No. 05-762

In the Supreme Court of the United States

MONROE WHITE, SR., PETITIONER

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the United States Court of Appeals for Veterans Claims did not abuse its discretion in denying attorney's fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d), based on a finding that the position of the Secretary of Veterans Affairs was substantially justified in the administrative and litigation phases of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 412 F.3d 1314. The opinion of the Court of Appeals for Veterans Claims denying an award of attorney's fees (Pet. App. 12-14) is unreported. The underlying opinion of the Court of Appeals for Veterans Claims upon which the fee application is based (Pet. App. 15-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2005. A petition for rehearing was denied on September 13, 2005 (Pet. App. 20). The petition for a writ of certiorari was filed on December 9, 2005. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed a claim seeking service connection for a lower back injury. Pet. App. 2. On October 3, 2002, the Board of Veterans Appeals (Board) denied petitioner's claim, finding that petitioner's lower back injury was not incurred in, or aggravated by, his service. *Id.* at 2, 15-16. In reaching that conclusion, the Board considered additional evidence that had not been first considered by a Department of Veterans Affairs (VA) regional office. *Id.* at 16. At that time, regulations promulgated by the VA authorized the Board to "undertake the action essential for a proper appellate decision" when "further evidence, clarification of the evidence, correction of a procedural defect, or any other action is necessary for a proper appellate decision." 38 C.F.R. 19.9(a)(2) (2002). Under those regulations, the Board was not required to refer the additional evidence to the regional office for initial review or to seek the appellant's waiver of regional office review. 38 C.F.R. 20.1304 (2002). Petitioner appealed to the United States Court of Appeals for Veterans Claims (CAVC), arguing, *inter alia*, that the medical evidence did not support the Board's finding. Pet. App. 15-16.

2. While petitioner's appeal was pending before the CAVC, the United States Court of Appeals for the Federal Circuit issued a decision in a separate, unrelated case entitled *Disabled American Veterans (DAV)* v. *Secretary of Veterans Affairs*, 327 F.3d 1339 (Fed. Cir. 2003). In that case, the Federal Circuit held that "38 C.F.R. § 19.9(a)(2) is invalid because, in conjunction with the amended rule codified at 38 C.F.R. § 20.1304, it al-

lows the Board to consider additional evidence without having to remand the case to the [regional office] for initial consideration and without having to obtain the appellant's waiver." *DAV*, 327 F.3d at 1341. The pertinent statute provided that "[a]ll questions in a matter which . . . is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary." *Id.* at 1341-1342 (quoting 38 U.S.C. 7104(a)). In addition, the statute provided that "final decisions on such appeals are made by the Board." *Id.* at 1342 (citing 38 U.S.C. 7104). In the court of appeals' view, the regulations did not satisfy those requirements:

> When the Board obtains evidence that was not considered by the [regional office] and does not obtain the appellant's waiver, * * * an appellant has no means to obtain "one review on appeal to the Secretary," because the Board is the only appellate tribunal under the Secretary.

Id. at 1347. The court of appeals therefore concluded that the regulation was contrary to the expressed intent of Congress, and invalidated it under the first step of the analysis set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

3. Petitioner asked the CAVC to remand his case "for the Board to comply with *Disabled American Veterans.*" Pet. App. 17. The "Secretary concede[d] that the Board did not obtain from appellant a waiver of [regional office] consideration of the additional evidence obtained by the Board." *Ibid.* The CAVC vacated the Board's decision and "remand[ed] the matter to the Board for readjudication consistent with *Disabled American Veterans* v. *Sec'y of Veterans Affairs*, 327 F.3d 1339, 1341 (Fed. Cir. 2003)." *Id.* at 18.

4. Petitioner filed an application with the CAVC for an award of attorney's fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). Pet. App. 12. The EAJA authorizes the court to award reasonable attorney's fees to a qualifying "prevailing party" in certain civil actions "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. 2412(d)(1)(A).

The CAVC denied petitioner's application. Pet. App. 12-14. The CAVC found that "even assuming that the remand in the underlying case was predicated on administrative error and that [petitioner] is a prevailing party, his application must be denied because the Secretary's position at the administrative and litigation stages was substantially justified." *Id.* at 13 (citation omitted).

The CAVC based its substantial justification finding on three of its prior decisions in which it had denied EAJA fee applications, each involving a remand that was caused by a court's invalidation of a regulation. Pet. App. 13-14 (citing *Johnson* v. *Principi*, 17 Vet. App. 436 (2004); *Ozer* v. *Principi*, 16 Vet. App. 475 (2002); *Felton* v. *Brown*, 7 Vet. App. 276 (1994)). In one of the prior cases, *Johnson* v. *Principi*, *supra*, the CAVC had considered, and denied, an EAJA application based on a remand for compliance with the decision in *DAV*. In *Johnson*, the CAVC had concluded that the Secretary's reliance on the invalidated regulations was substantially justified because *DAV* "was [a] case of first impression and there had been no prior adverse reaction to application of [38 C.F.R.] § 19.9(a)(2) [and] it could not be said that [the] Secretary was unreasonable in promulgating [the] regulation." Pet. App. 13 (citing *Johnson*, 17 Vet. App. at 439-442). The CAVC found that "the circum-

stances of [petitioner's] case as to substantial justification warrant the same result as in *Johnson*." *Id.* at 14.

5. The court of appeals affirmed. Pet. App. 1-11. The panel majority held that the CAVC had applied the proper burden of proof in concluding that the Secretary's position was substantially justified. *Id.* at 2. Because "[t]he fact that one court agreed or disagreed with the Government does not establish whether or not its position was substantially justified," *id.* at 4 (quoting *Pierce* v. *Underwood*, 487 U.S. 552, 569 (1988)), the court of appeals held that "[i]n order for the Government to be deemed unjustified in enforcing a regulation," "it is not enough for a regulation to be deemed facially invalid on the basis of contradicting the overarching legislation," *ibid.* Instead, the inquiry into "substantial justification" must focus on "the totality of the circumstances" surrounding the government's position. Pet. App. 7.

Considering the totality of the circumstances in this case, and the "virtually identical facts" considered in *Johnson* v. *Principi*, *supra*, the court of appeals concluded that there was no reason to "differ from the persuasive reasoning of *Johnson*." Pet. App. 6-7. The CAVC had not abused its discretion in concluding that "the Government met its burden of demonstrating that the Secretary's position at the administrative and litigation levels was substantially justified." *Id.* at 8.

The dissenting judge concluded that the decision of the CAVC was flawed because it failed to consider the "significance of the unambiguous language of a controlling statute." Pet. App. 9-10. Because the Secretary had promulgated a regulation that contravened the specific language of the statute, the dissenting judge stated that "the government bears a heavy burden to * * *

prove that its position was 'substantially justified' based on the invalid regulation" and concluded that the Secretary's conduct was not substantially justified. *Id.* at 11.

ARGUMENT

The court of appeals correctly held that the CAVC did not abuse its discretion in concluding that the Secretary's position was substantially justified. Further review is not warranted.

1. Petitioner cannot obtain fees under the EAJA because he has not established that he was a "prevailing party." 28 U.S.C. 2412(d)(1)(A). To obtain "prevailing party" status, "a party must receive 'at least some relief on the merits of his claim.'" *Vaughn* v. *Principi*, 336 F.3d 1351, 1356-1357 (Fed. Cir. 2003) (quoting *Buckhannon Bd. & Care Home, Inc.* v. *West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)). A successful motion for remand does not meet that standard when it is not "predicated upon administrative error." *Sumner* v. *Principi*, 15 Vet. App. 256, 264 (2001), aff'd *sub nom. Vaughn* v. *Principi*, 336 F.3d 1351 (Fed. Cir. 2003). "In order for a remand to have been predicated upon administrative error, the remand must have been either (1) directed in a Court opinion, decision, or order that contained a Court recognition of administrative error or (2) granted on the basis of a concession of error by the Secretary." *Johnson* v. *Principi*, 17 Vet. App. 436, 439 (2004) (citing cases). A remand "based on the retroactive application of the Federal Circuit's decision in *DAV v. Sec'y* * * * [is] not a remand based on administrative error" where, as here, the court's remand order "neither directed VA to award benefits * * * nor indicated that remand was based on either a 'Court recogni-

tion of administrative error' or the Secretary's 'concession of error.'" *Ibid.*

2. Petitioner also cannot obtain fees under the EAJA because the CAVC did not abuse its discretion in concluding that the Secretary's position was substantially justified. Petitioner contends (Pet. 11-13) that the court of appeals erred by adopting a so-called "*Johnson* rule" in this case which, according to petitioner, authorizes a "finding of substantial justification based on nothing more than absence of prior case law." That contention misstates the standard applied by the CAVC and the court of appeals in this case and by the CAVC in the *Johnson* case, which "centers the inquiry for a substantial justification on the 'totality of the circumstances.'" Pet. App. 6-7 (quoting *Johnson*, 17 Vet. App. at 440). Under the totality of the circumstances standard, "whether a case is one of first impression is only one factor for the court to consider." *Felton* v. *Brown*, 7 Vet. App. 276, 281 (1994).

"Where, as here, an appellant alleges that the Secretary's position was not substantially justified, the Secretary has the burden to prove that his position was substantially justified at both the administrative and litigation phases." *Johnson*, 17 Vet. App. at 440 (citing cases). "[S]ubstantially justified" means "justified to a degree that could satisfy a reasonable person." *Pierce* v. *Underwood*, 487 U.S. 552, 565 (1988). "[T]he government's failure to prevail does not raise a presumption that its position was not substantially justified." *Felton* v. *Brown*, 7 Vet. App. 276, 280 (1994) (quoting *Kali* v. *Bowen*, 854 F.2d 329, 332 (9th Cir. 1988)). Instead, whether the government's position was substantially justified is determined "based upon the totality of the circumstances, including merits, conduct, reasons given,

and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the Court." *Ozer* v. *Principi*, 16 Vet. App. 475, 476 (2002) (quoting *Stillwell* v. *Brown*, 6 Vet. App. 291, 302 (1994)). Also relevant to the inquiry is whether the case was "one[] of first impression involving good faith arguments of the government that are eventually rejected by the Court." *Johnson*, 17 Vet. App. at 440 (quoting *Stillwell*, 6 Vet. App. at 303). The decision of the lower court regarding substantial justification is reviewed under an abuse of discretion standard. *Halverson* v. *Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000) (citing *Pierce*, 487 U.S. at 563).

In this case, as the court of appeals concluded, the CAVC appropriately applied the "totality of the circumstances" standard in determining that "the Secretary's position at the administrative and litigation levels was substantially justified." Pet. App. 8. With respect to the administrative level, "in a case in which the Secretary's regulation has been invalidated," the Secretary must show substantial justification "both in promulgating the regulation and in his position during adjudication of the claim before the agency." *Ozer*, 16 Vet. App. at 477 (citing *Felton*, 7 Vet. App. at 283).

Here, the regulations were reasonably promulgated as part of an effort "to shorten appeal processing time and to reduce the backlog of claims awaiting decision." *Johnson*, 17 Vet. App. at 441 (quoting 66 Fed. Reg. 40,942 (2001)). Although the statutory language required that "[a]ll questions in a matter * * * shall be subject to one review on appeal to the Secretary," 38 U.S.C. 7104(a), it did not state that all evidence relating to those questions needed to be considered first by the

regional office. Therefore, there was a reasonable basis for arguing that the Secretary could, in compliance with the statute, "improve the efficiency of the review on appeal to the Secretary" by allowing "the Board to obtain evidence, clarify the evidence, cure procedural defect, or perform any other action essential for a proper appellate decision in any appeal properly before it." *Disabled American Veterans (DAV)* v. *Secretary of Veterans Affairs*, 327 F.3d 1339, 1342, 1346 (Fed. Cir. 2003). That is particularly true in light of the fact that the Board was expressly authorized by statute to "secure an advisory medical opinion from one or more independent medical experts who are not employees of the Department" when "in the judgment of the Board, expert medical opinion, in addition to that available within the Department, is warranted by the medical complexity or controversy involved in an appeal case." 38 U.S.C. 7109(a).

The regulations were the subject of notice-and-comment rulemaking, and the VA did not receive any comments objecting to the proposed new rule on the ground that it was inconsistent with the "one review on appeal" language of 38 U.S.C. 7104(a). See *Board of Veterans' Appeals: Obtaining Evidence and Curing Procedural Defects Without Remanding*, 67 Fed. Reg. 3099 (2002). As a result, the validity of the regulations in light of 38 U.S.C. 7104(a)'s appeal requirement "had not been questioned until several veterans organizations had filed with the Federal Circuit a petition for review" of the regulation in *DAV*. *Johnson*, 17 Vet. App. at 442. Under those circumstances, the CAVC and the court of appeals correctly concluded that the Secretary's promulgation of the regulation was substantially justified. Pet. App. 6-7 (citing *Johnson*, 17 Vet. App. at 442).

The Board's application of the regulation to petitioner's administrative case was also substantially justified because the Board was "bound by law to apply the regulation to the [petitioner]'s claim." *Ozer*, 16 Vet. App. at 478 (citing *Fugere* v. *Derwinski*, 1 Vet. App. 103, 110 (1990)). "Given the existence of the regulation, whose validity had not yet been questioned in this case, the Secretary's position during this part of the administrative phase was also substantially justified." *Felton*, 7 Vet. App. at 284.

With respect to the litigation phase of the case, the Secretary's position before the CAVC was also substantially justified. When the Secretary successfully moves for remand, or cooperates with a successful request for remand, after a regulation is invalidated, the Secretary's litigation position is "substantially justified." *Johnson*, 17 Vet. App. at 442 (citing *Wisner* v. *West*, 12 Vet. App. 330, 334 (1999); *Stillwell*, 6 Vet. App. at 302).

For those reasons, the court of appeals correctly concluded that the CAVC properly applied the totality of the circumstances standard "based on the whole record, including relevant statutory law," Pet. App. 8, and did not abuse its discretion in holding that the Secretary's position at the administration and litigation levels was substantially justified. That fact-bound, case-specific conclusion does not warrant further review by this Court.

3. Petitioner also contends (Pet. 11-15) that the decision below conflicts with decisions of the Seventh and D.C. Circuits. That argument lacks merit because, contrary to petitioner's assertion (Pet. 13), the court of appeals applied the same totality of the circumstances approach in this case that was applied by the Seventh Cir-

cuit in *Marcus* v. *Shalala*, 17 F.3d 1033 (7th Cir. 1994), and by the D.C. Circuit in *Halverson* v. *Slater*, *supra*.

In *Marcus* and *Halverson*, as here, a regulation had been invalidated under the first step of the analysis set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), on the ground that it conflicted with the unambiguously expressed intent of Congress. *Halverson*, 206 F.3d at 1207; *Marcus*, 17 F.3d at 1035. In the ensuing EAJA fee litigation, the courts of appeals considered whether, in spite of the particular merits decision, the government's position was substantially justified. In *Halverson*, the government's position was not substantially justified because the statute explicitly authorized the Secretary of Transportation to delegate certain pilotage duties to the United States Coast Guard, but the regulation instead purported to delegate those duties to the St. Lawrence Seaway Development Corporation. 206 F.3d at 1206-1207, 1211. Noting that the relevant question under EAJA was "whether the Department's position, though rejected, was substantially justified" (*id.* at 1209), the court concluded that it was not, because the government's position had been found "entirely without merit" based on an "elementary application" of basic canons of construction, leaving "no persuasive reason for believing that this was an issue over 'which reasonable minds could differ.'" *Id.* at 1211 (citation omitted).

In *Marcus*, the court concluded that the government's positions were not substantially justified because "six other circuits * * * had [previously] rejected the Secretary's position" and "the Secretary's position was 'unconvincing,' and 'make[s] little sense.'" 17 F.3d at 1038 (citations omitted). In light of that litigation history, the issues were not "close ones," and the court of appeals

concluded that the district court did not abuse its discretion in deeming the government's positions to lack substantial justification. *Ibid.*

Here, as in *Halverson* and *Marcus*, a totality of the circumstances approach was followed. The result was different because the underlying merits decision was not "easy," as in *Halverson*, 206 F.3d at 1212, and because the underlying question was one of first impression as to which reasonable minds could disagree, unlike *Marcus*. Contrary to petitioner's submission (Pet. 11), therefore, there is no "division among the Federal Courts of Appeals."

Further review is not warranted.

4. Petitioner finally contends (Pet. 16) that the court of appeals erred in finding substantial justification because "[w]hen the underlying merits issue is the validity of a regulation * * * the determination of reasonableness cannot be divorced from the *Chevron* analysis in the merits litigation, at least when the regulation is invalidated under *Chevron*'s step one." That argument is contrary to this Court's precedents.

This Court has made clear that "a position can be justified even though it is not correct, and * * * it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Pierce*, 487 U.S. at 566 n.2. "Congress did not * * * want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case.'" *Scarborough* v. *Principi*, 541 U.S. 401, 415 (2004) (quoting H.R. Rep. No. 1005, 96th Cong., 2d Sess. Pt. 1, at 10 (1980)).

Therefore, the determination of the "substantial justification" of the government's position "may not be col-

lapsed into [the] antecedent evaluation of the merits." *Cooper* v. *United States R.R. Ret. Bd.*, 24 F.3d 1414, 1416 (D.C. Cir. 1994); see *Kiareldeen* v. *Ashcroft*, 273 F.3d 542, 554 (3d Cir. 2001); *United States* v. *Paisley*, 957 F.2d 1161, 1167 (4th Cir.), cert. denied, 506 U.S. 822 (1992); *Welter* v. *Sullivan*, 941 F.2d 674, 676 (8th Cir. 1991); *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali* v. *United States*, 837 F.2d 465, 467 (Fed. Cir. 1988). "[A] court cannot assume that the government's position was not substantially justified simply because the government lost on the merits." *Morgan* v. *Perry*, 142 F.3d 670, 685 (3d Cir. 1998), cert. denied, 525 U.S. 1070 (1999); see *Dantran, Inc.* v. *United States Dep't of Labor*, 246 F.3d 36, 40-41 (1st Cir. 2001).

Petitioner has pointed to no case in which a court of appeals has held categorically that the invalidation of a regulation at step one of the *Chevron* analysis necessarily requires a finding of no substantial justification. To the contrary, in *Halverson*, the D.C. Circuit "emphasize[d] that [it did] not rel[y] solely on the fact that the merits panel resolved this case on *Chevron* step one grounds," noting that "other *Chevron* step one cases have presented quite difficult issues and involved 'substantially justified' arguments on both sides," 206 F.3d at 1211. Similarly, in *FEC* v. *Political Contributions Data, Inc.*, 995 F.2d 383, 387 (1993), cert. denied, 510 U.S. 1116 (1994), the Second Circuit explained that "[w]e come to this conclusion not because the government lost its claim, but because a previous panel of this court determined that the statutory language and legislative history were clear." See *ibid.* (describing its holding as predicated on "this unusual situation where a previous panel has specifically passed on every question before us, and has found the Commission's position to have

been unreasonable in that it frustrated the intent of Congress and might jeopardize first amendment rights"). Thus, far from adopting the categorical rule advocated by petitioner (Pet. 18), each court of appeals properly limited its substantial justification decision to the circumstances of the particular case. *FEC*, 995 F.2d at 387; *Halverson*, 206 F.3d at 1212.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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