IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

GABRIEL HUICHAN, JR.,

Petitioner, OPINION AND ORDER

v. 05-C-0268-C

JO ANNE B. BARNHART,
Commissioner of Social Security,

Respondent.

On May 6, 2005, plaintiff Gabriel Huichan, Jr. filed this action for judicial review of an adverse decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). On April 21, 2006, judgment was entered in favor of plaintiff and the case was remanded to the commissioner for further proceedings pursuant to sentence four of § 405(g). The issue now before the court is whether it may entertain plaintiff's application for attorney fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412, even though plaintiff filed it 18 days after the expiration of the 30-day deadline set by § 2412(d)(1)(B). I conclude that where, as here, the plaintiff's failure to file his petition on time is the product of garden-variety neglect, the court may not consider the petition.

FACTS

The facts are brief and undisputed. On March 20, 2006, United States Magistrate Judge Stephen Crocker issued a report and recommendation in which he recommended that the decision of the commissioner be reversed and the case remanded for further administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g). On April 20, 2006, this court issued an order adopting the magistrate judge's report and recommendation; judgment was entered the following day, April 21, 2006. Under Rule 4(a) of the Federal Rules of Appellate Procedure, the parties had 60 days in which to appeal, or until June 20, 2006. Neither party filed an appeal.

Under the EAJA, "[a] party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees." 28 U.S.C. § 2412(d)(1)(B). A final judgment is a "judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G). The court's judgment became final on June 20, 2006, when the time for filing an appeal expired. Plaintiff's application for EAJA fees was thus due no later than July 20, 2006. However, he did not file his fee petition until August 7, 2006. Plaintiff asserts that his failure to file his petition on time was the result of administrative error by his law firm.

OPINION

The Equal Access to Justice Act (EAJA) authorizes the payment of attorney fees to a party who prevails in a civil action against the United States unless the court finds that the position of the government was not substantially justified or that special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A). Under § 2412(d)(1)(B),

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which show that the party is a prevailing party and is eligible to receive an award under this subsection, and the amounts sought . . . .

In Scarborough v. Principi, 541 U.S. 401 (2004), the Supreme Court made clear that compliance with § 2412(d)(1)(B)'s requirements was not a prerequisite to the court's exercise of jurisdiction over the fee petition. In that case, the Court considered whether it was proper to apply the relation-back doctrine to cure the plaintiff's failure to allege "no substantial justification" in an EAJA petition that had been filed within the 30-day time period. Referring to its decision in Kontrick v. Ryan, 540 U.S. 443 (2004), the Court reiterated that the label "jurisdictional" was properly used only "for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority" and not for claim-processing rules. Id., 541 U.S. at 413-14 (quoting Kontrick, 540 U.S. at 454-55). Because § 2412(d)(1)(B)'s 30-day deadline did not describe what "classes of cases" could be adjudicated but rather "relates only to postjudgment proceedings auxiliary to cases already within [the] court's adjudicatory authority," said the Court, it was "not properly typed 'jurisdictional.'" Id. at 414.

Plaintiff argues that because § 2412(d)(1)(B) is not jurisdictional, the court may accept an untimely application "in the interests of equity." Plaintiff goes on to argue that language from the Court's opinion in Scarborough indicates that an untimely EAJA petition should be allowed unless it affects the "substantial rights" of the parties. Although I agree with plaintiff that Scarborough supports the notion that the same equitable principles that apply to statutes of limitations and other statutory time prescriptions should apply to § 2412(d)(1)(B), id., at 421-22, I disagree with plaintiff's suggestion that a court may consider an untimely EAJA petition whenever the balance of the equities lies in the plaintiff's favor.

First, in Scarborough the Court was not deciding whether or when a court could consider an untimely EAJA fee petition. The question in Scarborough was whether a plaintiff's failure to allege in her initial, *timely* EAJA petition that the government's position was "not substantially justified" could be cured by an amended petition that was filed after the 30-day deadline expired. The Court determined that it could, holding that the "relation-back" doctrine could be applied to the plaintiff's amended EAJA petition just as the doctrine applied in other contexts. Id. at 416-18. In referring to the "substantial rights" of the parties and to the government's failure to demonstrate prejudice, the Court was referring to the long-established rules governing application of the relation-back doctrine, which is founded on the principle that a party who otherwise has adequately notified his adversary of a claim within the prescribed time period should not have his claim barred on the merits

by virtue of an immaterial pleading defect. Maty v. Grasselli Chemical Co., 303 U.S. 197, 200-201 (1938); 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1471, at 359 (1990) (discussing policies underlying Fed. R. Civ. P. 15(c)). Contrary to plaintiff's suggestion, those rules simply have no application where a plaintiff fails to put his adversary on notice of his claim within the statutorily-prescribed period.

Second, prior to Scarborough, the circuit courts agreed unanimously that compliance with the 30-day deadline is a prerequisite to government liability that cannot be waived judicially. See, e.g., Bryan v. OPM, 165 F.3d 1315, 1321 (10th Cir. 1999); Yang v. Shalala, 22 F.3d 213, 215 n.4 (9th Cir. 1994); Welter v. Sullivan, 941 F.2d 674, 675 (8th Cir. 1991); Myers v. Sullivan, 916 F.2d 659, 666 (11th Cir. 1990); Howitt v. United States Dept. of Commerce, 897 F.2d 583, 584 (1st Cir. 1990); J.M.T. Machine Company, Inc. v. United States, 826 F.2d 1042, 1047 (Fed. Cir. 1987); Sonicraft, Inc. v. NLRB, 814 F.2d 385, 387 (7th Cir. 1987) (construing identical 30-day period applicable to agency adjudication contained in U.S.C. § 504(a)(2)); Taylor v. United States, 749 F.2d 171, 174 (3d. Cir.1984); Allen v. Secretary of HHS, 781 F.2d 92, 93 (6th Cir. 1986); Clifton v. Heckler, 755 F.2d 1138, 1144 (5th Cir. 1985); Action on Smoking & Health v. Civil Aeronautics Bd., 724 F.2d 211, 225 (D.C. Cir.1984). Although in Scarborough, the Court overruled these decisions insofar as they described the EAJA's 30-day deadline as "jurisdictional," the Court gave no hint that it disagreed with the proposition that filing a fee petition within the EAJA's 30-day deadline was a prerequisite to receipt of an award. See

Arulampalam v. Gonzales, 399 F.3d 1087, 1090 (9th Cir. 2005) (denying EAJA petition as untimely after Scarborough).

Third, "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States, 352 U.S. 270, 276 (1957) (citing United States v. Sherwood, 312 U.S. 584, 590-91 (1941) and cases cited therein); see also Ardestani v. I.N.S., 502 U.S. 129, 137 (1991) (government's waiver of sovereign immunity to be construed narrowly). In enacting the EAJA, Congress significantly abridged the government's immunity from suits for attorney fees. Spencer v. NLRB, 712 F.2d 539, 544-45 (D.C. App. 1983) (discussing history of EAJA); United States v. Chemical Foundation, 272 U.S. 1, 20 (1926) (sovereign immunity precludes court from awarding costs and fees against United States in absence of statute directly authorizing it); H.R. Rep. No. 1418, 96th Cong., 2d Sess. 1, 8-9 (1980), reprinted in 1980 U.S. CODE CONG. & AD. NEWS 4953, 4986-87. One of the conditions Congress attached to its consent to be sued for fees was that a party seeking such fees must file an application no more than 30 days after final judgment. If the court were to accept an untimely EAJA petition any time it found that the remedial goals of the statute or the equities in the case would be served by doing so, it would effectively write the 30-day limitations period out of the statute, contrary to Congress's intent. As the Supreme Court has explained:

> If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so on in a cascade of exceptions that would engulf the rule

> erected by the filing deadline; yet regardless of where the cutoff line is set, some individuals will always fall just on the other side of it. Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced.

United States v. Locke, 471 U.S. 84, 100-101 (1985). See also Baldwin County Welcome Center v. Brown, 466 U.S. 147, 152 (1984) ("Procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts out of a vague sympathy for particular litigants.").

This is not to suggest that the EAJA's time limit for filing fee applications can never be extended. Although in Scarborough the Court explicitly left open the question of whether the EAJA time limitation for fee applications is subject to equitable tolling, 541 U.S. at 1869 n.8, language from the decision supports application of the doctrine to § 2412(d)(1)(B). See Townsend v. Commissioner of Social Security, 415 F.3d 578, 582 (6th Cir. 2005) (concluding after Scarborough that EAJA time limitations for fee applications are subject to equitable tolling). It is unnecessary to decide in this case whether the EAJA time limitation is subject to equitable tolling because even if it is, plaintiff has failed to show that he was prevented by some extraordinary circumstance from filing his EAJA petition on time despite his diligent efforts. Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005) (describing what plaintiff must show to be entitled to equitable tolling). Plaintiff asserts that his untimeliness was the result of a glitch in his lawyer's case management procedures. However, as plaintiff appears to recognize, "the principles of equitable tolling . . . do not extend to what is at best

a garden variety claim of excusable neglect." Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990).

In sum, even though the 30-day time limit for filing an EAJA petition is not jurisdictional, it is nonetheless an emphatic time restriction with which a plaintiff must comply in order to be entitled to an award of EAJA fees. Although the provision is likely subject to the doctrine of equitable tolling, plaintiff has not argued in favor of the doctrine's application. Whether or not equitable tolling applies, I am not at liberty to excuse plaintiff's failure to comply with the deadline on the basis of his lawyer's administrative error.

ORDER

IT IS ORDERED that the application of plaintiff Gabriel Huichan for an award of attorney fees and expenses under 28 U.S.C. § 2412 is DENIED as untimely.

Entered this 10th day of October, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge