IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 20-4372

SHERRY CRAIG-DAVIDSON,

Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S REPLY IN SUPPORT OF APPLICATION FOR AWARD OF ATTORNEYS' FEES & EXPENSES

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INTRODUCTION

Appellant Sherry Craig-Davidson has applied to this Court for $27,271.05 in attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA" or "the Act"). The Secretary opposes that application. He does not dispute that Mrs. Craig-Davidson is a prevailing party, that there are no special circumstances that would make a fee award unjust, or that the EAJA application was timely filed. Instead, the Secretary argues that Mrs. Craig-Davidson's entire fee application should be denied because the Secretary's decision to seek dismissal of this appeal during one phase of the litigation was substantially justified. In the alternative, the Secretary argues that this Court should dramatically reduce the award because the requested fees are unreasonable.

As discussed below, the Secretary's proposal that the Court limit the substantial justification inquiry to just one decision during one phase of this litigation runs contrary to settled law, which requires the Court to holistically consider the Secretary's positions at all phases of this dispute. In any event, the Secretary's positions—including the decision to move for dismissal of the appeal—were not substantially justified. And the fees and expenses Ms. Craig-Davidson incurred to twice prevail before this Court and win remand of her claim are reasonable.

ISSUES PRESENTED

The Secretary lists the issues he thinks Mrs. Craig-Davidson's EAJA application raises. The Secretary's list is incomplete and misleading. Mrs. Craig-Davidson believes the appropriate issues are:

1. Whether controlling law requires this Court to determine whether the Secretary's positions were substantially justified across all phases of this dispute, including at both the administrative and litigation stages?

2. Whether the Secretary has carried his burden of establishing that his positions across all phases of this dispute were substantially justified?

3. Whether the fees and expenses incurred by Mrs. Craig-Davidson to secure her rights were reasonable and necessary, where she twice prevailed before this Court and won remand of her claim?

ARGUMENT

I. THE SECRETARY MUST ESTABLISH THAT HIS POSITIONS WERE SUBSTANTIALLY JUSTIFIED THROUGHOUT THIS DISPUTE

The Secretary invites this Court to consider for the purposes of the substantial justification inquiry only the Secretary's decision to move to dismiss this appeal during a jurisdictional phase of the dispute. *See* Secretary's Resp. Opp'n to Appellant's App. ("Sec'y Resp.") at 5, 7-10. As discussed *infra*, the Secretary's decision to seek dismissal of this appeal was not substantially justified. But as a preliminary matter, the Secretary's attempt to confine the substantial justification inquiry to a *single* decision in *one* phase of this case is inappropriate under settled law.

As this Court and the Federal Circuit have repeatedly explained, substantial justification is an affirmative defense and "the Secretary bears the burden of demonstrating that his position was substantially justified at *both* the administrative *and* litigation stages." *Butts v. McDonald*, 28 Vet. App. 74, 79 (2016) (en banc) (emphasis added); *Doty v. United States*, 71 F.3d 384, 386 (Fed. Cir. 1995) (substantial justification inquiry views the "government's position throughout the dispute, including not only its litigating position but also the agency's administrative position"); *Stillwell v. Brown*, 6 Vet.App. 291, 302

(1994) ("[T]he entirety of the conduct of the government is to be analyzed, both the government's litigation position and the action or inaction by the agency prior to the litigation."). Regarding the administrative stage, the Court evaluates "the reasonableness of the underlying government action at issue." *Felton v. Brown*, 7 Vet.App. 276, 280 (1994) (internal citation omitted). Regarding the litigation stage, the Court "looks to the circumstances surrounding the resolution of the dispute." *Coleman v. Nicholson*, 21 Vet. App. 386, 389 (2007).

Butts and the many other decisions like it recognize that the substantial justification inquiry requires a holistic assessment of the Secretary's positions in both the administrative and litigation contexts. These decisions flow from the Supreme Court's unambiguous direction in *Commissioner, I.N.S. v. Jean*, 496 U.S. 154 (1990). In that case, the government opposed recovery of fees attributable to litigating an EAJA application on the basis that the government's conduct in opposing the EAJA application (if not in other phases of the dispute) was substantially justified. *Id.* The Supreme Court squarely rejected this "atomized" approach to the substantial justification inquiry. *Id.* at 162. The Court explained that "[t]he single finding that the Government's position lacks substantial justification, like the determination that a claimant is a 'prevailing party,' . . . operates as a one-time threshold for fee eligibility." *Id.* at 160. This is because the text of the EAJA "favors treating a case as an inclusive whole" *Id.* at 160-61; *see id*. at 159 (EAJA "refers to an award of fees 'in any civil action' without any reference to separate parts of the litigation"). "[A]bsent unreasonably dilatory conduct by the prevailing party in 'any portion' of the litigation, which would justify denying fees for that portion, a fee award

presumptively encompasses all aspects of the civil action." *Id*. at 161.[1] Based on the holding in *Jean*, the Federal Circuit held that "[a]n award of fees incurred in *every stage of litigation* is consistent with the legislative purpose of the EAJA." *Wagner v. Shinseki*, 640 F.3d 1255, 1259 (Fed. Cir. 2011) (emphasis added).

The Court should not entertain the Secretary's invitation to inappropriately limit its substantial justification inquiry to one position taken during a single phase of this dispute.[2] Pursuant to controlling precedents, the Secretary's must establish that his positions were justified at all stages of this dispute. And for the reasons discussed below, the Secretary has failed to satisfy his burden.

II. THE GOVERNMENT'S POSITION THROUGHOUT THE LIFE OF THIS MATTER HAS NOT BEEN SUBSTANTIALLY JUSTIFIED

A. The Secretary's Administrative Position Was Not Substantially Justified

The Secretary does not argue that the Board of Veterans' Appeals' ("BVA") denial of Virgil Davidson's claim was substantially justified. He thus concedes that he has not

[1] The Secretary does not argue that Mrs. Craig-Davidson engaged in any dilatory conduct in relation to the motion to dismiss her appeal (or any other phase of this dispute). Nor could he. Throughout this dispute, Mrs. Craig-Davidson has demonstrated remarkable diligence—including before she was represented by counsel. For example, Mrs. Craig-Davidson, proceeding *pro se*, filed her notice of appeal less than 30 days after her veteran-husband died. *See* Appellant's EAJA Application ("EAJA App.") at 1-2. After the Secretary moved to dismiss the appeal, this Court ordered Mrs. Craig-Davidson to provide a copy of her husband's death certificate and to inform the Court whether she filed a claim for accrued benefits at the VA regional office. *Id.* Mrs. Craig-Davidson did so 12 days later. *Id.*

[2] Notably, the Secretary's opposition brief acknowledges that he "bears the burden of demonstrating that his position was substantially justified *at both the administrative and litigation stages*." Sec'y Resp. at 7 (emphasis added) (citing *Jandreau v. Shinseki*, 23 Vet. App. 12, 14 (2009)). This concession makes it especially difficult to understand why the Secretary would invite this Court to ignore his administrative position and litigation positions unrelated to the motion to dismiss.

met his burden. *See Libas, Ltd. v. United States*, 314 F.3d 1362, 1364 (Fed. Cir. 2003) (court can consider "government's failure to submit evidence as an admission that its position was not substantially justified"). Because the Secretary concedes the agency's administrative position was not substantially justified, the Court need look no further to award EAJA fees and costs. *See Johnson v. McDonald*, 28 Vet. App. 136, 143 (2016) ("Because the Secretary has not met his burden of demonstrating that he was substantially justified . . . at the administrative stage, we need not address whether he was substantially justified at the litigation stage."); *Evington v. Principi*, 18 Vet. App. 331, 334 (2004) (holding that Secretary conceded no substantial justification where he did not assert that both his administrative and litigation positions were justified); *see also Martinez v. United States*, 94 Fed. Cl. 176, 185 (2010) (awarding EAJA fees based on agency's unjustified position even though litigation position was reasonable).

The Secretary's apparent reluctance to defend his administrative position is understandable. The circumstances of the administrative proceeding are set out in this Court's order on the merits, *Craig-Davidson v. McDonough*, No. 20-4372, 2023 WL 5941958 (Vet. App. Sept. 13, 2023), and Mrs. Craig-Davidson's EAJA Application. In short, Mrs. Craig-Davidson's husband averred in his benefits claim that we was exposed to ionizing radiation during his training at Camp Pendleton's Atomic Biology Warfare School. With no explanation, the BVA dismissed Mr. Davidson's testimony as "not competent" and denied his claim. As the Court explained in its order remanding this claim, the BVA's decision violated clearly established law requiring the Secretary "to weigh 'lay statements . . . against other evidence' when determining whether any event occurred in

service." *Craig-Davidson*, 2023 WL 5941958 at *2 (citing *Bardwell v. Shinseki*, 24 Vet. App. 36, 38 (2010)). The BVA's blanket refusal to consider Mr. Davidson's lay statements also violated applicable statutes and regulations, which explicitly demand that due consideration be given to a veteran's testimony.[3] Although the Secretary's failure to defend his administrative position ends the inquiry, it well-settled that a position lacks substantial justification when it violates controlling precedent and applicable law. *See Patrick v. Shinseki*, 668 F.3d 1325, 1330-32 (Fed. Cir. 2011) (no substantial justification exists where interpretation of statute is "contrary to its plain language and unsupported by its legislative history" or where government's position does not "comport[] with then-existing precedent on a particular issue"); *Impresa Construzioni Geom. Domenico Garufi v. United States*, 100 Fed. Cl. 750, 762-63 (2011) (same).

B. The Secretary's Litigation Positions Were Not Substantially Justified

Because the Secretary has failed to address, let alone justify, his administrative position in this dispute, the Court need not reach the question of whether the Secretary was substantially justified in his litigation positions. If the Court does reach these issues, it should conclude that the Secretary's litigation positions were not substantially justified.

[3] *See, e.g.,* 38 U.S.C. § 1154(a) (requiring that VA regulations concerning service-connection claims include provisions "requiring that in each case where a veteran is seeking service-connection for any disability[,] due consideration shall be given to . . . all pertinent medical and *lay evidence* . . . ." (emphasis added)); 38 U.S.C. § 5107(b) ("The Secretary shall consider all information and *lay* and medical *evidence* of record in a case before the Secretary with respect to benefits under laws administered by the Secretary." (emphasis added)); 38 U.S.C. § 3.303(a) (each disabling condition for which a veteran "seeks a service connection must be considered on the basis of the places, types and circumstances of his service as shown by service records, the official history of each organization in which he served, his medical records and *all pertinent* medical and *lay evidence*." (emphases added)).

1. The Secretary's decision to file a motion to dismiss this appeal was not substantially justified

The procedural history concerning the Secretary's motion to dismiss is set forth in detail in both Mrs. Craig-Davidson's EAJA application and the Secretary's response. *See* EAJA App. at 2; Sec'y Resp. at 1-4. In his response, the Secretary "urges" this Court "to find that [he] was substantially justified in filing a motion to dismiss and arguing that Appellant did not have standing to proceed with her appeal . . . due to her untimely filing of the NOA." Sec'y Resp. at 9. In support of this argument, the Secretary contends that the question at issue was one of first impression and that, in any event, his position was reasonable. The Secretary is wrong on both counts.

First, in rendering its decision in this appeal, this Court did not resolve a question of first impression. The issue before the Court was the *scope* of the Court's prior ruling in *Demery v. Wilkie*, which held that "an eligible accrued-benefits claimant has standing, both as a statutory and as a constitutional matter, to file an appeal on his or her own behalf when a veteran dies *during the time permitted to file an NOA*," 30 Vet. App. 430, 438 (2019) (per curiam order) (emphasis added). The Secretary took the position that the emphasized phrase limited the window to the 120-day period prescribed by 38 U.S.C. § 7266(a), without any modification that could be available through the doctrine of equitable tolling. This Court disagreed, concluding that the Secretary's narrow read was "undermine[d]" by "the rationale underlying the Court's decision in *Demery*." *Craig-Davidson v. McDonough*, 35 Vet. App. 281, 291 (2022). In other words, the Court found that the holding of *Demery* controlled the outcome.

Even if the question before the Court could be properly characterized as a matter of first impression, there is no "per se rule that a case of first impression will always render the Government's position substantially justified." *Felton*, 7 Vet. App. at 281. The Court still must "analyze the 'totality of the circumstances' surrounding the government's adoption of a particular position." *Butts*, 28 Vet. App. at 79 (citation omitted). "Such factors include 'merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act,' along with any other applicable circumstances." *Id.* (citing *Stillwell*, 6 Vet. App. at 302). Where the Secretary "interprets a statute in a manner that is contrary to its plain language and unsupported by its legislative history, it will prove difficult to establish substantial justification." *Patrick*, 668 F.3d at 1330–31.

The Secretary's position with respect to the motion to dismiss fails the "totality of the circumstances" test. In denying the motion, this Court explained that the Secretary's position was "inconsistent with the purpose of section 5121A" and "undermine[d]" the "rationale underlying" *Demery*. This is powerful reason alone to conclude that the Secretary was not substantially justified in taking his position. The Court's questions and the Secretary's responses (or lack thereof) during oral argument further illustrate the unreasonable position staked out by the Secretary. Judge Greenberg asked the parties the following: "What is the good faith basis for the Secretary's position, in creating what appears to me to be a no-man's land clearly not intended by Congress or the Supreme Court

in Henderson?"[4] Later during the argument, Judge Meredith noted that "VA's obligation is not to try to win, but to try to seek justice."[5] She then asked counsel for the Secretary: "Has VA explored any options for providing the Appellant an opportunity to have her case heard on the merits?"[6] Counsel for the Secretary responded: "The answer to that is no."[7]

2. The Secretary's litigation position on the merits was not substantially justified

As with the administrative position, the Secretary does not argue that his position on the merits of this appeal was substantially justified. For the same reasons discussed *supra* II.A, the Secretary has thus conceded that his position in this phase lacked substantial justification and has failed to carry his burden of establishing the affirmative defense.

If the Court were to consider the reasonableness of the Secretary's position on the merits, the record again makes clear that the Secretary was not substantially justified during this phase, either. As noted above, the BVA denied Mr. Davidson's claim after refusing to consider his lay testimony in clear violation of controlling precedent and applicable statutes and regulations. On appeal, the Secretary chose to embrace this clear error. As this Court noted, the Secretary's position was "essentially an effort to rehabilitate the Board's opinion." *Craig-Davidson*, 2023 WL 5941958, at *2.

If the Court decides to assess the reasonableness of the Secretary's litigation conduct during the merits phase, Mrs. Craig-Davidson respectfully submits that the Court should

[4] Video Recording of Oral Argument on Secretary's Motion to Dismiss, 5:10. A video recording of the oral argument is available at https://www.youtube.com/watch?v=Z-r7KUqsPow

[5] *Id.*, 37:35.

[6] *Id.*

[7] *Id.*, 37:53.

also consider the following: Consistent with the rules of this Court, the parties participated in a Rule 33 briefing conference before the merits phase of this appeal. *See* EAJA App. at 3. During that conference, undersigned counsel read aloud to counsel for the Secretary the holding in *Bardwell v. Shinseki*, which instructs that the VA must weigh lay statements from a veteran against other evidence in the record in a claim for service connection. *See* 24 Vet. App. 36, 38. Undersigned counsel also read aloud various VA statutes and regulations requiring the VA to give due consideration to a veteran's lay statements in a benefits claim. *See supra* n. 2. Undersigned counsel then requested that the Secretary agree to a remand of the claim so that that the BVA could appropriately weigh the evidence it had failed to consider, consistent with its obligations. Counsel for the Secretary refused that proposal. And as this Court is aware, the basis for its remand order was ultimately the BVA's failure to correctly apply the Court's guidance in *Bardwell v. Shinseki*.

III. THE REQUESTED FEES AND COSTS ARE REASONABLE

As represented in Mrs. Craig-Davidson's EAJA application, counsel spent more than two years working just to have Mrs. Craig-Davidson's claim heard on its merits. During those two years, counsel prevailed in two both phases of the appeal to this Court. Mrs. Craig-Davidson's request for fees and costs is reasonable given the length of time this matter has been pending and the multiplicity of complex issues involved. *See* 38 C.F.R. § 14.636(e) (providing that "extent and type of services" performed, "complexity of the case," "level of skill and competence required," "amount of time the representative spent on the case," results achieved, and "level of review to which the claim was taken" are factors considered in assessing reasonableness).

The Secretary first argues that the hourly rate for paralegal work is incorrectly calculated and unreasonable. Sec'y Resp. at 12-14. The Secretary's critique of the paralegal rate is premised on a misunderstanding of applicable law.

The Secretary cites *Sandoval v. Brown*, 9 Vet. App. 177, 181 (1996), which instructs 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***." (emphases added) (citing *Elcyzyn v. Brown*, 7 Vet.App. 170, 181 (1994)). Since *Sandoval* was decided, however, the statutory maximum rate in 28 U.S.C. § 2412(d)(2)(A) was increased from $75 to $125. In the fee application, counsel for Mrs. Craig-Davidson represented that the paralegal who performed work in connection with this dispute customarily charges $415, which is consistent with (if on the high end of) prevailing rates in the Denver market for sophisticated paralegals. Because the prevailing market rate for paralegal work well exceeds the statutory maximum of $125 set forth in 28 U.S.C. § 2412(d)(2)(A), Mrs. Craig-Davidson requested the statutory rate plus a COLA, as required by *Sandoval*.

The Secretary makes conclusory and overbroad assertions regarding the time counsel spent on this case. The Secretary, however, "cannot make bald allegations without providing more detail and descriptions." *Metro. Van & Storage, Inc. v. U.S.*, 101 Fed. Cl. 173, 193 (2011); *see Sandoval*, 9 Vet. App. at 181 (holding that Secretary's unsupported allegations that time expended was excessive is insufficient to justify a

reduction). The Secretary's claims should be ignored.

The Secretary also claims that the costs to prepare for oral argument before this Court should be rejected. But the Secretary does not cite a single authority to support this argument. Where counsel believes such preparation necessary, the court should not "second-guess" counsel's professional judgment. *First Fed. Savings & Loan Ass'n v. United States*, 88 Fed. Cl. 572, 588 (2009); *see Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1286 (9th Cir. 2004) (awarding fees for time spent conducting moot courts).

The Secretary raises concern with counsel's purported "block billing." *See* Sec'y Resp. at 14-17. The bills at issue here are transparent. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 n.12 (1983) (holding that counsel "is not required to record in great detail how each minute of his time was expended" but should identify "general subject matter" of time expenditures). Each attorney billing time to this matter provided a detailed description of the work the attorney was doing. Thus, nothing is obscured and the reasonableness of each time entry is self-evident. *See Scarborough v. Nicholson*, 19 Vet. App. 253, 266 (2005) (refusing to reduce EAJA award because block billing records were specific and detailed enough to review for reasonableness); *Gutierrez v. Nicholson*, No. 01-2105(E), 2006 WL 2805339, at *2 (Vet. App. 2006) (non-precedential) ("block billing" entries sufficiently detailed and time billed was reasonable "given the excellent work product and outcome obtained"); *Thomas v. Nicholson*, No. 01-586, 2006 WL 958733, at *6 (Vet. App. 2006) (non-precedential) (refusing to reduce EAJA award because block billing records were specific and detailed enough to review for

reasonableness).

CONCLUSION

Mrs. Craig-Davidson respectfully requests that this Court enter an order awarding her attorneys' fees and expenses as set forth within her EAJA application.

Respectfully submitted this 21st day of March, 2024.

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