IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

SHERRY CRAIG-DAVIDSON,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 20-4372
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

APPELLEE'S RESPONSE TO APPELLANT'S APPLICATION FOR ATTORNEY'S FEES AND EXPENSES

ISSUES PRESENTED

1. **Whether the Secretary was substantially justified where the Panel of the Court adopted a new rule in veterans benefits law, and where the issue was one of first impression.**

2. **In the alternative, whether the $27,271.05 in attorneys' fees requested in Appellant's December 6, 2023, Equal Access to Justice Act (EAJA) application should be reduced based on, *inter alia*, a lack of reasonableness.**

STATEMENT OF THE CASE

Appellant seeks EAJA fees totaling $27,271.05 in connection with her appeal of the December 3, 2019, Board decision that denied entitlement to service connection for residuals of lung cancer. On June 22, 2020, Appellant, then proceeding *pro se*, filed a Notice of Appeal (NOA) from a December 3, 2019, Board of Veterans' Appeals (Board) decision issued in the name of the veteran, Virgil Davidson. The NOA lists both Appellant and the Veteran. On August 17, 2020, the Secretary filed a motion to dismiss the appeal as untimely.

Appellant responded to the motion and asserted that she was unable to file a timely NOA as a result of the Veteran's health and she requested that her NOA be accepted as timely "due to [the] unusual circumstances required to care for [the V]eteran and required to settle matters of [the] estate." The Court held the Secretary's motion to dismiss in abeyance, stayed proceedings in the appeal, and ordered Appellant to provide a copy of the Veteran's death certificate and to inform the Court whether she filed a claim for accrued benefits at the VA regional office. Following additional proceedings, the Secretary informed the Court that Appellant met the basic eligibility requirements for substitution as the Veteran's spouse and is an eligible accrued benefits claimant pursuant to 38 U.S.C. §§ 5121(a), 5121A.

In June 2021, the Court ordered both parties to file a memorandum of law addressing whether Appellant had statutory and constitutional standing to pursue an appeal of the December 3, 2019, Board decision, and the import, if any, of her allegation that she did not timely file an NOA due to the Veteran's health, including the "unusual circumstances required to care for [the V]eteran and required to settle matters of [the] estate", because unlike the circumstances in *Demery v. Wilkie*, the veteran died, and Appellant filed her NOA, more than 120 days after the Board's decision. *See Demery v. Wilkie*, 30 Vet.App. 430, 438 (2019). Appellant argued that *Demery* applies but, the Secretary asserted that Appellant's case is distinguishable from *Demery,* the Veteran died after the date

permitted to file an NOA, thus the holding and analysis in *Demery* does not apply.

The case was submitted to panel and the Court ordered oral argument on the issue. The panel denied the Motion to Dismiss in May 2022. In its decision, the Court acknowledged that the Court in *Demery* held that an accrued-benefits claimant has statutory and constitutional standing "to file an appeal on his or her own behalf when a veteran dies during the time permitted to file an NOA*." Craig-Davidson v. McDonough*, 35 Vet. App. 281, 291 (2022) (citing *Demery v. Wilkie*, 30 Vet. App. 430, 438 (2019)). The Court also acknowledged that this required it to address how broadly, or narrowly, it should read the emphasized language. *Id.* . In its discussion of standing, the panel held stated that, "the Court in *Demery* was not called upon to address whether the relevant window for determining an accrued-benefits claimant's standing is limited to the 120-day statutory deadline without regard to whether the veteran would have been required to file an NOA on his or her behalf within that period." *Id.* . The Court held that "an eligible accrued-benefits claimant steps into the shoes of the veteran at the time of the veteran's death; if the veteran's time to appeal an adverse Board decision had not expired because the Court determines that equitable tolling applies, the accrued-benefits claimant may avail himself or herself of the tolled period to satisfy the requirement in *Demery* that the death occur during the period to appeal." *Id.* at 292. This means, that" if the Board

issues a decision denying benefits to the veteran on whose behalf accrued-benefits status is based, and the veteran died while he or she could have still appealed the Board decision, the accrued-benefits claimant is adversely affected by the Board's decision in the same manner as the deceased veteran and has standing to challenge it." *Id.* . The panel also ordered the Secretary to serve the record before the agency (RBA) within 30 days. *Id.* at 294.

Pursuant to the Court's Rule 10 process, the Secretary served the RBA on Appellant in June 2022. Appellant did not dispute the contents of the RBA. In September 2022, the parties participated in a pre-briefing staff conference under Rule 33 of the Court's Rules. Appellant filed a brief in November 2022. The Secretary filed a brief defending the Board's decision in March 2023. Appellant filed a reply brief in March 2023. The Court issued a Memorandum Decision remanding the Board's decision in September 2023.[1]

In December 2023, Appellant filed his EAJA application (EAJA App.) and 16-page EAJA attachment (Attachment) for attorney fees pursuant to 28 U.S.C. § 2412(d) seeking $27,271.05 in fees.[2]

[1] The Court held that the Board failed to adequately discuss favorable evidence that affect a major element necessary for service connection.

[2] These requested fees include $26,726.55 (111.50 hrs at a rate of $239.70 per hour) for attorneys Thomas Stoever, Eliseo Puig, David Jelsma, and Elizabeth Stonehill and paralegal Rebecca Golz. The request also includes expenses totaling $544.50.

SUMMARY OF ARGUMENT

The Court should deny Appellant's EAJA application because the Secretary was substantially justified in filing a Motion to Dismiss Appellant's Appeal. In both the June 2021 Court and the May 2022 panel decision, the Court acknowledged that *Demery* did not address whether the relevant window for determining an accrued-benefits claimant's standing is limited to the 120-day statutory deadline without regard to whether the veteran would have been required to file an NOA on his or her behalf within that period.

In the alternative, the Court should exercise its authority to substantially reduce Appellant's fee application based on a lack of reasonableness and vagueness which represents inappropriate billing to the U.S. Government. Specifically, the Secretary challenges reasonableness of the fee sought on the basis that the billing rate of $239.70 per hour for paralegal work is not the correct prevailing market rate in Denver, Colorado and was not calculated using a proper analytic framework.[3] Appellant has also engaged in the practice of "block billing" wherein multiple itemizations for the time sought are listed in large blocks of time exceeding three hours with vague descriptions of work performed. Due to the vague and generalized nature of the entries, the Secretary respectfully submits that Appellant has failed to carry his burden of

[3] The Secretary does not dispute the amount of hourly rate calculated by Appellant for the attorneys.

demonstrating the reasonableness of his application. Additionally, Appellant improperly bills the government for clerical and/or administrative tasks. As such, the Secretary requests the Court substantially reduce the amount sought.

PRELIMINARY CONSIDERATIONS

A. Compliance with Vet. App. R. 39(a)(1)

In compliance with Rule 39(a)(1), the undersigned contacted Appellant's counsel via email on February 1, 2024, regarding the Secretary's concerns with the EAJA application. In the interim, the undersigned continued to work on the case and develop the Secretary's position. The undersigned followed up with Appellant's counsel on February 13, 2024, and the following day the parties agreed to discuss the application on February 16, 2024. However, the Secretary decided to pursue the substantial justification argument, and determined that further discussion would not be fruitful.

B. Appellant's Burden

Appellant bears the burden of demonstrating entitlement to, and the reasonableness of, the fees for which he seeks reimbursement. *See Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Baldridge v. Nicholson*, 19 Vet.App. 227, 233 (2005). In evaluating the reasonableness of fees requested under EAJA, the Secretary, and ultimately the Court, primarily have only the information pled by an applicant in his application. Accordingly, the Secretary submits that the Court should bind Appellant's response in reply to the content of his EAJA application where appropriate. *See, e.g.,* A*tencio v. O'Rourke,* 30 Vet.App. 74, 85 (2018)

(noting that "[r]aising arguments for the first time at oral argument does not assist the Court and is unfair to opposing counsel").

ARGUMENT

A. The Secretary's Position Was Substantially Justified

The Court should deny Appellant's EAJA application because the Secretary's position was substantially justified. *See* 28 U.S.C. § 2412(d)(1)(A) (providing that a court shall award fees and other expenses to a prevailing party unless, inter alia, the court finds that the position of the United States was substantially justified). Once the EAJA applicant alleges lack of substantial justification, the Secretary bears the burden of demonstrating that his position was substantially justified at both the administrative and litigation stages. *Jandreau v. Shinseki*, 23 Vet.App. 12, 14 (2009).

The "substantially justified" standard "does not 'raise a presumption that the Government position was not justified, simply because it lost the case.'" *Norris v. SEC*, 695 F.3d 1261, 1265 (Fed. Cir. 2012) (quoting *Broad Ave. Laundry & Tailoring v. United States*, 693 F.2d 1387, 1391 (Fed. Cir. 1982)). Nor does the government's position have to be "correct" or even "justified to a high degree." *Id*. Rather, "substantially justified" means only that the government's position was "justified in substance or in the main–that is, justified to a degree that could satisfy a reasonable person." *Id*. In determining substantial justification, the Court considers the clarity of governing law concerning the

government's position in the underlying agency action, as well as arguments during the litigation itself. *Id*.

No single factor dictates whether the government was substantially justified. Instead, the substantial justification inquiry requires analyzing the "'totality of the circumstances' surrounding the government's adoption of a particular position." *Patrick v. Shinseki*, 668 F.3d 1325, 1332 (Fed. Cir. 2011) (quoting *Smith v. Principi*, 343 F.3d 1358, 1362 (Fed. Cir. 2003)). The "substantially justified" inquiry focuses "on the circumstances pertinent to the position taken by the government." *Smith v. Principi*, 343 F.3d 1358, 1363 (Fed. Cir. 2003); *see also Pierce v. Underwood*, 487 U.S. 552, 561 (1988) (explaining that the question is "not what the law now is, but what the Government was substantially justified in believing it to have been.").

Congress's intent when it enacted the EAJA was to "ensure that litigants 'will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved.'" *Patrick*, 668 F.3d at 1330 (quoting *Scarborough v. Principi*, 541 U.S. 401, 407 (2004)). On the other hand, the EAJA was not "intended to chill the government's right to litigate or to subject the public fisc to added risk of loss when the government chooses to litigate reasonably substantiated positions, whether or not the position later turns out to be wrong." *Stillwell v. Brown*, 6 Vet.App. 291, 303 (1994).

In addition, this Court has identified two "special circumstances" that may be relevant in determining the reasonableness in VA's litigation position. *Id.; see also Cline v. Shinseki*, 26 Vet.App. 325, 327 (2013). The first is "the evolution of VA benefits law since the creation of this Court that has often resulted in new, different, or more stringent requirements for adjudication." *Stillwell*, 6 Vet.App. at 303. The second is "that some cases before this Court are ones of first impression." *Id.* "Arguments presented in a case of first impression are more likely to be considered substantially justified than those where the Court determines that the Secretary ignored existing law." *Jandreau*, 23 Vet.App. at 14. "In cases of first impression the Court must determine whether the issue presented 'close' questions, and whether the Secretary sought an unreasonable interpretation or resolution of the matter." *Gordon v. Peake*, 22 Vet. App. 265, 269 (2008).

The Secretary urges the Court to find that the Secretary was substantially justified in filing a motion to dismiss and arguing that Appellant did not have standing to proceed with her appeal because due to her untimely filing of the NOA. The Secretary's litigation position was reasonable, as this was an issue of first impression and a discrete question of law that implicated the Court's jurisdiction. *See Jandreau*, 23 Vet.App. at 14; *Stillwell*, 6 Vet.App. at 303. Consistent with the Court's analysis, the Secretary has located no precedential opinions, beyond those issued in this case addressing whether the relevant

window for determining an accrued-benefits claimant's standing is limited to the 120-day statutory deadline without regard to whether the veteran would have been required to file an NOA on his or her behalf within that period, has not previously been addressed by the Court. *See Jandreau*, 23 Vet.App. at 17 (finding the Secretary's position to be substantially justified where the case presented an issue of first impression, and the Secretary's position was not contrary to law at the time); *Stillwell*, 6 Vet.App. at 303. The Court's analysis expanded upon the analysis in *Demery*, which is demonstrative of the expansion of the law. Thus, the Secretary's position with regard to standing was consistent with the existing case law at the time. In summary, when looking at the "totality of the circumstances" surrounding the government's position, *Patrick*, 668 F.3d at 1332, the Court should find that the Secretary's position was "justified to a degree that could satisfy a reasonable person." *Pierce*, 487 U.S. at 565.

B. In The Alternative, The Court Should Reduce Appellant's EAJA Award Because Some of The Charges Are Not Reasonable

Even if Appellant is entitled to an EAJA award, the Court should reduce her award from what she requested because the amount of time billed is not reasonable. *See* 28 U.S.C. § 2412(d)(2)(A) (establishing eligibility for "reasonable attorney fees"). Under the EAJA, this Court has authority to award reasonable attorney fees and expenses. *See id.* § 2412(d)(1). The Court has wide discretion in determining reasonableness. *Chesser v. West*, 11 Vet.App. 497, 501 (1998); *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *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).

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 v. Principi*, 17 Vet.App. 319, 321 (2003) (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 v. Principi*, 17 Vet.App. 319, 321 (2003)). 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. Time spent learning the law is not properly billed to the government. *See Chesser*, 11 Vet.App. at 501 (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 for remand," "receive voicemail from Office of General Counsel attorney," "receive Court order," "receive . . . Court order regarding briefing conference").

1. Appellant's Billing Rate of $239.70 Per Hour for Paralegal Work Is Not Premised Upon the Correct Prevailing Market Rate and Is Unreasonable

"The U.S. Supreme Court has held EAJA "allows the recovery of paralegal fees according to 'the practice in the relevant market.'" *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008) (quoting *Missouri v. Jenkins*, 491 U.S. 274, 288 (1989)). Likewise, this Court has held that EAJA fees under 28 U.S.C. § 2412(d)(1)(A) may be awarded "on an adjusted market rate basis for work performed by paralegals and law clerks." *Garrison v. Peake*, 22 Vet.App. 192, 194 (2008).

In *Sandoval v. Brown*, this Court read *Elcyzyn v. Brown*, 7 Vet. App. 170, 181 (1994), as instructing that the "appropriate hourly rate for paralegals, law

clerks, and law students is (1) the rate in the prevailing market in which the services were performed or (2) the $ 75 rate set forth in 28 U.S.C. § 2412(d)(2)(A) plus a cost-of living adjustment [COLA] calculated under the [(CPI or CPI-U)] for All Urban Consumers (CPI-ALL) 'measured from the effective date on which the legal services were performed,' whichever is lower." *Sandoval v. Brown*, 9 Vet.App. 177, 181 (1996) (emphasis added) (quoting *Elcyzyn v. Brown*, 7 Vet.App. 170, 181 (1994)). The approach discussed in *Sandoval* imports a base rate plus CPI-U cost-of-living increase formula from *Elcyzyn* into calculations of a reasonable hourly rate for paralegal work.

Here, Appellant impermissibly seeks compensation for a paralegal based on an adjustment of the base hourly rate $125 as opposed to the adjustment of $75 rate set forth in *Elcyzyn*. Appellant's EAJA App. at 10. Appellant does not provide any reasonably precise analysis to justify the use of the $125 rate or why it is appropriate to utilize the same rate for attorneys and paralegals. She instead makes a blanket statement that this paralegal "customarily charges $415 per hour, which is consistent with prevailing rates in the Denver market." *Id.* Aside from this statement, Appellant fails to include any information that specifically explains how she determined that a billing rate of $239.70 is reasonable for paralegal work performed in Denver, Colorado and as such, she has failed to carry her burden of producing satisfactory evidence demonstrating that $239.70 per hour is the prevailing market rate for paralegal work in that location. As this

Court stated in *Elcyzyn*, "[i]t is not enough merely to propose an hourly rate and then throw numerous factors and conditions against the wall in the hope that at least some will stick and justify the requested rate." *Elcyzyn*, 7 Vet. App. at 178-79. Rather, a "fee applicant must 'produce satisfactory evidence . . . that the requested rates are in line with those prevailing in the community'" to establish that the requested rates are reasonable. *Id.* at 179 (quoting *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984)). Appellant has not done so here.

The Secretary asks the Court to find that Appellant has not carried her burden to "'produce satisfactory evidence . . . that the requested rate[] [is] in line with those prevailing in the community' as to establish that the requested rate[] [is] reasonable." *Elcyzyn*, 7 Vet.App. at 179 (quoting *Blum*, 465 U.S. at 895 n.11). Alternatively, the Court should find that the Secretary has satisfied any burden that has shifted to him, as the opposing party, of producing evidence that shows that the market rate of $239.70 per hour for paralegal work is erroneous and unreasonable. *See Sandoval*, 9 Vet.App. at 181. Thus, because Appellant has not met her burden to demonstrate that the asserted paralegal rate is reasonable, the Court should reduce Appellant's EAJA amount by the total hours billed (29.60) for paralegal, Rebecca Golz.

2. The Court Should Reduce Appellant's Application For Work That Was Insufficiently Detailed In The Application

An appellant must document hours spent on billable activities adequately so that the opposing party and the Court can properly determine the

reasonableness of individual tasks. *Andrews*, 17 Vet.App. at 323*; see also Hensley*, 461 U.S. at 433-34 (a court may reduce fee award based on inadequate documentation of hours). Large 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 v. Principi*, 17 Vet.App. 319, 321 (2003)).

Here, Appellant has engaged in the impermissible practice of "block billing," in which she listed itemizations for multiple tasks in large blocks of time exceeding three hours without documenting the time spent on each task. This practice is prohibited when the itemization of the entries is non-specific, vague, generalized, and where the Secretary or the Court cannot parse how much time was billed for each task identified. *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); *see also Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 971 (D.C. Cir. 2004) (reducing fee award where billing records lacked adequate detail or where

they included generic entries such as "research," "writing," and time spent in conferences or meetings).

Appellant's application contains several entries exceeding the three-hour threshold and containing descriptions for several tasks without a precise breakdown of the time spent on each task. Seven such entries dated October 7, 2021 (3.6 hours); October 8, 2021 (3.5 hours); October 8, 2021 (6 hours)[4]; March 2, 2022 (3.5 hours); March 10, 2022 (4 hours); March 11, 2022 (3.7 hours); March 15, 2023 (3.6 hours). The entry of 3.5 hours billed on October 8, 2021, includes time spent to research whether a surviving spouse has standing to independently appeal an adverse Board decision. Appellant's Itemized Time Detail Report at 1 of 5. However, Appellant does not explain how much time was spent on each individual task. *Id.* As such, the itemizations for these entries do not provide the Secretary or the Court with enough specificity to review the reasonableness of the billed hours. *Andrews*, 17 Vet.App. at 321 (noting the applicant bears the ultimate burden of establishing the reasonableness of the fee request). Moreover, Appellant has billed for legal research, without explaining why this billing was reasonable. *See Chesser,* 11 Vet.App. at 501.

Appellant's application also contains three entries related to the drafting of her opening brief and reply brief that exceeded the three-hour threshold. Those entries dated November 15, 2022, billed 4.5 hours to "draft opening brief" and

[4] Task performed by paralegal Rebecca Golz which also should be eliminated for the reasons discussed above.

March 15, 2023, billed 4.2 hours to "draft reply brief and conduct legal research for use in the same." Appellant's Itemized Time Detail Report at 4 of 5. Neither description contains a breakdown of the time provided on each individual task. *Id*. Again, the descriptions of these entries do not provide enough information to establish that the hours billed were reasonable. *Andrews*, 17 Vet.App. at 321.

Further, Appellant's EAJA application includes several entries that do not provide specific detail of the tasks performed. The entries dated March 4, 2022 (1.7 hours); March 9, 2022 (1.6 hours); and March 15, 2022 (3 hours) all indicate that time was expended to "prepare for oral argument". Attachment, Appx. A at 2 and 3. Similarly, two entries on September 6, 2022 (.50 hours) and (1.50) indicate time was expended "to prepare for Rule 33 conference." *Id*. at 3. However, none of these entries are specific or detailed enough for the Secretary to determine what this preparation entailed. *Compare e.g.*, with January 17, 2022, entry "Review briefing and cases to prepare for oral argument." *Id*. at 2. This lack of specification fails to satisfy Appellant's burden of submitting a "billing statement that is specific and detailed." *Baldridge*, 19 Vet.App. at 235. As such, the Secretary asks for a substantial reduction in these billing entries.

3. Appellant Impermissibly Billed For Clerical and/or Administrative Tasks

Applicants may not properly bill the government for clerical or administrative tasks under the EAJA. *See id*. at 236, 244-46; *see also Missouri v. Jenkins*, 491 U.S. 274, 288 n.10 (1989). Filing, receiving, and serving

documents are clerical tasks. *Id*. at 236, 246; *see also Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 973 (D.C. Cir. 2004) ("We do not understand why attorney or even legal assistant skills were required" to file briefs); *see also Papa v. O'Rourke*, 2018 U.S. App. Vet. Claims LEXIS 748, *9, Vet. App. No. 16-2297E (May 31, 2018) (declining to award fees for receiving and reviewing docket notices from the clerk); *see also Jackson v. Shinse*ki, 2011 U.S. App. Vet. Claims LEXIS 1745 at *13, Vet. App. No. 10-0279E (Aug. 15, 2011) (reducing fees for "reviewing" a notice of appearance because it was clerical).[5] Additionally, maintaining a calendar is a clerical task. *See Baldridge*, 19 Vet.App. at 244.

While an average of 0.1 to 0.4 hours may not appear an unreasonable amount to bill for any action, time claimed for all similar actions billed are excessive when considered *in toto*. To this end, the Secretary urges the Court to reduce or eliminate the following entries totaling 3.9 hours performed on July 20, 2021 (.20); August 2, 2021 (.10); August 5, 2021 (.10); August 16, 2021 (.20); September 21, 2021 (.10); October 28, 2021 (.10); October 29, 2021 (.20); December 21, 2021 (.20); December 30, 2021 (.10); June13, 2022 (.20); July 13, 2022 (.40); August 4, 2022 (.10); August 29, 2022 (.10); September 26, 2022 (.20); November 15, 2022 (.50); and January 10, 2023 (.20) from Appellant's

[5] Though the Secretary reads *Baldridge* as holding that time spent "reviewing" non-substantive notices is not billable under the EAJA, if the Court disagrees, then the Secretary points to these non-precedential authorities, and others cited throughout his response, for their persuasive value. *See* U.S. Vet. App. R. 30(a).

EAJA award because they reflect improper billing for clerical or administrative tasks by Appellant that are not properly billed to the government. Moreover, even if the tasks are not completely clerical, the charges for them are excessive when considered *in toto* with the nature of the tasks.[6]

4. Appellant Impermissibly Billed For Items Not Properly Billed To The Government

Inefficient or unproductive time is not to be compensated, and billing the Government for remedying such error is unreasonable, unacceptable, and demonstrates counsel's failure to exercise billing judgment. *See Hensley v. Principi*, 16 Vet.App. 491, 498-99 (2002). Because counsel cannot reasonably bill his client directly for nonfeasance, *Hensley*, 461 U.S. at 434 ("[A]n applicant for EAJA fees must treat the government as though it were a private client by exercising the same kind of billing judgment that an attorney would use in preparing a billing statement for a private client."), he cannot bill the government either. *Sandoval*, 9 Vet.App. at 182 (holding that reasonable fees are fees that would normally be charged to and paid by a private client). This includes extensions of time for workload considerations, corrective actions related to missed briefing or other court deadlines, filing documents/communications related to rescheduling briefing conferences where Appellant's counsel requests the rescheduled date, etc. No billing judgment has been exercised by Appellant in this case.

[6] The tasks were performed by paralegal Rebecca Golz which also should be eliminated for the reasons discussed above.

To this end, the Secretary urges the Court to reduce or eliminate the following entries totaling 3.8 hours for drafting, editing or filing extensions of time August 3, 2021 (.70); August 4, 2021 (.40); December 22, 2021 (.60); December 28, 2021 (.50); September 20, 2021 (.40); September 23, 2022 (.50); September 26, 2022 (.50); September 26, 2022 (.20) and 1 hour which is reflective of corrective action taken to refile the reply brief March 21, 2023 (.40) and (.60) from Appellant's EAJA award that are not properly billed to the government.

Similarly, the Court should also reduce or eliminate time for the following entries totaling .7 hours billed on December 2, 2021 (.50) to review sample motions for leave to file a reply to Appellee's response to court order and December 2, 2021 (.20) to review court order and rules of practice regarding oral argument because they demonstrate inexperience of the law. *See Chesser*, 11 Vet.App. at 501 (disallowing as "expected background" fees billed for general veterans law research).

CONCLUSION

WHEREFORE, the Secretary urges the Court to deny Appellant's EAJA application or, in the alternative, reduce it to an amount the Court deems reasonable based on the foregoing.

Respectfully submitted,

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