

**UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

FRED W. FOSTER,)	
Appellant,)	
)	
v.)	Vet. App. No. 19-7442
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**APPELLANT’S APPLICATION FOR AN AWARD OF REASONABLE
ATTORNEY FEES AND EXPENSES UNDER 28 U.S.C. § 2412(D)**

Pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. §2412(d), Appellant, Fred W. Foster, moves this Court for an award of reasonable attorney fees and expenses. Appellant seeks an award in the amount of \$7,157.48 for litigating the merits of this appeal and drafting this petition. In support of this motion, Appellant submits that: (1) he is entitled to an award of attorney fees and expenses under EAJA, 28 U.S.C. § 2412(d); and, (2) an award of \$7,157.48 is reasonable and appropriate.

PRELIMINARY STATEMENT

In 1980, Congress passed the EAJA in response to its concern that persons “may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.” Pub. L. No. 96-481, tit. II, §204(a), (c), 94 Stat. 2327, 2329 (1980); *Sullivan v. Hudson*, 109 S.Ct. 2248, 2253 (1989). As the Senate observed, in instances in which the cost of securing vindication exceeds the amount at stake, “it is more practical to endure an injustice than to contest it.” S. Rep. No. 96-253, 96th Cong., 1st Sess. 5 (1979). The purpose of the EAJA’s fee-shifting provisions is thus “to eliminate for the average person

the financial disincentive to challenge unreasonable government actions.” *Commissioner, I.N.S. v. Jean*, 110 S.Ct. 2316, 2321 (1990).

It has since become clear that the EAJA applies to proceedings in this Court. In the Federal Courts Administration Act of 1992, Congress amended section 2412(d)(2)(F) to add the United States Court of Veterans Appeals (now Court of Appeals for Veterans Claims) to the definition of Courts authorized to make awards under the EAJA. Pub. L. No. 102-572, tit. V § 506(b), 106 Stat. 4506, 4513 (1993) (found at 28 U.S.C. § 2412 note); S. Rep. No. 342, 102d Cong., 2d Sess. 39 (1992), [hereinafter “S. Rep”]]. *See Jones v. Principi*, 985 F.2d 582 (Fed. Cir. 1992) (vacating and remanding *Jones v. Derwinski*, in light of the Federal Courts Administration Act). In amending the EAJA to apply to appeals to this Court, Congress affirmed the Act’s objective of eliminating financial deterrents to defend against unreasonable government action, observing that “[v]eterans are exactly the type of individuals the statute was intended to help.” S. Rep. at 39.

It is also clear that the EAJA amendment applies in this case. The amendment applies, *inter alia*, “to any case pending before the United States Court of Veterans Appeals on the date of the enactment of this Act, to any appeal filed in that court on or after such date in the United States Court of Appeals for the Federal Circuit.” Pub. L. No. 102-572, tit. V, §506(b), 106 Stat. 4506, 4513 (1992) (found at 28 U.S.C. §2412 note). The instant case was pending in the United States Court of Appeals for Veterans Claims after October 29, 1992, when the EAJA amendment became effective.

SUMMARY OF PROCEEDINGS

This case involves the Board's decision dated September 5, 2019, that determined that (1) the reduction of appellant's disability rating for prostate cancer residuals from 100% to 10% effective January 1, 2019, and (2) the discontinuance of special monthly compensation (SMC), also effective as of January 2019, were both proper.

In October 2021, the Court issued a panel decision that set aside and remanded the issues of (1) the propriety of appellant's 10% disability rating for residuals of prostate cancer; and (2) entitlement to SMC from January 2019. Specifically, the Court determined the propriety of the 10% disability rating for residuals was properly before the Board and concluded that the Board based its credibility finding on an inaccurate description of the evidence of record.

ARGUMENT

I. APPELLANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND EXPENSES UNDER EAJA, 28 U.S.C. § 2412(D).

There are four statutory requirements that a party must satisfy to be eligible for an award of attorney's fees under EAJA, 28 U.S.C. § 2412(d). They are: (1) the party must have been a "prevailing party;" (2) the party must be eligible to receive an award under this subsection;" (3) the position of the United States must not have been "substantially justified;" and (4) there must be no special circumstances which would make an award unjust. If these requirements are met, the Court "shall award" reasonable fees and expenses. *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1466 (Fed. Cir. 1986) (en banc). As shown below, Appellant meets these requirements.

A. Appellant is a Prevailing Party

Generally, to be a prevailing party, a party must receive "at least some relief on the merits" and the relief must materially alter the legal relationship of the parties. *Higher Taste v. City of Tacoma*, 717 F.3d 712 (Fed. Cir. 2013) citing *Buckhannon Board*

& Care Home, Inc. v. West Virginia Department of Health & Human Res., 532 U.S. 598 (2001). More specifically, a party prevails with respect to the EAJA if they “succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit.” *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983) (citations omitted); *see also Sullivan v. Hudson*, 109 S. Ct. 2248, 255 (1989); *Texas State Teachers Ass’n v. Garland Indep. School Dist.*, 109 S. Ct. 1486, 1491-92 (1989). In making this inquiry “substance should prevail over form.” *Devine v. Sutermeister*, 733 F.2d 892 (Fed. Cir. 1984). In *Lematta v. Brown*, 8 Vet. App. 504 (1996), this Court held “[I]t is enough for the Court to make some ‘substantive determination in [the] appeal, based upon the record, the parties’ pleadings, and the Court’s precedent, that is favorable to the appellant.” *Id.* at 508 (quoting *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994)).

The Federal Circuit has issued several decisions relating to the attainment of prevailing party status under the EAJA. In *Vaughn v. Principi*, 336 F. 3d 1360 (Fed. Cir. 2003), the court held that a remand to an administrative agency, to consider the effects of legislation enacted while the case is on appeal does not constitute securing relief on the merits for prevailing party purposes. *Id.*, at 1366. There, the Court affirmed the CAVC’s findings that prevailing party status did not attach based on, *inter alia*, the catalyst theory. *Id.*, citing *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (2001)(Rejecting the catalyst theory as a basis for fee awards and holding that enforceable judgments on the merits and court-ordered consent decrees create the “material alteration of the legal relationship of the parties). Notably, that case involved a remand for re-adjudication solely in light of the enactment of the VCAA – as opposed to based on VA error. *See Vaughn v. Principi*, 15 Vet. App. at 280; *see also Akers v. Sec’y of Veterans Affairs* 04-7132 (Fed. Cir. May 26, 2005) (affirming the CAVC determination that Appellant was not a prevailing party inasmuch as the Board decision on appeal was vacated and remanded as a result of a change in law subsequent to

the Board's decision and did not involve a direct finding by the Court on the merits or an order to do anything as a result of an error found either by the Court or the parties.)

In *Former Employees of Motorola Ceramic Products v. United States*, 336 F. 3d 1360 (Fed. Cir. 2003), the Federal Circuit addressed the meaning of "prevailing party" and appeared to clarify its decision in *Vaughn*. There, the court made clear, *inter alia*, that "where a plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party [] without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court. . ." *Id.*, at 1360; *see also Rice Services, Ltd., v. United States*, 405 F.3d 1017 (Fed. Cir. 2005) (Acknowledging *Motorola* for the principle that a remand order to an administrative agency from a court proceeding constitutes the securing of relief on the merits sufficient to attain prevailing party status); *Kelly v. Nicholson*, 463 F.3d 1349 (Fed. Cir. 2006).

Most recently, the Federal Circuit in *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016), set out a three-part test "to determine a prevailing party status under the EAJA on administrative agency remands." Under this three-part test, a party is a prevailing party if (1) the remand was granted based upon or triggered by administrative error, (2) the remanding court did not retain jurisdiction, and (3) the remand clearly orders further agency proceedings, which allows the party "the possibility of attaining a favorable merits determination." *Blue v. Wilkie*, 30 Vet. App. 61 (2018), *citing Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016). Therefore, by applying the three-part test from *Dover*, the court here should find that Appellant is a prevailing party.

In this case, unlike the facts in either *Vaughn* or *Akers, supra*, the Court of Appeals for Veterans Claims issued a panel decision that set aside and remanded the Board's decision. Specifically, the Court determined the propriety of the 10% disability rating for residuals was properly before the Board and concluded that the Board based its credibility finding on an inaccurate description of the evidence of record.

B. Appellant is a Person Eligible to Receive an Award Under 28 U.S.C. § 2412(2).

In order to be eligible to file a petition for fees under 28 U.S.C. § 2412(d), a prevailing party must not be: (i) an individual whose net worth exceeded \$2,000,000.00 at the time the litigation began, nor (ii) a business entity whose net worth exceeded \$7,000,000.00 and which had more than 500 employees at the time the litigation began. 28 U.S.C. § 2412(d)(2)(B)(i), (ii).

Appellant had a net worth *under* \$2,000,000.00 on the date this action was commenced. (*See* Exhibit A, Certification of Net Worth). Moreover, Appellant was not a business entity. Therefore, Appellant is a person eligible to receive an award under the EAJA.

C. The Position of the Government was not Substantially Justified.

In order to be considered “substantially justified” under the EAJA, the government must show that its position was “justified to a degree that could satisfy a reasonable person,” i.e., has a reasonable basis in both law and fact. *Pierce v. Underwood*, 108 S. Ct. 2541, 2549-50 (1988); *Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989). The burden is on the Secretary to demonstrate that his position was substantially justified. *Brewer v. American Battle Monument Comm’n*, 814 F.2d 1964, 1569 (Fed. Cir. 1987); *Gavette*, 808 F.2d at 1465-66; *Essex Electro Eng’rs v. United States*, 757 F.2d 247, 252 (Fed. Cir. 1985).

To determine whether the government’s position was substantially justified, the Court is “instructed to look at the entirety of the government’s conduct and make a judgment call whether the government’s overall position has a reasonable basis both in law and fact.” *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). The “overall” position is that taken by the government “both prior to and during litigation.” *Id.* Thus, to prevail on “substantial justification” in this case, the government must demonstrate

that the agency action leading to litigation, i.e. the denial of Appellant's claim, as well as its litigation position in this Court, were "overall reasonable."

This Court further explained substantial justification in *Moore v. Gober*, 10 Vet. App. 436 (1997). In *Moore*, the Court held that in order "[t]o determine whether the Secretary's position was 'reasonable' during the administrative proceedings, the Court looks to the relevant determinative circumstances, including the state of the law at the time of the BVA decision." *Id.* at 440 (citing *Bowyer v. Brown*, 7 Vet. App. 549, 552 (1995)).

In this case, the government's position leading up to, and throughout this litigation was not "substantially justified" where the Court issued a panel decision that set aside and remanded the above-noted issues. Specifically, the Court determined the propriety of the 10% disability rating for residuals was properly before the Board and concluded that the Board based its credibility finding on an inaccurate description of the evidence of record.

D. No Special Circumstances Make an Award Unjust on this Appeal.

The Secretary does not meet the heavy burden of proving that "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). See *Devine v. Sutermeister*, 733 F.2d 892, 895 (Fed. Cir. 1984); *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991). Courts narrowly construe the "special circumstances" exception so as not to interfere with the Congressional purpose for passing the EAJA, i.e., to insure that litigants have access to the courts when suing the Government. See *Martin v. Heckler*, 772 F.2d 1145, 1150 (11th Cir. 1985); *Taylor v. United States*, 815 F.2d 249, 253 (3d Cir. 1987). "[T]hat few courts apparently have relied upon this exception to EAJA awards in denying fee applications is evidence that the circumstances of a case will infrequently justify a denial of an award." There is no reason or special circumstance to deny this Fee Petition.

II. THE COURT SHOULD AWARD APPELLANT REASONABLE FEES AND EXPENSES OF \$7,157.48.

The EAJA provides that a court “shall” award “fees and other expenses” when the other prerequisites of the statute have been met. 28 U.S.C. § 2412(d)(1)(A). The statute defines “fees and other expenses” to include reasonable attorney fees.” 28 U.S.C. § 2412(d)(2)(A).

When Congress has authorized the award of “reasonable” attorney fees, the amount to be awarded is based upon “the number of hours expended on the litigation multiplied by a reasonable hourly rate.” *See Hensley*, 461 U.S. at 433; *National Ass’n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982).

A. Hours Reasonably Expended

As the Declaration of Glenn R. Bergmann, Esq. (attached hereto as Exhibit B) documents, in the exercise of sound billing judgment, Appellant’s counsel is not asking for payment for time spent on administrative matters such as copying or filing, nor for communications (either written or oral) among co-counsel. Moreover, being mindful of the reasonableness requirement, Appellant is not requesting compensation for **97.3 hours – totaling \$20,582.40** -- of billable attorney time. (*See* Exhibit B). Appellant’s counsel submits that a reasonable attorney, exercising sound billing judgment, would charge for time spent on all matters included in Exhibit B – this may have included limited time expended for “peer review” where necessary to ensure that any briefs filed contained comprehensive and complete arguments pertinent to the underlying appeal. To the extent “peer review” time was expended, such would have involved senior attorneys and would have taken the place of “supervisory review” of a substantive pleading.

B. Reasonable Hourly Rate

Under the EAJA, the amount of fees awarded “shall be based upon the prevailing market rates for the kind and quality of services furnished” but “shall not be awarded in excess of \$125.00 per hour unless the Court determines that an increase in the cost of

living” is necessary. Appellant’s counsel, Glenn R. Bergmann, avers that the usual and customary fee for working on similar matters is between \$175.00 and \$250.00 per hour.

1. The EAJA Statutory Cap of \$125.00 Should be Adjusted Upward to Reflect the Increase in the Cost of Living.

Under 28 U.S.C. § 2412(d)(2)(A)(ii), attorneys may demonstrate that an increase in the cost of living justifies an increase in the \$125.00 per hour statutory cap. *See Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988) (referring to a cap of \$75.00 per hour “adjusted for inflation.”); *Philips v. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991). An increase for cost of living is generally allowed. *Johnston v. Sullivan*, 919 F.2d 503, 508-10 (8th Cir. 1990); *Animal Lovers Volunteer Ass’n, inc. v. Carlucci*, 867 F.2d 1224, 1227 (9th Cir. 1989); *Coup v. Heckler*, 839 F.2d 313, 320 (3d Cir. 1987); *Baker v. Brown*, 839 F.2d 1075 (5th Cir. 1988) (allowed except in unusual circumstances).

This Court in *Elczyn v. Brown*, 7 Vet. App. 170 (1994), decided for the first time that an Appellant’s attorney can petition for a fee in excess of the then statutory cap based upon the Consumer Price Index as published by the Bureau of Labor Statistics. *Id.* at 179-181. This Court further directed attorneys filing for an increased fee based upon the CPI to choose a mid-point in the litigation to establish the appropriate date for calculating the cost of living increase. *Id.* at 181. In this case, the Court issued a panel decision in October 2021. Appellant selects September 2020, as the date for calculating the CPI increase. *See Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994).

Appellant submits that the Court should increase the \$125.00 per hour cap by the general inflationary index in the cost of living since March of 1996, as reflected by the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV, area.¹ According to the most recent report from the Bureau of Labor Statistics, the CPI-U for the

¹ This Court determined that the local CPI-U should be used to calculate the cost-of-living increase. *Mannino v. West*, 12 Vet. App. 242 (1999). Accordingly, counsel has selected CPI-U for Washington-Arlington-Alexandria, DC-VA-MD-WV, to calculate the rate of inflation.

Washington-Arlington-Alexandria, DC-VA-MD-WV, area – rose 69.69% between March 1996, and September 2020. Applying the increase in the CPI to the statutory rate, Appellant’s counsel should be compensated at the rate of \$212.11 per hour. This rate was calculated by subtracting the CPI-U for September 2020 (268.788) from that of March 1996 (158.4), and dividing the result (110.388) by the CPI-U for March 1996. The result (.6969), representing the increase between March 1996 and September 2020 was then multiplied by the statutory rate (\$125.00), demonstrating an increase of \$87.11, which was added to the \$125.00 statutory rate to arrive at the inflation-adjusted rate of \$212.11 per hour.

In addition, Appellant avers that paralegals should be compensated at a rate of \$150.00 per hour, where the prevailing market rate for the work done by paralegals was at least \$173.00 from June 1, 2019, to May 31, 2020, and at least \$180.00 from June 1, 2020, to the present according to the most recent paralegals fees matrix prepared by the Civil Division of the United States Attorney’s Office for the District of Columbia (USAO).²

Considering the foregoing, Appellant’s counsel requests a fee of \$7,119.63 based upon 33.0 hours of attorney work and 0.8 hours of paralegal work; and \$37.85 in expenses (See exhibit B) for a total of \$7,157.48.

² See USAO Attorney’s Fees Matrix, 2015-2020 (“The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), aff’d in part, rev’d in part on other grounds, 746 F.2d 4 (D.C. Cir. 1984), cert. denied, 472 U.S. 1021 (1985), and then adjusted those rates based on the CPI-U for the Washington-Baltimore ... area.”); see also *Sandoval v. Brown*, 9 Vet. App. 177, 181 (1996); *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008).

Respectfully submitted,

/s/ Glenn R. Bergmann

GLENN R. BERGMANN, ESQ.

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(301) 986-0841

Counsel for Appellant

Exhibit A

CERTIFICATE OF NET WORTH

I, Glenn R. Bergmann, of Bethesda, Maryland, hereby declare that at no time during the course of this appeal to the Court of Appeals for Veterans Claims, did Appellant, Fred W. Foster, have a net worth of, or in excess of, \$2,000,000.00.

/s/ Glenn R. Bergmann
Glenn R. Bergmann

Exhibit B

DECLARATION OF APPELLANT'S COUNSEL,
GLENN R. BERGMANN

In support of Appellant's application for attorney's fees under 28 U.S.C. § 2412(d), I Glenn R. Bergmann hereby declare as follows:

1. I am an attorney licensed to practice in the State of Maryland, and am admitted to practice before the United States Court of Appeals for Veterans Claims.
2. I have represented Fred W. Foster in Foster v. McDonough, Vet. App. No. 19-7442 without charge.
3. In January 2022 I visited the website maintained by the U.S. Dept. of Labor, Bureau of Labor Statistics and ascertained the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV, area rose by 110.388 between March 1996, when the EAJA was amended, and September 2020.
4. In January 2022 I visited the website maintained by USAO and determined that market rate for paralegals was \$173.00 from June 1, 2019, to May 31, 2020, and \$180.00 from June 1, 2020, to the present.

The following is a statement of the exact service rendered and expenses incurred in the representation of the Appellant. In addition to Glenn Bergmann, Esq. (GRB), attorneys who may have worked on this appeal include: Joseph Moore (JRM); Tom Polseno (TMP); Daniel Wedemeyer (DDW); Sun H. Choi (SHC); Bryan Anderson (BBA); Steven Spitzer (SMS); Greta Allardyce (GRA); David Ames (DSA); Chitakone Arounlangsy (CQA); Kelsey Binder (KLB); Brian Blake (BJB); Sarah Burkey (SAB); Chanel Chasanov (CGC); Andrew Cho (AHC); Ken Ciardiello (KMC); Alan Coleman (ARC); Steven Cook (SJC); Simone Coyle (SKC); Corey Creek (JCC); Ceyla Esendemir (CEE); Michael Garza (MAG); Caroline Greene (CJG); Tiffany Guglielmetti (TMG); H. Ritter Haaga (HRH); Brandon Hairston (BAH); Melissa Hendricks (MAH); Jordan Hensley (JLH); Rachel Jiang (RBJ); John Juergensen (JLJ); Lila Kanovsky (MLK); Sharon Kim

(SRK); Joshua Leach (JDL); Ziadanne Lewis (ZPL); Andrea MacDonald (AMM); Robert Molson (RJM); Monica Moyo (MPM); Jonathan Murphy (JCM); Joseph Murphy (JLM); Christopher Parker (CJP); Kristin Parker-Fahey (KPF); Ryan Pau (RSP); Matthew Peterson (MFP); Justin Pollard (JSP); Homer Richards (HRR); James Ridgway (JDR); Samuel Rouleau (SJR); Ilan Roth (ILR); Scott Schulman (SAS); Kim Sheffield (KLS); Ronan Slater (RRS); Nicole Steers (NMS); Jenny Tang (JJT); Alpha Taylor (AST); Alex Tway (ACT); Srimukhi Vunnam (SRV); Max Yarus (MWY); and Hannah Youh (HCY). All are members of the Court's bar. Additionally, (P)aralegals who may have worked on this appeal include Elizabeth Green (P) (ERG); Taciana Melanson (P) (TSM); and Luis Zelaya (P) (LDZ).

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Timesheet: Fred W. Foster (19-7442)

January 31, 2022

Legal Services

Date	Description of Services	Total Hours (N/C) Billed	
9/19/19	BVA decision case screen (DSA/GRB)	.4	.4
10/10	T/C to client sign up (LML)	.2	(.2) .0
	Correspondence to veteran w/ attachments	.1	.1
10/28	Review documents from veteran including POA docs	.2	.2
	Prepare/file appearance/POA	.1	.1
	Prepared Financial Hardship	.1	.1
10/30	Review notice of docketing (SRK)	.1	.1
11/22	Prepare new client correspondence outlining appellate process w/ attachments (HRH/GB)	.2	.2
11/25	Prepare notice of appearance as co-counsel (JCC)	.1	.1
12/4	Review VA notice of appearance (JCC)	.1	.1
12/26	Review RBA filing notice (JCC)	.1	.1
12/30	Receive RBA CD (1698 pages) (RHJ)	.2	(.2) .0
1/13/20	E-corres to VA re: RBA response ext. (JCC)	.1	(.1) .0
	Prepare motion for extension of time to file RBA response (JCC)	.1	(.1) .0
1/30	RBA page-by-page review for legibility/completeness pursuant to R. 10; confirmed accuracy of all evidence/documents relied upon in BVA decision; determined relevance of incomplete/illegible documents identified in review, (pages 1- 837) (CJG)	2.5	2.5
1/31	RBA page-by-page review for legibility/completeness pursuant to R. 10; confirmed accuracy of all evidence/documents relied upon in BVA decision; determined relevance of incomplete/illegible documents identified in review, (pages 837- 1698) (CJG)	.7	.7

Date	Description of Services	Total Hours (N/C)	Billed
1/31	Prepare report re: RBA completeness/legibility; e-corres re: RBA review (CJG)	.4	.4
2/27	Prepare statement accepting RBA (JCC)	.1	.1
3/25	RBA merits review (ignoring illegible / incomplete documents previously deemed not relevant at R. 10) in preparation for drafting Rule 33 memo identifying potential bases for alternative resolution, taking notes, pages 150-1698 (JCC)	3.0	3.0
	RBA merits review (ignoring illegible / incomplete documents previously deemed not relevant at R. 10) in preparation for drafting Rule 33 memo identifying potential bases for alternative resolution, taking notes, pages 1-149 (JCC)	.5	.5
	Draft Rule 33 memo; identifying errors for alternative resolution consideration; R/B argument - credibility finding; SMC inextricably intertwined, incorporating law and cites (JCC)	1.3	1.3
4/21	Review order scheduling CLS conference (JCC)	.1	.1
4/22	Revise Rule 33 memo, adding citations to RBA & authorities where necessary; prepare R33 Certificate of Service (JCC)	.4	.4
	Create abstract RBA for CLS review (JCC)	.2	(.2) .0
4/23	Draft assessment re: case goals/merits (JCC)	.4	.4
5/19	Review litigation file inc. Rule 33 memo in preparation for CLS conference (JCC)	.3	.3
	E-corres from VA re: unable to offer JMR (JCC)	.1	.1
	Participate in CLS conference (JCC)	.1	.1
	Prepare CLS conference notes for file (JCC)	.1	.1
6/12	E-corres to VA re: additional argument for brief, applicable regulations rating reduction case (JCC)	.3	(.3) .0
6/15	E-corres from VA re: Mem. Decs. applying 3.344(a) to prostate cancer ratings (JCC)	.1	(.1) .0
	E-corres to VA research re: Mem. Decs. and response to VA's request (JCC)	.3	(.3) .0
6/18	Prepare motion for stay (JCC)	.1	.1
7/20	E-corres to VA re: need to continue stay (JCC)	.1	.1
	Prepare motion to continue stay (JCC)	.1	.1
8/12	T/c to client re: case status (JCC)	.1	.1
8/18	E-corres to VA re: status of VA's position on remand (JCC)	.1	.1

Date	Description of Services	Total Hours (N/C) Billed		
8/19	Prepare motion for extension of time to file Appellant's brief (JCC)	.1	(.1)	.0
9/16	Draft principal brief w/ nature of case / summary of issues, statement of relevant facts & procedural history; re 400-1698 for preparation of statement of facts (JCC)	3.0		3.0
9/18	Draft principal brief w/ nature of case / summary of issues, statement of relevant facts & procedural history; re 1-399 for preparation of statement of facts; draft summary of argument (JCC)	3.0		3.0
	Draft principal brief; R/B arguments re IR +10%, incorporating law and cites (JCC)	3.0		3.0
	Draft principal brief; R/B arguments re above and Begin arg reduction, incorporating law and cites (JCC)	3.0	(3.0)	.0
9/20	Draft principal brief; R/B arguments reduction cont'd, incorporating law and cites (JCC)	3.0	(3.0)	.0
9/21	Draft principal brief; R/B arguments re reduction and SMC, incorporating law and cites (JCC)	3.0	(2.0)	1.0
9/29	Supervisory review of draft principal brief; review related materials & identify add'l brief content (BBA)	2.5	(1.0)	1.5
10/1	Final review & revision of principal brief for filing (JCC)	2.5	(1.0)	1.5
10/5	Prepare table of authorities and table of contents for principal brief (JCC)	1.5	(1.5)	.0
10/6	Correspondence to client with attached principal brief	.1		.1
12/3	E-corres from VA re: position on ext. for brief (JCC)	.1		.1
	Review Sec. motion to ext. time to file brief (JCC)	.1		.1
1/26/21	T/c to client re: status update (JCC)	.1		.1
1/29	Prepare motion for extension of time to file reply brief (JCC)	.1	(.1)	.0
2/22	Review litigation file inc. briefs in preparation for reply brief (JCC)	1.5	(.5)	1.0
2/24	Draft reply brief; Reversal and R/B arguments, incorporating law and cites (JCC)	3.0	(3.0)	.0
	Draft reply brief; Reversal and R/B arguments, incorporating law and cites (JCC)	3.0	(3.0)	.0
3/5	Draft reply brief; concession (JCC)	1.5	(.5)	1.0
3/6	Draft reply brief; Reversal and R/B arguments, incorporating law and cites (JCC)	1.5	(1.5)	.0

Date	Description of Services	Total Hours (N/C) Billed		
3/9	Supervisory review of draft reply brief; review related materials & identify add'l brief content (BBA)	1.7	(1.2)	.5
3/14	Final review & revision of reply brief for filing (JCC)	1.5	(1.0)	.5
3/15	Prepare table of authorities and table of contents for reply brief (P) (ERG)	.5	(.5)	.0
3/17	Review table of authorities and table of contents for reply brief (P) (ERG)	.3	(.3)	.0
3/18	Correspondence to client with attached reply brief	.1		.1
4/1	Review ROP filing notice (JCC)	.1		.1
4/7	Review ROP for compliance with Rule 28 and note findings (KPF)	.6		.6
4/8	Prepare statement accepting ROP (JCC)	.1		.1
5/5	Review litigation file inc. briefs CAVC decision, Stern v. McDonough, for R.30(b) notice consideration (JCC)	1.5	(1.5)	.0
	Draft Rule 30(b) notice re: supplemental authority (JCC)	.4	(.4)	.0
	Supervisory review of Rule 30 letter (BBA)	.2	(.2)	.0
5/7	Review Court order re: panel (JCC)	.1		.1
5/13	Review Court order scheduling oral argument (JCC)	.1		.1
5/22	T/c to client re: case status - left VM (JCC)	.1		.1
5/24	Corres to client re: request for contact (JCC)	.1		.1
5/25	T/c to client re: case status, oral argument (JCC)	.1		.1
7/7	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0
7/8	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	2.0	(2.0)	.0
7/9	Supervisory review of case materials to familiarize w/ oral argument issues (TMP)	.9	(.9)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0
7/12	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.5	(3.5)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0

Date	Description of Services	Total Hours (N/C) Billed		
7/13	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.5	(3.5)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.5	(3.5)	.0
7/14	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0
	Review case materials to prepare for oral argument moot (SMS)	.6	(.6)	.0
7/15	Review case materials; participate in moot court (TMP)	1.9	(1.9)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0
	Participate in oral argument moot (SMS)	1.0	(1.0)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0
	Review case materials; participate in moot court (BBA)	2.0	(2.0)	.0
7/16	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.0	(3.0)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	2.0	(2.0)	.0
7/17	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.5	(3.5)	.0
7/18	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.5	(3.5)	.0
7/19	Participate in oral argument moot (SMS)	1.0	(1.0)	.0
	Review case materials in preparation for second moot court; participate in moot as judge (TMP)	2.3	(2.3)	.0
	Review briefs & cited cases in prep for oral argument moot (DDW)	1.1	(1.1)	.0
	Participate in oral argument moot (DDW)	1.0	(1.0)	.0
	Review litigation file inc. briefs in preparation for oral argument (JCC)	3.5	(3.5)	.0
7/20	Review oral argument materials provided by Court; participate in oral argument as second chair (TMP)	1.3	(1.3)	.0
	Review oral argument materials; participate in oral argument (JCC)	1.3	(1.3)	.0
10/20	Review mem. dec.; prepare memo summarizing outcome and consideration of R.35 (JCC)	.5		.5

Date	Description of Services	Total Hours (N/C) Billed		
10/22	Supervisory review of case materials & initial R.35 memo re recon (no) or appeal (possibly) (TMP)	.9	(.9)	.0
11/4	T/c to client Mem Dec outcome; options for appeal (BBA)	.2		.2
11/5	Prepare client memory drive with C-file	.1	(.1)	.0
11/16	Commence client correspondence re: case disposition and next steps (HCY)	1.9		1.9
11/17	T/c to client re: case disposition and next steps; left vm (HCY)	.1		.1
11/19	T/c to client re: case disposition and next steps; left vm (HCY)	.1		.1
11/22	T/c to client re: case disposition and next steps; left vm (HCY)	.1		.1
	Complete client correspondence re: case disposition and next steps (P) (TSM)	.1	(.1)	.0
1/19/22	Review mandate (GRB)	.1		.1
1/26	Compile time sheet (P) (LDZ)	.3		.3
	Prepare EAJA application (P) (LDZ)	.5		.5
	Supervisory review of EAJA application (SRK)	.2		.2
	Total Services Rendered	<u>131.1</u>	hrs	<u>27,702.03</u>
	Total Services Not Charged	<u>(-97.3)</u>	hrs	<u>(-20,582.40)</u>
	Total Charged Attorney Services	<u>33.0</u>	hrs	<u>6,999.63</u>
	Total Charged Paralegal Services	<u>0.8</u>	hrs	<u>120.00</u>
	Total Services Charged	<u>33.8</u>	hrs	<u>7,119.63</u>
	Expenses			
	Priority Mail	7.35	10/10/19	
	Standard Mail Rate	0.55	11/22/19	
	Priority Mail	7.75	10/06/20	
	Priority Mail	7.95	03/18/21	
	Standard Mail	0.55	05/24/21	
	Client Memory Drive	5.00	11/05/21	
	Priority Mail	8.70	11/22/21	
	Total Expenses	37.85		37.85
	Total current services rendered plus expenses			<u>\$7,157.48</u>

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/Glenn R. Bergmann January 31, 2022
Glenn R. Bergmann **Date**