

UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

Served: October 20, 1993

FAA Order No. 93-30

In the Matter of:)

WILLIAM S. POST)

) Docket No. CP93AL0007
) EAJA050022
) (CP91AL0438)
)

DECISION AND ORDER

Complainant has appealed from the written initial decision of Administrative Law Judge Burton S. Kolko issued on April 14, 1993.^{1/} In his initial decision, the law judge awarded Post, the Applicant, \$6,423.70 in attorney fees and other expenses, of which \$554 was to reimburse Applicant for his own travel expenses. Complainant appeals only the \$554 travel expense award to Applicant.^{2/}

This case arose from a mid-air collision on June 17, 1990, near Juneau, Alaska, between two float-equipped Cessna 206

^{1/} A copy of the law judge's written initial decision is attached.

^{2/} In its appeal brief, Complainant incorrectly stated that the amount awarded to Applicant for his own travel expenses was \$464, when it really was \$554. The \$554 award consisted of: \$325 in roundtrip airfare from Juneau, Alaska, to Seattle, Washington; \$110 for two nights lodging; \$90 for food for three days; and \$29 for a rental car.

aircraft, each carrying a full load of five passengers. Both aircraft were operated by Taku Glacier Air, Inc., on sightseeing tours. Complainant brought civil penalty actions against Applicant and Mark L. Sweeney, the Cessna pilots.^{3/}

After a hearing in Seattle, Washington, where both pilots were represented by counsel, the law judge dismissed the complaint against Applicant, finding that Complainant had not established the allegations set forth in the complaint.^{4/}

Applicant filed an application for attorney fees and other expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504. The law judge held that Complainant had not been substantially justified in bringing the action against Applicant, and awarded him the full \$6,423.70 sought in attorney fees and other expenses.

On appeal, Complainant argues that the law judge cited no specific authority for finding that Applicant's personal travel expenses are reimbursable under the EAJA. Complainant urges the Administrator to follow, as persuasive precedent,

^{3/} It was alleged in the complaints that the pilots operated their aircraft carelessly or recklessly, and created a collision hazard by operating their aircraft too close to each other, in violation of Sections 91.9 and 91.65(a) of the Federal Aviation Regulations, (FAR), 14 C.F.R. §§ 91.9 and 91.65(a), redesignated as 14 C.F.R. §§ 91.13(a) and 91.111(a). The complaint against Sweeney contained the additional allegation that he failed to see and avoid Applicant's aircraft and failed to give Applicant the right of way, in violation of Section 91.67(a), 14 C.F.R. § 91.67(a), redesignated as 14 C.F.R. § 91.113(b).

^{4/} The law judge found that Sweeney violated the regulations as alleged in the complaint. He assessed a \$2,500 civil penalty. Sweeney appealed to the Administrator, who affirmed the decision of the law judge. See In the Matter of Sweeney, FAA Order No. 93- (, 1993).

decisions of the National Transportation Safety Board (NTSB) that hold that an applicant's own travel expenses are not recoverable under the EAJA.^{5/}

In his reply brief Applicant argues that Section 14.22 of the Federal Aviation Regulations, (FAR), 14 C.F.R. § 14.22, required Complainant to raise the issue of Applicant's travel expenses in its answer to the application for attorney fees and other expenses.^{6/} Applicant argues that Complainant "defaulted" by failing to object in its answer to the requested reimbursement of Respondent's personal travel expenses and should not be allowed to raise the issue on appeal.

Contrary to Applicant's argument, Complainant is not barred by 14 C.F.R. § 14.22 from appealing the award of travel expenses to Applicant. Complainant's appeal is from the law judge's legal conclusion that Applicant's own travel expenses are recoverable under the EAJA. The appeal of an issue of law is a proper basis for an appeal to the Administrator. See 14 C.F.R. § 13.233(b)(2). It would have been the better practice to raise this issue in Complainant's answer to the application for attorney fees and other expenses in order to

^{5/} Complainant cites as an example Gay v. Administrator, NTSB Order No. EA-3763 (January 21, 1993) (applicant's own travel expenses to attend two NTSB hearings are not recoverable under the EAJA).

^{6/} Section 14.22(c), 14 C.F.R. § 14.22(c), provides in pertinent part: "[t]he answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position."

aid the law judge in his decision. Complainant's failure to do so, however, does not bar the issue from being addressed on appeal by the Administrator.

The law judge held that Applicant's expenses for his own travel, lodging, and food were recoverable under the EAJA because they were incurred in connection with the hearing, and because their recovery promoted the purposes of the EAJA.^{7/}

A prevailing party may be awarded attorney fees and other expenses incurred in connection with a proceeding. See 5 U.S.C. § 504(a)(1). Although Applicant's travel expenses were incurred in connection with his attendance of the hearing in Seattle, the inquiry does not end there.

The EAJA provides that "fees and other expenses includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case"

Courts have differed in their interpretations of the term "fees and other expenses" in the identical provision of the EAJA set forth at 28 U.S.C. § 2412(d)(2)(A).^{8/} Some courts

^{7/} The law judge cited Commissioner, I.N.S. v. Jean, 496 U.S. 154, 163 (1990), for the proposition that the specific purpose of the EAJA is "to eliminate for the average person the financial disincentive to challenge unreasonable government actions."

^{8/} Section 2412(d)(2)(A), 28 U.S.C. § 2412(d)(2)(A), is applicable in civil judicial proceedings. It provides: "fees and other expenses includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case"

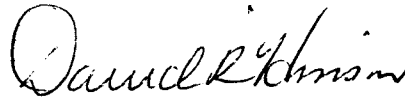
have concluded that the EAJA does not cover attorney travel expenses because they are not the same kind of expenses as those listed in the statute. See e.g., NAACP v. Donovan, 554 F. Supp. 715, 719 (D.D.C. 1982). Other courts have held that attorney travel expenses are covered by the EAJA provision because they are items normally charged to clients as legal expenses. See e.g., Hoopa Valley Tribe v. Watt, 569 F. Supp. 943, 947 (N.D. Cal. 1983).

The travel expenses of an applicant are not similar to the type of expenses listed in 5 U.S.C. § 504(b)(1)(A), and are not normally billed as legal expenses. Furthermore, nothing in Section 14.05 of the FAR, 14 C.F.R. § 14.05, which discusses allowable EAJA fees and expenses, would lead one to conclude that an applicant's personal expenses may be recovered. Applicant's travel expenses, therefore, should not be reimbursed under the EAJA.

The NTSB has reached the same conclusion by finding that the fees and other expenses reimbursable under the EAJA are those incurred by an "attorney, agent, or expert witness representing or appearing in behalf of the party" and do not include an applicant's personal travel expenses.^{9/} See 5 U.S.C. § 504(a)(2). Using similar reasoning, courts have not permitted pro se parties to recover attorney fees under the EAJA. See e.g., Demarest v. Manspeaker, 948 F.2d 655 (11th Cir. 1991).

^{9/} See Gay v. Administrator, NTSB Order EA-3763, at 9 (January 21, 1993); see also Rooney v. Administrator, 5 NTSB 776, 777 (1985).

Accordingly, Applicant may not recover his own travel expenses under the EAJA. The decision of the law judge is modified to exclude \$554 in Applicant's travel expenses from the \$6,423.70 award of attorney fees and other expenses. Applicant's final award of attorney fees and other expenses under the EAJA is \$5,869.70.^{10/}



DAVID R. HINSON, ADMINISTRATOR
Federal Aviation Administration

Issued this 19th day of October, 1993.

^{10/} The Applicant may, within 30 days after this determination, file an appeal with an appropriate United States Court of Appeals. 14 C.F.R. § 14.29.