

FILED

United States Court of Appeals
Tenth Circuit

FEB 22 1989

ROBERT L. HOECKER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARTHA ROBINSON,

Plaintiff-Appellee,

V.

OTIS R. BOWEN, M.D., Secretary,
Department of Health and Human
Services,

Defendant-Appellant.

No. 88-1608

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. Civil No. 84-1226-T)

Harry B. Mallin, Assistant Regional Counsel, Department of Health and Human Services, Kansas City, Missouri (Benjamin L. Burgess, Jr., United States Attorney for the District of Kansas; Stephen K. Lester, Assistant United States Attorney; and Paul P. Cacioppo, Chief Counsel, Department of Health and Human Services, with him on the brief), for Defendant-Appellant.

David H.M. Gray of Gragert, Hiebert, Gray & Woodring, Wichita,
Kansas, for Plaintiff-Appellee.

Before MCKAY, BARRETT, and BALDOCK, Circuit Judges.

PER CURIAM.

We find that the trial court violated Rule 36.3 of the Rules of Court for the United States Court of Appeals for the Tenth Circuit in relying upon an unpublished opinion, *Van Natter v.*

Secretary of Health, Education and Welfare, No. 79-1439, slip op. (10th Cir. 1981). Notwithstanding this error, we affirm the trial court's decision for the balance of reasons given in its opinion. We cannot say that the court abused its discretion in finding that the Secretary's position was not substantially justified for purposes of awarding attorney's fees to the prevailing plaintiff under EAJA.

AFFIRMED.