

UNITED STATES COURT OF VETERANS APPEALS

No. 95-516

ROGER H. GANTER,

APPELLANT,

v.

VA FILE NO. 25 569 520

JESSE BROWN,

SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before KRAMER, IVERS, and STEINBERG, *Judges*.

ORDER

The Court has determined that further briefing is necessary to the disposition of this appeal. The appellant contended in his July 25, 1996, application under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), that the position of the Secretary was not substantially justified. Application at 2. Assuming that the appeal will not be dismissed for a defective application, as the Secretary urges in his September 25, 1996, response to the application, Response (Resp.) at 6-9, this contention by the appellant shifts the burden of demonstrating substantial justification to the Secretary. *See Locher v. Brown*, __ Vet.App. __, No. 94-1097, slip op. at 4 (Nov. 26, 1996); *Olney v. Brown*, 7 Vet.App. 160, 162 (1994); *Stillwell v. Brown* 6 Vet.App. 291, 301 (1994); *Cook v. Brown*, 6 Vet.App. 226, 237 (1994). In his response, the Secretary has not addressed whether his position in litigation before this Court was substantially justified except to assert, without any analysis or explanation, that his "position both at the administrative level and litigation levels [sic] was reasonable, and the Secretary did not 'drag his feet' in resolving the litigation." Resp. at 13.

The Court notes the following chronology of events in connection with the litigation in this Court:

3/17/95:	Court's opinion in <i>Allen v. Brown</i> , 7 Vet.App. 439 (1995) (en banc), issued.
5/26/95:	Notice of Appeal filed.
6/23/95:	Copy of BVA decision (setting forth the appellant's contentions) filed.
7/31/95:	Designation of Record (including both Dr. Talley's statement (#47) and the appellant's Substantive Appeal (#99)) filed.
8/28/95:	Counter designation of the Record on Appeal (ROA) filed.
9/29/95:	Secretary's motion to extend time for filing ROA filed.
10/30/95:	Secretary's motion to extend time for filing ROA

filed.
 11/08/95: Secretary's motion to extend time for filing ROA
 filed.
 11/22/95: Secretary's motion to extend time for filing ROA
 filed.
 11/29/95: Secretary's motion to extend time for filing ROA
 filed.
 12/06/95: Secretary's motion to extend time for filing ROA
 filed.
 12/13/95: ROA filed.
 12/20/95: Appellant's motion to extend time for filing brief filed.
 2/12/96: Appellant's brief (not citing *Tobin v. Brown*, 2 Vet.App. 34
 (1991), or *Allen, supra*) filed.
 4/17/96: Appellant's counsel and Secretary's counsel discussed "joint
 motion", see Itemization attached to Application.
 6/24/96: Joint motion for remand filed.

In view of this chronology, the Court is in doubt as to whether, at some point prior to the filing of the joint motion, the Secretary, under the criteria set forth in *Dillon v. Brown*, 8 Vet.App. 165, 166 (1995), and *Stillwell*, 6 Vet.App. at 302, crossed the line between cooperating speedily in resolving the litigation and dragging his feet thereupon. See *Stillwell*, 6 Vet.App. at 302 (quoting *Essex Electric Engineers, Inc. v. United States*, 757 F.2d 247, 253 (Fed. Cir. 1985)). The Court will thus require the Secretary to address this question in terms of the specific facts of this case and the Secretary's justification for his position at each point in the above chronology. In his response to this order, the Secretary will also respond (1) as to when negotiations began for a joint remand; (2) which party initiated such negotiations; (3) the terms for such a remand as first proposed (including whether it was based on *Allen, supra*) and the Secretary's initial position as to such a joint motion; and (4) the chronology of the negotiations (including the general positions of the parties at each stage).

Upon consideration of the foregoing, it is

ORDERED that the Secretary, within 30 days after the date of this order, file with the Court, and serve on the appellant, a memorandum (attaching copies of any appropriate supporting documentation), addressing the Court's concerns as to the points set forth above. Within 30 days after the Secretary's memorandum is served upon the appellant, he shall file a reply memorandum (attaching copies of any appropriate supporting documentation).

DATED: January 9, 1997

PER CURIAM.