "Plaintiff is clearly the prevailing party in this action. She sought only one remedy, namely, remand to the AFBCMR for reconsideration, and that was the relief she obtained when her Motion for Summary Judgment was granted and Defendant's Motion for Summary Judgment was denied." In language equally applicable to Mr. Roberts, the court continued: "The Agency did not act voluntarily to reconsider Plaintiff's application, and Plaintiff secured a judgment, i.e., a court order, changing the legal relationship between the parties. Because of this Court's Order, the Defendant was required to consider Plaintiff's application and therefore, contrary to her position before filing this lawsuit, she had the opportunity to prevail before the AFBCMR." 2005 U.S.Dist.LEXIS 18899 at 1.

Of course, it is not just this Circuit's district court that has ignored or at least departed from Waterman. In Thomas v. Nat'l Science Foundation, 330 F.3d 486, (D.C. Cir. 2003), this Court cited Buchannon Bd. and Care Home, Inc. v. W.Va. Dept. of Health & Human Services, 532 U.S. 598, 606 (2001), a post-Waterman decision, stating: "A [judicial] declaration must require 'some action (or cessation of action) by the defendant that the judgment produces – the payment of damages, or specific performance or the termination of some conduct." 330 F.3d at 494. Paraphrasing this quotation from Thomas, the district court in Gentry v. Roche, supra, observed: "That is precisely what Plaintiff obtained – judicial relief required the [AFBCMR] to consider her application." Gentry v. Roche, 2005 U.S.Dist.LEXIS 18899 at 2 (D.D.C. 2005).

This Circuit often cites a statement in Farrar v. Hobby, 506 U.S. 103, 109 (1992): "[P]laintiffs may be considered 'prevailing parties' for attorneys fees purposes if they

succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." S*ee, e.g.*, Edmonds v. Federal Bureau of Investigation, 417 F.3d 1319, 1326-27 (D.C. Cir. 2005), Nat'l Black Police Ass'n v. D.C. Board of Elections, 168 F.3d 525, 529 (D.C. Cir. 1999). Mr. Roberts filed his suit under the APA; a remand to the ABCMR was the only 'real world' result that could be obtained. As the district court noted in Lynom v. Widnall, *supra*: "In a civil action brought pursuant to the APA, remand to the administrative agency is commonly the only available or appropriate remedy. *See, e.g.*, Tourus Records, Inc. v. Drug Enforcement Admin., 259 F.3d 731, 738 (D.C. Cir. 2001) ("When an agency provides a statement of reasons insufficient to permit a court to discern its rationale, or states no reasons at all, the usual remedy is a 'remand to the agency for additional investigation or explanation.'") (quoting Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985))." Lynom, 222 F.2d at 9.

What happens after remand is immaterial. In Nat'l Black Police Ass'n v. D.C. Board of Elections, 168 F.3d 525, 529 (D.C. Cir. 1999), this Court stated that even the subsequent mootness of a case does not affect the finding of a prevailing party. 168 F.3d at 528. *See also*, Select Milk Producers, Inc. v. Johanns, 400 F.3d 939, 947 (D. C. Cir. 2005) ("[T]he subsequent mootness of a case does not necessarily alter the plaintiffs' status as a prevailing party.").

In Oil, Chemical & Atomic Workers Int'l Union v. Dept. of Energy, 417 F.3d 1319, 454-57 (D.C. Cir. 2002), this Court held that the "substantially prevail" language in the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") is the functional equivalent of the "prevailing party" language found in other fee-shifting statutes including the EAJA. In two FOIA fees cases, Edmonds v. Federal Bureau of Investigation, 417 F.3d 1319, 1323 (D.C.

Cir. 2005), and Davy v. Central Intelligence Agency, 456 F.3d 162, 166 (D.C. Cir. 2006), this Circuit found prevailing party status by noting that the plaintiffs received what they had sought, expedited processing of their requests. In each decision, the Court applied a prevailing party test that could easily be applied to Mr. Roberts' case – whether the plaintiff received an enforceable order that could be enforced against a recalcitrant agency by the sanction of contempt.

The district court's apparent unease with Waterman and its unfortunate remand-denies-prevailing-party-status language appears to cause it often to avoid that decision's seemingly "bright line" prevailing party test and instead struggle with what is the far more difficult fact specific finding of whether or not the Government's position was substantially justified. *See, e.g.*, Back Country Horsemen of America v. Johanns, 438 F.Supp.2d 1 (D.D.C. 2006); (petitioner who secures remand not entitled to EAJA fees because agency position was substantially justified); Calloway v. Brownlee, 400 F.Supp.2d 52, 55 (D.D.C. 2005) ("the Court concludes that it is clear that the defendant was 'substantially justified' in advancing his positions. Thus, because the plaintiff has failed to satisfy the second prong of the EAJA test, the court need not address the defendant's" [no prevailing party position].

The fact remains that the District Court's January 4, 2007, Memorandum Opinion in Mr. Roberts' case appears to be the only published decision by a Federal court[3] that has cited Waterman in a case denying prevailing party status to a petitioner who secured a remand.

[3] *But see*, NANCO Envtl. Servs. v. N.Y. State Dep't of Envtl. Conservation, 467 N.Y.S.2d 995 (N.Y. Sup. Ct. 1991), a pre-Melkonyan decision of the Supreme Court of New York, Albany County.

C. Pre-Melkonyan and Schaefer cases such as Waterman are no longer authoritative in other circuits.

Appellees' Motion notes at p. 6 n.6 that the "vast majority" of Courts of Appeals have concluded that a remand does not create prevailing party status. However, the five cases Appellees cite are all pre-Melkonyan and Schaefer. Indeed, the first three cases cited, Paulson v. Bowen, 836 F.2d 1249, 1252 (9th Cir. 1988), Brown v. Sec'y of Health & Human Services, 747 F.2d 878, 882 (3d Cir. 1984), and Swedberg v. Bowen, 804 F.2d 432,, 434 (8th Cir. 1986), are social security cases cited by both Hudson (490 U.S. at 887) and Waterman (901 F.2d at 1122) and by the minority concurrence in Schaefer (509 U.S. at 308 n.4. Like Waterman, these cases are no longer authoritative.

The Ninth Circuit that decided Paulson now holds that a social security claimant securing a sentence four remand is an EAJA prevailing party, Sampson v. Chater, 103 F.3d 918, 921 n.2 (9th Cir. 1996). Third Circuit courts have realized that Brown was overtaken by Melkonyan. *See, e.g.* Rollins v. Sullivan, 784 F.Supp. 253, 255, (E.D. Pa. 1992) (In Brown ... the court concluded that ... the claimant did not become a prevailing party until an affirmative decision was made that the claimant was entitled to benefits.... The situation changed on June 10, 1991, with the Supreme Court's decision in Melkonyan."). The Third Circuit has also held that other remands, remands like that obtained by Mr. Roberts, are no different from the so-called 'sentence-four remands described in Melkonyan. *See, e.g.*, Johnson v. Gonzales, 416 F.3d 205, 210 (3d Cir. 2005) ([W]e join our sister Circuit Courts in holding that an alien whose petition for review of a [Board of Immigration Appeals] decision is granted by our Court and whose case is then remanded to the BIA is a prevailing party under the EAJA.") (citing Schaefer, Rueda-Menicucci v. INS, 132 F.3d 493,

495 (9th Cir. 1997), and Muhur v. Ashcroft, 382 F.3d 653, 654 (7th Cir. 2004)). Lastly, Eighth Circuit courts have reconsidered Swedberg. *See, e.g.*, Mills v. Sullivan, 782 F.Supp. 1347, 1348 (W.D. Mo. 1992) ("The previous Supreme Court and Eighth Circuit decisions on prevailing party status in a remand situation must be considered in light of the Melkonyan decision. This Court concludes that a party who obtains a remand can constitute a prevailing party where remand was part of the relief sought or where remand follows reversal of the Secretary's decision. This conclusion is logical because, frequently, remand is the only relief available through the courts....").

Of course, a number of other courts have repudiated Waterman-type decisions that relied upon Hudson – decisions which they have conveniently labeled as "pre-Melkonyan. *See, e.g.*, Labrie v. Sec'y of Health & Human Services, 976 F.2d 779, 780 n.2 (1st Cir. 1992) ("As the court realized, pre-Melkonyan case law in this circuit was to the contrary. See, e.g., Guglietti v. Sec'y of HHS, 900 F.2d 397, 400 (1st Cir. 1990) (mere obtaining of a remand does not make claimant a prevailing party under EAJA)"); Hackett v. Barnhart, 475 F.3d 1166, 1168 (10th Cir. 2007) ("plaintiff obtained a district court remand to the Commissioner of Social Security under the fourth sentence in 42 U.S.C. § 405(g), and she is therefore a prevailing party for purposes of EAJA"); Magray v. Sullivan, 807 F.Supp. 495 (E.D. Wisc. 1992) (see cases cited in n.4 at 497 and text accompanying n.4).

Another pre-Melkonyan and Schaefer case cited by Appellees' Motion is National Coalition Against The Misuse of Pesticides v. Thomas, 828 F.2d 42 (D.C. Cir. 1987), a case that relied upon both the Supreme Court's now limited Hampton decision and the Third Circuit's now discredited Brown decision. 828 F.2d at 44. National Coalition Against The Misuse of Pesticides, which has not been cited by any court in the last fourteen

years, is also unhelpful because it concerned an agency rulemaking and characterized the merits decision as "amount[ing] at best to a procedural victory for petitioners."

Yet, another pre-Melkonyan and Schaefer case cited by Appellees (p. 6, n.6) and Waterman (901 F.2d at 1122) is McGill v. Sec'y of Health & Human Services, 712 F.2d 28, 31 (2d Cir. 1983). As the court noted in Edwards v. Barnhart, 238 F.Supp. 2d 645, 649-51 (S.D.N.Y. 2003): "Today it is clear that by obtaining a sentence four remand a claimant immediately prevails whether or not he ultimately obtains benefits, and he may recover attorney's fees [citing Schaefer]. ... Until 1991, the rule in this [Second] Circuit and elsewhere was that, 'generally speaking, a social security claimant prevails when it is determined that she is entitled to benefits' [citing McGill]. A version of this rule was announced by the Supreme Court in 1989 in Sullivan v. Hudson.... The Hudson regime was a short one." In Roberson v. Giuliani, 346 F.3d 75 (2d Cir. 2003), a 42 U.S.C. § 1988 case, the Second Circuit noted: "We therefore join the majority of courts to have considered the issue [of prevailing party status] since Buckhannon [Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001)] in concluding that judicial action other than a judgment on the merits or a consent decree can support an award of attorney's fees, so long as such action carries with it sufficient judicial imprimatur." 346 F.3d at 81.

The final "other circuit" case cited by Appellees' Motion (at p. 6) and Waterman (901 F.2d at 1122) is Brewer v. American Battle Monuments Comm'n, 814 F.2d 1564, 1567 (Fed. Cir. 1987). Both Brewer and the other Federal Circuit case relied upon by Appellees, Austin v. Department of Commerce, 742 F.2d 1417 (Fed. Cir. 1984), are pre-

Melkonyan and Schaefer cases.[4] Both of these Federal Circuit cases have been superceded by several recent cases, the latest of which is Kelly v. Nicholson, 463 F.3d 1349 (Fed.Cir. 2006), which noted that: "To be considered a 'prevailing party' entitled to fees under EAJA, one must secure 'some relief on the merits.' [citing Buckhannon, 532 U.S. at 603]" The court continued: " Moreover, it is wholly irrelevant to our analysis whether Kelly will prevail on his ... claim on remand. In awarding attorneys' fees and expenses under EAJA, the inquiry is whether he was a prevailing party in his 'civil action,' not whether he ultimately prevails on his ... claim. ... Kelly prevailed in his civil action by securing a remand requiring consideration of his [claim]. ... In such circumstances as here, the veteran has already prevailed in the civil action before the Veterans Court by obtaining a remand in light of the agency's error." (citations omitted) 463 F.3d at 1353-55.

III. Conclusion

The most that Mr. Roberts could have achieved with his APA suit was a remand. He accomplished what he set out to do: he forced the ABCMR to consider his petition. He clearly is the prevailing party. The District Court erred by assigning so much authority to Waterman as to permit it to control this case. Certainly, the authoritativeness of Waterman is in sufficient question as to make a summary affirmance improper. The jurisprudence of this Circuit will benefit by permitting further briefing and argument in this case.

---

[4] Austin is a twenty-three year old decision that was cited by this Circuit only once (in a dissenting opinion eighteen years ago) and by the district court only once (in support of the Court's finding that the plaintiff *was* the prevailing party). *See*, Union of Concerned Scientists v. U.S. Nuclear Regulatory Comm'n, 840 F.2d 957, 959 (D.C. Cir. 1988) (dissent); Fleming v. Bowen, 637 F.Supp. 726, 730 (D.D.C. 1986).

Respectfully Submitted,

_____
Date

_____
Michael W. Dolan, Esq.
D.C. Bar No. 3384
2021 L Street, N.W.
Suite 204
Washington, D.C. 20036
202/293-2776
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that this day a copy of the foregoing was served by depositing a copy in the U. S. Mail, first-class postage prepaid, marked for delivery to:

Steven M. Ranieri, Esq.
Special Assistant U.S. Attorney
Civil Division
555 Fourth Street, N.W.
Washington, D.C. 20530

Counsel for Appellees

Dated: _____
Washington, D.C.

_____
Michael W. Dolan, Esq. #3384
2021 L Street, N.W., Suite 204
Washington, D.C. 20036
(202) 293-2776

Counsel for Appellant