

*Not published*

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

No. 20-4372(E)

SHERRY CRAIG-DAVIDSON,

APPELLANT,

v.

DENIS McDONOUGH,  
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before LAURER, *Judge*.

**ORDER**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

On December 6, 2023, appellant applied for \$27,271.05 in attorney fees under the Equal Access to Justice Act (EAJA).<sup>1</sup> On February 20, 2024, the Secretary requested that the Court deny appellant's application or reduce the award to a reasonable amount.<sup>2</sup> The Secretary argues that, because he substantially justified his position, appellant doesn't qualify for attorney fees under EAJA.<sup>3</sup> He also contends that the Court should reduce the amount requested because appellant (1) overbilled for paralegal work, (2) failed to adequately describe the tasks performed, (3) billed for clerical work, and (4) failed to exercise billing judgment.<sup>4</sup> In reply, appellant reminds the Court that, when it assesses the position taken by the Secretary, it must consider both the Secretary's actions litigating at the Court *and* at the Agency before the appeal at the Court began.<sup>5</sup> She also defends the amount requested and argues that it's reasonable.

Since the Secretary contested the EAJA application for reasons other than reasonableness, the parties didn't participate in a staff conference under Rule 33 of the Court's Rules of Practice and Procedure.<sup>6</sup>

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<sup>1</sup> 28 U.S.C. § 2412(b); *see also* appellant's EAJA Application at 1. References to the page numbers of appellant's EAJA application refer to the page numbers as they appear in the scroll bar of the combined Portable Document Format (PDF).

<sup>2</sup> Secretary's Response (Resp.) at 20.

<sup>3</sup> Secretary's Resp. at 7-10 (citing 28 U.S.C. § 2412(d)(1)(A)).

<sup>4</sup> Secretary's Resp. at 10-20.

<sup>5</sup> Appellant's EAJA Reply at 2-10.

<sup>6</sup> U.S. VET. APP. IOP XII(a).

The Court will first assess whether appellant qualifies for an EAJA award. Then the Court will take up the reasonableness of the award.

## I. BACKGROUND

Appellant is the surviving spouse of United States Marine Corps veteran Virgil Davidson, and she challenged a December 3, 2019, Board of Veterans' Appeals (Board) decision denying service connection for residuals of lung cancer.<sup>7</sup> Following the veteran's unfortunate death, appellant submitted her Notice of Appeal (NOA) after the 120-day filing deadline, and the Secretary moved to dismiss the case. A panel of Judges held that equitable tolling was warranted,<sup>8</sup> and the Court denied the Secretary's motion to dismiss.<sup>9</sup>

The Court then dissolved the panel and ordered the appeal to proceed in the normal course of business.<sup>10</sup> Then, on September 13, 2023, the Court issued a single-judge memorandum decision and remanded the claim for service connection for residuals of lung cancer since the Board failed to provide adequate reasons or bases with how it weighed the evidence.

## II. ANALYSIS

### A. Substantial Justification

The Court may award EAJA fees when an appellant is a prevailing party and the Secretary's position lacked substantial justification.<sup>11</sup> To determine whether the Secretary's position lacked substantial justification, the Court reviews the conduct during both the administrative proceedings and the litigation.<sup>12</sup> In other words, the Secretary must prove that he justified his position at both the administrative and litigation stages.<sup>13</sup>

The Secretary focuses on the arguments he presented to the panel on whether equitable tolling was warranted. But that only speaks to half of what the Court must review.<sup>14</sup> The Secretary must also prove that he justified his position during the administrative proceedings. Said

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<sup>7</sup> *Craig-Davidson v. McDonough* (*Craig-Davidson II*), No. 20-4372, 2023 WL 5941958, at \*1 (Vet. App. Sept. 13, 2023) (mem. dec.).

<sup>8</sup> *Craig-Davidson v. McDonough* (*Craig-Davidson I*), 35 Vet.App. 281, 283 (2022) (per curiam order).

<sup>9</sup> *Craig-Davidson I*, 35 Vet.App. at 294.

<sup>10</sup> *Craig-Davidson II*, 2023 WL 5941958, at \*1.

<sup>11</sup> *Butts v. McDonald*, 28 Vet.App. 74, 79 (2016) (en banc), *aff'd per curiam sub nom. Butts v. Wilkie*, 721 F. App'x 988 (Fed. Cir. 2018) (R. 36 judgment).

<sup>12</sup> *Stillwell v. Brown*, 6 Vet.App. 291, 302 (1994) ("[W]hen assessing whether to award attorney fees incurred by a party who successfully challenged a governmental action, the 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."); *Butts*, 28 Vet.App. at 79 ("[T]he Secretary bears the burden of demonstrating that his position was substantially justified at both the administrative and litigation stages.").

<sup>13</sup> *Butts*, 28 Vet.App. at 79.

<sup>14</sup> *Stillwell*, 6 Vet.App. at 302 (citation omitted).

differently, he must show that the Board's decision was reasonable in law and fact.<sup>15</sup> If he doesn't, then appellant is entitled to EAJA since there's no question that appellant is a prevailing party.

But the Secretary fails to address how he justified his conduct and legal position at the Agency, and he doesn't assert that the Board's decision was reasonable.<sup>16</sup> Rather, he focuses on why moving to dismiss the appeal was appropriate. He argues that, given the status of the law, his request for the Court to dismiss was a justified litigation position. So the Secretary's oversight—failing to acknowledge the merits and the Board's decision—is fatal to his EAJA argument. The Secretary ignored a pivotal legal element, so he doesn't prove that he justified his conduct and legal position.

And, even if the Secretary had made that argument, it would carry little weight. The Court's September 2023 memorandum decision controls the outcome here. In that decision, the Court determined that the Board erred by failing to provide adequate reasons or bases, so the Court held that the Secretary's position at the Agency was erroneous.<sup>17</sup> The Secretary fails to prove that he substantially justified his position. Since the Secretary doesn't otherwise object to appellant's entitlement to an EAJA award, the Court decides that appellant is a prevailing party. The Court holds that appellant is entitled to an EAJA award, so the question now is what's a reasonable amount.

#### B. Reasonableness

To reiterate, appellant qualifies for an EAJA award since the Secretary didn't substantially justify his position and doesn't otherwise object. The parties haven't yet had a chance to resolve the dispute over the reasonableness of appellant's EAJA application through a Rule 33 staff conference. The Court will provide them with that chance and is optimistic that the parties will benefit from alternative dispute resolution.

The Court orders the parties to mediation so that they can resolve the dispute with the reasonableness of the EAJA award. The Court will also provide the parties with 30 days after the staff conference to reach a settlement. If the parties can't resolve the dispute through negotiating, then the Court will inspect the details of appellant's EAJA application.

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<sup>15</sup> *Stillwell*, 6 Vet.App. at 302; see *Patrick v. Shinseki*, 668 F.3d 1325, 1330 (Fed. Cir. 2011) (“The government can establish that its position was substantially justified if it demonstrates that it adopted a reasonable, albeit incorrect, interpretation of a particular statute or regulation.”).

<sup>16</sup> See Secretary's Resp. at 9-10; *Butts*, 28 Vet.App. at 79 (outlining the factors the Court uses when it reviews the reasonableness of the Secretary's position).

<sup>17</sup> *ZP v. Brown*, 8 Vet.App. 303, 304 (1995) (declining to address the Secretary's litigation position at the Court and holding that the Secretary's position lacked substantial justification because the Board committed a reasons-or-bases error).

### III. CONCLUSION

Based on the above, it is

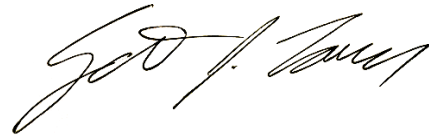
ORDERED that appellant is entitled to attorney fees and costs under EAJA. It is also

ORDERED that the Court schedule a Rule 33 staff conference. It is also

ORDERED that within 30 days of the staff conference, the parties file separate responses or a joint response, not exceeding 5 pages, and advise the Court on the status of their negotiations.

DATED: June 6, 2024

BY THE COURT:

A handwritten signature in black ink, appearing to read "Scott J. Laurer", written in a cursive style.

SCOTT J. LAURER  
Judge

Copies to:

Thomas W. Stoeve, Esq.

VA General Counsel (027)