IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

VETERANS LEGAL ADVOCACY GROUP, Petitioner,	)	
v.	)	Vet. App. No. 20-8291-EAJA
DENIS MCDONOUGH, Secretary of Veterans Affairs, Respondent.	)	

THE SECRETARY'S RESPONSE TO PETITIONER'S APPLICATION FOR ATTORNEY'S FEES AND EXPENSES

Pursuant to U.S. Vet. App. Rule 39(a)(1), Respondent, Denis McDonough, Secretary of Veterans Affairs (Secretary), responds in opposition to Petitioner's application for an award of attorney fees and expenses (Application) under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. The Secretary respectfully requests the Court deny the Application because Petitioner has failed to meet his burden of establishing prevailing-party status. The Secretary also contests the reasonableness of the Application.

STATEMENT OF THE CASE

On December 2, 2020, Petitioner, the law firm Veterans Legal Advocacy Group (VetLAG or Petitioner) filed a petition for extraordinary relief. In its petition, VetLAG contended that the Department of Veterans Affairs (VA) repeatedly sent correspondence to VetLAG's outdated addresses despite Petitioner's efforts to notify VA of its change of address. VetLAG requested that the Court compel VA to update Petitioner's mailing address in the VA system and to cease sending

documents and records to Petitioner's clients at addresses no longer associated with the firm. VetLAG further argued that sanctions were warranted to deter VA from sending future mailings to incorrect addresses.

The Court, on December 8, 2020, ordered Petitioner to file a supplemental memorandum of law addressing whether it even had standing to bring the petition before the Court. VetLAG submitted its response on January 13, 2021. Thereafter, on January 15, 2021, the Court ordered the Secretary to file a supplemental memorandum of law addressing the merits of the petition and whether Petitioner had standing to seek the requested relief. On March 2, 2021, the Secretary responded to the Court's January 15, 2021, order, and on March 30, 2021, petitioner replied to the Secretary's response.

On April 9, 2021, the Court sought additional information from the Secretary on how VA maintains and updates addresses for claimants' attorneys. On May 14, 2021, the Secretary responded to the Court's inquiries. On June 14, 2021, petitioner replied to the Secretary's May 14, 2021, response.

On July 16, 2021, the Court submitted the case to panel, and on October 29, 2021, the panel held oral argument. During oral argument, counsel for the Secretary asserted that VetLAG's petition was moot because all addresses for the attorneys identified in the petition had been updated within VA's central mailing database. Counsel for the Secretary further explained that because VA uses this central mailing database to pull addresses for all mailings, VA would send future mailing for the attorneys identified in VetLAG's petition to the correct Arlington,

Virginia, address. Further, in response to a question posed by the panel, Counsel for the Secretary asserted that an affidavit could be submitted providing proof that VA had resolved the issue.

Following oral argument, the panel determined that such an affidavit confirming that VA will send all future correspondence for attorneys identified in VetLAG's petition to the correct address would help the Court to decide whether to dismiss the petition as moot. Thus, on November 5, 2021, the Court (1) ordered Petitioner to provide the Secretary with file numbers for all its clients with matters pending before VA, and (2) ordered the Secretary to submit an affidavit, signed by several VA officials, addressing three questions concerning VA's mailing practices and policies.

On November 12, 2021, Petitioner certified that it sent Counsel for the Secretary the names and file numbers for all its clients with matters pending before VA. On January 11, 2022, the Secretary responded to the Court's November 5, 2021, Order with details on the client list submitted by Petitioner and with attached affidavits from VA General Counsel, Mr. Richard Sauber; Board Chairman, Ms. Cheryl Mason; and Acting Under Secretary for Benefits, Mr. Thomas J. Murphy. The Secretary confirmed that VA updated Petitioner's addresses within the VA central database for all identified attorneys and clients, only excepting the 10 clients for whom Petitioner could not supply updated information. While Petitioner was provided an opportunity to respond to the Secretary's January 11, 2022, response, VetLAG elected not to respond.

On February 14, 2022, the Court issued its decision, dismissing VetLAG's petition for extraordinary relief as moot without addressing standing or the merits of the petition.

ARGUMENT

The Court generally has jurisdiction to award reasonable attorney fees and expenses to a prevailing party unless the Court finds the position of the Secretary was substantially justified or that special circumstances exist making an award unjust. 28 U.S.C. § 2412(d); *Evington v. Principi*, 18 Vet. App. 331, 333 (2004). Here, however, the Court should deny Petitioner's Application because it has primarily failed to show prevailing-party status in the face of the Court's Order dismissing the Petition as moot. Alternatively, should the Court find that Petitioner was the prevailing party, the Secretary respectfully requests that this Court use its discretion to substantially reduce Petitioner's EAJA application based on a lack of reasonableness and vagueness, which represents inappropriate billing to the U.S. Government.

1. Petitioner is Not Entitled to EAJA Fees Because It Was Not a Prevailing Party

Petitioner has failed to show prevailing-party status.[1] EAJA fees may be awarded only to prevailing parties. *See* 28 U.S.C. § 2412(d)(1)(A), (1)(B), (2)(B);

[1] It is also unclear whether Petitioner, as a law firm, satisfies the definition of "party" pursuant to the provisions of 28 U.S.C. § 2412(d)(2)(B). In this regard, EAJA fees are awarded to the litigant, not the attorney. *See Astrue v. Ratliff*, 560 U.S. 586, 593 (2010); *Froio v. McDonald*, 27 Vet.App. 352, 360 (2015).

Scarborough v. Principi, 541 U.S. 401, 407-08 (2004). And it is the responsibility of the party seeking EAJA fees to show prevailing-party status to this Court. *Chandler v. Gober*, 11 Vet.App. 6, 7-8 (1997).

At one time, this Court considered a party to have prevailed if "as the result of the suit's 'catalytic effects,'" *id.*at 7, he could show "(1) a causal connection between the litigation and the relief obtained[ ] and (2) that [VA] did not act gratuitously in granting the [party's] relief," *Weierbach v. West*, 12 Vet.App. 486, 487 (1999) (internal quotation marks and citation omitted). But in *Buckhannon Bd. & Care Home, Inc. v. W. VA. Dept. of Health & Human Res.*, 532 U.S. 598 (2001), the Supreme Court rejected the "catalyst theory." *Id*. at 610. And this Court subsequently held that "the catalyst theory is no longer available to achieve prevailing-party status [under EAJA]." *Thayer v. Principi*, 15 Vet.App. 204, 211 (2001); *see also Vaughn v. Principi*, 336 F.3d 1351, 1357 (Fed. Cir. 2003) ("This court further holds that the catalyst theory is an improper basis for an award of attorney fees as a 'prevailing party' under EAJA."). This was recently reaffirmed in *Cavaciuti v. McDonough*, 75 4th 1363 (Fed. Cir. 2023).

The "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-793 (1989). This change must be marked by "judicial *imprimatur*." *Buckhannon*, 532 U.S. at 605. The Supreme Court has explained that, when a plaintiff secures an "enforceable judgmen[t] on the merits" or a "court-ordered consent decre[e]," that plaintiff is the prevailing party

because he has received a "judicially sanctioned change in the legal relationship of the parties." *Id.* at 604-605; *see also Akers v. Nicholson*, 409 F.3d 1356, 1359 (Fed. Cir. 2005). This is so even though "[a] defendant's voluntary change in conduct . . . perhaps accomplish[es] what the plaintiff sought to achieve by the lawsuit." *Buckhannon*, 532 U.S. at 605. Under this Court's precedent, an appellant (or petitioner) is considered a prevailing party upon either "(1) the ultimate receipt of a benefit that was sought in bringing the litigation, i.e., the award of a benefit, or (2) a court remand predicated upon administrative error." *Zuberi v. Nicholson*, 19 Vet.App. 541, 544 (2006); *see also Sumner v. Principi*, 15 Vet.App. 256, 264 (2001) (en banc).

Here, Petitioner is not a prevailing party because there was no "judicially sanctioned change in the legal relationship of the parties." *Buckhannon*, 532 U.S. at 604-605. The Court dismissed the Petition as moot because Petitioner was provided the relief sought—that VA updated its databases to reflect Petitioner's correct address—leaving no remaining case or controversy. *See* Court's February 14, 2022, Order, at 1; *see also Melkonyan v. Sullivan*, 501 U.S. 89, 96 (1991) (noting that EAJA fees are awarded under 28 U.S.C. § 2412(d) for success in court, not success in obtaining relief from an administrative agency). The Court's Order did find error with the Secretary's actions or otherwise engage with the merits of the Petition. *See id.*; *Zuberi*, 19 Vet.App. at 544. Because there was no enforceable judgment on the Petition, i.e., the issuance of a writ of mandamus, there was no "judicial *imprimatur*." *Id*. at 605. And because there was no "judicial

imprimatur," there was no "material alteration of the legal relationship of the parties." *Texas State Teachers Assn.*, 489 U.S. at 792-793. It is of no moment that "[a] defendant's voluntary change in conduct . . . perhaps accomplish[es] what the plaintiff sought to achieve by the lawsuit." *Buckhannon*, 532 U.S. at 605; *see also Rice Services, Ltd. v. United States*, 405 F.3d 1017, 1027 (Fed. Cir. 2005) (holding that prevailing-party status was not conferred on a party when the defendant took unilateral action to grant the remedy sought and the court did not enter a merits adjudication on the matter). Thus, Petitioner is not a prevailing party because the Court dismissed the Petition.

Indeed, this Court has consistently denied requests for EAJA fees where a petition for extraordinary relief was dismissed as moot based on the *Buckhannon* principles. *See*, *e.g.*, *Sabir v. Wilkie*, 2019 U.S. App. Vet. Claims LEXIS 1871; *Jeremiah v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 728; *Smalls v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 664; *Bailes v. McDonald*, 2015 U.S. App. Vet. Claims LEXIS 584; *Whitehead v. Shinseki*, 2014 U.S. App. Vet. Claims LEXIS 74; *Lowe v. Shinseki*, 2013 U.S. App. Vet. Claims LEXIS 1639; *Morton v. Shinseki*, 2013 U.S. App. Vet. Claims LEXIS 216; *Brown v. Shinseki*, 2011 U.S. App. Vet. Claims LEXIS 1547; *Groves v. Shinseki*, 2009 U.S. App. Vet. Claims LEXIS 1641; *Moore v. Shinseki*, 2009 U.S. App. Vet. Claims LEXIS 1599; *Cabiya v. Nicholson*, 2007 U.S. App. Vet. Claims LEXIS 541; *Buescher v. Nicholson*, 2005 U.S. App. Vet. Claims LEXIS 774; *Boose v. Principi*, 2002 U.S. App. Vet. Claims LEXIS 560; *Colayong v. Principi*, 2002 U.S. App. Vet. Claims LEXIS 259; *Belton v. Principi*, 2001 U.S.

App. Vet. Claims LEXIS 138.[2] Similarly, the Federal Circuit has denied EAJA fees where the sole basis for prevailing party status was premised on the catalyst theory. *See Cavaciuti v. McDonough*, 75 F.4th 1363, 1366 (Fed. Cir. 2023).

Petitioner mistakenly relies on this Court's November 5, 2021, Order to establish that it is the prevailing party. *See* Application at 2-3; *see also* Court's November 5, 2021, Order. Contrary to Petitioner's suggestions, the Court did not order the Secretary to take any remedial actions in that November 2021 Order. Instead, the Court merely summarized the actions Counsel for the Secretary stated had *already* occurred; specifically, that the Petition was "moot because VA ha[d] corrected the addresses for all VLAG attorneys identified in the petition." *See* Court's November 5, 2021, Order at 1. The Court also noted that Counsel for the Secretary had argued, during oral argument, that the Secretary would provide an "affidavit from a VA official[,]" attesting under oath that the actions described above had occurred. *Id*. The Court then directed Counsel for the Secretary to provide such an affidavit, because as the Court stated, such an affidavit would help [the Court] determine whether the issue raised in the Petition is moot. *Id*. at 2. Thus, Petitioner is mistaken when it asserts that but for the November 5, 2021, Court Order, the Secretary would not have fixed VA's mailing databases. *See* Application at 2. Quite to the contrary, the Secretary corrected the reported

[2] This nonprecedential authority is cited only for the persuasive value of its logic and reasoning showing consistency in the Court's application and interpretation of *Buckhannon*. U.S. Vet. App. Rule 30(a).

problem well before the Court's November 5, 2021, Order and, in response to the Court's order, provided an affidavit asserting to actions the Sectary had *already* taken.

Petitioner is also mistaken when it asserts that the Secretary reused to fix its mailing problem until ordered to do so. *See* Application at 2-3, Fn. 4. Specifically, Petitioner points to two filings from the Secretary wherein it alleges that the Secretary "refused to fix[ ] the problem." *Id*. But once again, Petitioner is mistaken. In his March 2, 2021, Response to the Court's January 15, 2021, Order, the Secretary argued that Petitioner lacked standing to bring its petition because the law firm had not demonstrated how it had been harmed. *See* Secretary's March 2, 2021, Response. This response addressed only the merits of Petitioner's standing argument. *Id*. Similarly, in his May 14, 2021, Response to the Court's April 9, 2021, Order, the Secretary responded to a series of questions posed by the Court regarding VA's process for maintaining and updating addresses for claimants' attorneys. *See* April 9, 2021, Court Order; *see also* May 14, 2021, Response to Court Order. Thus, Petitioner is again mistaken when it characterizes the Secretary's response as a refusal to remediate the issue absent a Court order.

In addition to the proceedings here being distinguishable, *Buckhannon*'s discussion speaks to litigation strategy (referred to as "policy arguments"), not an exception to the "catalyst theory." *See Buckhannon*, 532 U.S. at 609. In other words, if a court may not find that a case is moot, a defendant may consider settlement rather than risking an enforceable judgement that may lead to attorney's

fees under *Buckhannon*'s requirement that to establish prevailing party status, a party must obtain "judicially sanctioned change in the legal relationship of the parties," like an enforceable judgement or a writ of mandamus. *Id*. at 604-05; *see id.* at 639-40 (Ginsburg, J., dissenting) (noting, in rejecting various policy arguments, that, "[b]ecause a mootness dismissal is not easily achieved, the defendant may be impelled to settle, negotiating fees less generous than a court might award."). Petitioner did not obtain an enforceable judgement in this case and thus lacks the required "judicial *imprimatur*." *See* Court's February 14, 2022, Order.

What remains then is really a contention that Petitioner was a prevailing party under the "catalyst theory;" that, but for Petitioner filing the Petition and counsel's advocacy, it would not have obtained the relief sought. *See generally* Application. But, as detailed above, that very theory has been rejected by the Supreme Court, the Federal Circuit, and this Court. *See Buckhannon*, 532 U.S. at 610; *Vaughn*, 336 F.3d at 1357; *Thayer*, 15 Vet.App. at 211. A finding that Petitioner is a prevailing party here "otherwise would expose a backdoor through which claimants could circumvent *Buckhannon* by obtaining attorney's fees for what are, in essence, "catalyst theory" cases." *Rice Servs., Ltd.*, 405 F.3d at 1028. Additionally, Petitioner's speculation about what could have been in this case if the course of proceedings had gone differently is just the sort of inquiry the Supreme Court shunned in *Buckhannon* because it "would require analysis of [VA's] subjective motivations in changing its conduct." *Id*. at 609. Moreover, the

Supreme Court emphasized that a request for attorney's fees should not result in a second major litigation, which is what Petitioner essentially invites here. *See id*. (citing *Hensley* v. *Eckerhart,* 461 U.S. 424, 437 (1983); *Texas State Teachers Assn.*, 489 U.S. at 791)). The prevailing party analysis under *Buckhannon* is outcome-driven, *i.e.*, whether an enforceable judgement was obtained, not circumstance-driven, *i.e.*, what happened leading to the case's disposition, including a party's voluntary actions. And that outcome-driven analysis is simple—no "judicial *imprimatur*," no EAJA fees or, here, no writ of mandamus, no EAJA fees.

Thus, this Court should find that Petitioner has not demonstrated that it is a prevailing party entitled to EAJA fees. The Supreme Court unambiguously held that the "catalyst theory," is not a permissible basis for the award of attorney's fees under fee-shifting statutes. *Id*. The Court should find that Petitioner has failed to meet his burden of showing prevailing-party status. *Chandler*, 11 Vet.App. at 7-8.

The Secretary asserts this matter fails because Petitioner cannot show it was a prevailing party. However, if the Court disagrees, the Secretary asserts his position was substantially justified. Once an EAJA applicant alleges that the Secretary's position lacked substantial justification, *see* Application at 5, the burden shifts to the Secretary to show that the Government's position was substantially justified at both the administrative and litigation stages of the matter in order to avoid paying EAJA fees. *See Locher v. Brown*, 9 Vet. App. 535, 537 (1996). To meet this burden, the Secretary must demonstrate that, based on "the

totality of the circumstances, including merits, conduct, reasons given, and consistency with judicial precedent," his position at the administrative and litigation stages of the proceeding had "a reasonable basis in law and fact." *Stillwell v. Brown,* 6 Vet. App. 291, 302 (1994) (quoting *Pierce v. Underwood*, 487 U.S. 552, 566 n.2 (1988)).

The Secretary notes that concept of substantial justification does not fit neatly where the Petition was dismissed as moot after the voluntary actions of the Secretary. And because Petitioner has not shown the predicate prevailing-party status, whether the Secretary's position was substantially justified is moot.

2. Should The Court Find Petitioner Was a Prevailing Party, it Should Substantially Reduce Petitioner's EAJA Fees As They Are Unreasonable

Finally, the fees sought in the Application are not reasonable.[3] Because Appellant has failed to show prevailing-party status, the Secretary submits that the fees sought in the Application are *per se* unreasonable under the EAJA, including all time itemized seeking EAJA fees. But, if the Court finds that Petitioner was a prevailing party and that the Secretary's position was not substantially justified, the Court should substantially reduce Petitioner's Application based on a lack of reasonableness and vagueness, which represents inappropriate billing to the U.S. Government.

[3] Because the dispositive question here is prevailing-party status, the Secretary has not consulted Petitioner about the amount and reasonableness of the fees sought in the Application. *See* U.S. Vet. App. Rule 39(a)(1).

Under the EAJA, this Court has authority to award reasonable attorney fees and expenses. *See* 28 U.S.C. § 2412(d)(1). The Court has wide discretion in determining reasonableness. *Chesser v. West*, 11 Vet.App. 497, 501 (1998); *see also* 38 U.S.C. § 2412(d)(2)(A). The reasonableness of a request for attorney fees and expenses requires a court to consider whether the hours billed are unreasonable on their face, contraindicated by factors set forth in case law, or otherwise persuasively opposed by the Secretary. *McCormick v. Principi*, 16 Vet.App. 407, 413 (2002). A reasonable fee may not be more than that which would normally be charged to and paid by a private client. *Sandoval v. Brown*, 9 Vet.App. 177, 182 (1996); *see also Andrews v. Principi*, 17 Vet.App. 319, 321 (2003) ("'Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority.'" (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983))). Appellant has the burden of establishing entitlement to an award and demonstrating that the fee request is reasonable. *Baldridge v. Nicholson*, 19 Vet.App. 227, 235 (2005).

When determining the reasonableness of an application, this Court "'may consider a number of factors, including whether the work performed was duplicative, if an attorney takes extra time due to inexperience, or if an attorney performs tasks normally performed by paralegals, clerical personnel, or other non-attorneys.'" *Andrews,* 17 Vet.App. at 321 (quoting *Ussery v. Brown*, 10 Vet.App. 51, 53 (1997)). This Court has also determined that "[l]arge blocks of time associated with either many tasks or a single task with only generalized

descriptions . . . are not specific enough to permit the Court an adequate basis for review and are subject to reduction." *Baldridge*, 19 Vet.App. at 235 (citing *Andrews*, 17 Vet.App. at 321). In that regard, this Court has disapproved of the practice of billing intervals of time of three hours or more where the work performed is not sufficiently described. *Baldridge*, 19 Vet.App. at 244. And time spent learning the law is not properly billed to the government. *See Chesser v. West*, 11 Vet.App. 497, 501 (1998) (disallowing as "expected background" fees billed for general veterans law research); *see also Ussery v. Brown*, 10 Vet.App. 51, 53 (1997) (holding that the Court may consider if an attorney takes extra time due to inexperience when evaluating the reasonableness of an EAJA application).

Moreover, the government is not properly billed for clerical or administrative tasks, to include items such as creating and updating table of contents or authorities, receiving documents, and reviewing docket entries. *See Baldridge*, 19 Vet.App. at 236; 244-46 (reducing the application to eliminate clerical and administrative charges such as "prepare representation forms, set up files," "receive correspondence from client," "receive. . . appellee's motion f or remand," "receive voicemail from Office of General Counsel attorney," "receive Court order," "receive . . . Court order regarding briefing conference"). This is so "[b]ecause of the assumption that 'work done by librarians, clerical personnel and other support staff . . . [is] generally considered within the overhead component of a lawyer's fee.'" *Id*.

This Court has wide discretion in the award of attorney fees under EAJA. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). And where the applicant has not met her burden of demonstrating the reasonableness of the fees billed, the Court may reduce the fee award. *Id.* at 433-34. Here, if Petitioner is found to be entitled to a fee, the Secretary asserts the requested fee should be substantially reduced.

I. Petitioner's Application Includes Charges which are Excessive, Duplicative, Billed for Unproductive Efforts, Billed for Administrative Tasks, or Otherwise Inappropriately Billed

As discussed above, the case law is quite clear that a reasonable fee in an application under 28 U.S.C. § 2412(d)(2)(A) is one that would normally be charged to a private client. *Sandoval v. Brown*, 9 Vet.App. 177, 182 (1996). As applicable here, the Court should reduce from Petitioner's EAJA application all time spent on drafting and filing Petitioner's January 13, 2021, Response to the Court's December 8, 2021, Order. *See* Application at 11 (totaling approximately 8 hours). The Secretary submits that the time spent on this response is unreasonable given that it was solely due to a deficiency in VetLAG's initial petition for extraordinary relief. Specifically, had Petitioner fully addressed the initial jurisdictional threshold question of whether it had standing to bring the petition in its initial application, the Court would not have ordered Petitioner to supply this supplemental memorandum of law. The Secretary submits that it would not be reasonable for Petitioner to bill a private client for such a mistake or oversight, and thus it is not appropriate for Petitioner to bill the Government for its mistake.

Next, Petitioner's EAJA application is unreasonable due to the excessive amount of block billing and vague descriptions for work performed. For example, Petitioner itemized the following for Meghan Gentile: 6 hours on October 25th, 10 hours on October 26th, 10 hours on October 27th, 10 hours on October 28th, and 12 hours on October 29th, all with the vague description of "OA prep (moot, practice, discuss, research)," and without any precise breakdown for how much time was spent on each specific task. *See* Application at 14-16. This practice is impermissible. *See Baldridge*, 19 Vet. App. at 235 ("Large blocks of time associated with either many tasks or a single task with only generalized descriptions such as 'research' or 'conference' are not specific enough to permit the Court an adequate basis for review and are subject to reduction."); *Andrews*, 17 Vet. App. at 321 (deciding that a significant reduction in hours billed was warranted where the attorney listed the time billed in increments in excess of three hours with vague descriptions of what occurred during those hours).

Aside from this block billing being impermissible, it is concerning for two additional reasons. First, while Petitioner itemizes 6 hours by Meghan Gentile for on October 25th for "OA prep (moot, practice, discuss, research)," 6 additional hours were also billed that day for "Travel to DC for OA." *See* Application at 14. Also, on October 29th, the day the oral argument was held, virtually, Meghan Gentile bills 12 hours, for the same vague "moot prep" and then an additional 1.75 hours for attending the virtual argument. *See* Application at 16. This amount of time is both unreasonable and questionable as the feasibility of someone billing 12

hours for preparation prior to an argument held that same day at 1pm. Second, the vagueness of this block billing is amplified when compared with the time itemized by Parker Low for the same moot preparation. For example, over the same time span, Parker Low bills in much smaller increments and with much more detailed descriptions for the time spent. *See*, *e.g.*, Application at 16 (on October 28th itemizing 0.25 for "OA – Serve as a moot court judge for HHH, and ask questions on the process and possible sanctions, standing, and ramifications," 1.00 for "OA – Work with HHH on the opening statement. Make it smoother," 0.1 for "OA - Review and highlight fee agreement with language re: agreeing with VetLAG, not attorney."). A simple comparison of the time itemized by Parker Low, as compared to Meghan Gentile, for all entries related to moot preparation highlights the vagueness, and therefore unreasonableness, of the block billing entries for Meghan Gentile.

Next, the Secretary submits that it is unreasonable for Petitioner to bill for any travel or lodging expenses associated with the oral argument held in this matter because it was a virtual argument. *See* 28 U.S.C. § 2412(b) (specifying that only reasonable fees *and expenses* should be awarded); *see also Gisbrecht v. Barnhart*, 535 U.S. 789, 807 n.17 (2002) (explaining that when a fee-shifting statute requires a court to make a finding of reasonableness, the award applicant "bears the burden of persuasion that the statutory requirement has been satisfied"). Petitioner makes no effort to explain why such travel was necessary or how it would be reasonable to bill for anything associated with such travel (e.g.,

plane tickets, time itemized for travel, COVID testing, and an AirBnB). This matter was called to panel and a notice for oral argument was issued on July 28, 2021. Thereafter, on August 23, 2021, the Court issued a second order confirming that the argument would be held remotely. It is unclear from Petitioner's EAJA application why, if the argument was held remotely, it was reasonable or necessary for both lead counsel and co-counsel to travel to Washington, D.C. Petitioner fails to satisfy his burden in this regard.

It is also unclear from Petitioner's EAJA application why it was necessary, or reasonable, to bill the government $1,120.10 for an AirBnB. *See* Application at 19. The EAJA application is also unclear as to how many nights this AirBnB was rented for; however, the EAJA application suggests that it was for the time period between October 25th to November 5th. *See* Application at 14, 16 (documenting travel days). But this raises yet another unexplained question: why, if the oral argument was held on October 29th, which again it was held virtually, was it necessary for Petitioner's counsel to stay an additional seven days? And why, would it be reasonable to expect the government to foot the bill for this additional time?[4] Again, Petitioner fails to satisfy his burden in this regard.

[4] In a non-precedential opinion, the Court recently addressed the reasonableness of lodging, confirming it is the EAJA applicant's burden to establish its reasonableness. *See Kellogg v. Wilkie*, 2020 U.S. App. Vet. Claims LEXIS 2127 (Vet.App. 17-2348(E), Nov. 25, 2020). This nonprecedential authority is cited only for the persuasive value of its logic and reasoning. U.S. Vet. App. Rule 30(a).

The Secretary also submits that it was unnecessary and unreasonable for Petitioner to itemize $296.90 for "HH Covid Tests for int'l travel." *See* Application at 19. Again, the Secretary asserts that because this argument was held remotely, all charges related to travel to Washington, D.C., are *per se* unreasonable as it was not necessary. Nor has Petitioner shown any of the expenses are properly billed to the Government.

As Petitioner has not carried its burden of establishing that any of the itemized charges for travel for an oral argument, that was held remotely, was necessary or reasonable, all charges related to such travel should be eliminated, or at the very least, substantially reduced. *See American Civil Liberties Union of Georgia v. Barnes*, 168 F.3d 423, 428 (11th Cir. 1999) ("If fee applicants do not exercise billing judgment, courts are obligated to do it for them . . . Courts are not authorized to be generous with the money of others, and it is as much the duty of courts to see that excessive fees and expenses are not awarded as it is to see that an adequate amount is awarded."); *see also Rhodan v. West*, 12 Vet.App. 55, 58 (1998) (acknowledging the Secretary's duty to "present[] the kind of vigorous defense of the public fisc that the taxpayers have a right to expect").

Finally, the Secretary submits that Petitioner's EAJA application should be substantially reduced as it has improperly billed the government for clerical or administrative tasks. *See Baldridge*, 19 Vet.App. at 236; 244-46. While the average charge of 0.1 to 0.3 hours may not appear an unreasonable amount to bill for any time claimed for all similar actions billed are excessive when considered *in*

toto. *See* Application at 10-19 (0.25 on 12-2-2020 by HHDC to "File new petition with docs," 0.10 on 12-2-2020 by HHDC to "Enter appearance," 0.10 on 1-13-2021 by HHDC to "File response to original Court order," 0.25 on 3-5-2021, by HHDC to "Draft and file motion for leave to file," 0.10 by HHDC on 3-30-2021 by HHDC to "File Response to Secretary," 0.25 on 4-9-2021 by HHDC to "Review Court order[,]" 1.50 on 6-11-2023 by HHDC to "Draft table for section"[5], 0.10 by PL on 7-16-2021 to "Review the Court's assignment of the case to a panel of judges," 0.10 by MG on 7-30-2021 to "Enter appearance," 0.25 by HHSP on 11-12-2021 to "Draft and file CoS/order compliance," and 0.50 on 10-10-2023 by HHSP to "File EAJA Application.")

In sum, the Secretary submits that the Court should use its discretion to substantially reduce Petitioner's EAJA application because it is unreasonable, vague, and contains many instances of impermissible billing, if the Court otherwise finds Petitioner the prevailing party.

CONCLUSION

WHEREFORE, the Secretary respectfully requests the Court deny Petitioner's Application, or in the alternative, substantially reduce the requested fee.

[5] The Secretary asks the Court to take judicial notice of the fact that automated table generation is a commonly available tool in word processing applications such as Microsoft Word, and through modern legal research services such as Westlaw and LexisNexis. *See Tagupa v. McDonald*, 27 Vet.App. 95, 100 (2014) ("[T]he Court may take judicial notice of facts not subject to reasonable dispute if such facts are generally known or are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

Respectfully submitted,

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