In the
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT H. GRAY, Appellant,	)	
v.	)	No. 13 - 3339 - EAJA
ROBERT A. McDONALD, Secretary of Veterans Affairs, Appellee.	)	

APPELLANT'S REPLY TO THE SECRETARY'S OPPOSITION TO APPELLANT'S APPLICATION FOR AN AWARD OF REASONABLE ATTORNEY FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT (EAJA)

Pursuant to U.S. Vet. App. Rules 26(b) and 39(a)(2), appellant Robert H. Gray, through counsel, submits the following reply to the Secretary's September 17, 2015 opposition to Mr. Gray's July 20, 2015 EAJA application for an award of attorney fees and expenses pursuant to 28 U.S.C. § 2412(d). For the reasons discussed in greater detail below, the Court should reject the Secretary's opposition to Mr. Gray's application to an EAJA award, and instead issue an Order granting the application.

Introduction

First and foremost, the Secretary requests that the Court deny Mr. Gray's EAJA application *in toto* "because the position of the United States was substantially justified." *See* Appellee's Response at 1, 4-14. The Court will deny an EAJA application if, at both the agency and judicial levels, the VA's litigation position in the case was "substantially justified." 28 U.S.C. § 2412(d)(2)(B). However, in Mr. Gray's case there is no merit to

the Secretary's assertion that the VA's litigation position, either at the administrative or judicial stage, was substantially justified. To the contrary, the VA's litigation position at both the administrative and judicial levels of this case cannot be found substantially justified. This is the only conclusion reasonably possible given the reasoning in the Court's decision on the merits, which found the Secretary's actions in this case, among other things, to be "irrational", "arbitrary and capricious", and not indicative of VA's "fair and considered judgment on the matter at issue." *Gray v. McDonald*, 27 Vet.App. 313 (2015).

Secondarily, and in the alternative to denying the EAJA application altogether, the Secretary argues that the amount of the EAJA fee Mr. Gray requests should be reduced. Appellee's Response at 15-24. As well, there is no merit to virtually all of the Secretary's assertions made to support the reductions the Secretary requests. Therefore, the Court should reject all of the grounds on which the Secretary opposes Mr. Gray's EAJA application, whether *in toto* or in part.

Arguments

I. WHERE THE COURT'S DECISION ON THE MERITS HELD THAT VA'S INTERPRETATION OF 38 C.F.R. § 3.307(a)(6)(iii) IN MR. GRAY'S CASE WAS "IRRATIONAL", "ARBITRARY AND CAPRICIOUS", AND NOT BASED ON VA'S "FAIR AND CONSIDERED JUDGMENT ON THE MATTER", NO REASONABLE PERSON COULD CONCLUDE THAT THE SECRETARY'S LITIGATION POSITION WAS SUBSTANTIALLY JUSTIFIED

Although Mr. Gray was the prevailing party in this case pursuant to 28 U.S.C. §

2412(d), the Secretary opposes his award of an EAJA fee on grounds that the VA's litigation position was "substantially justified." 28 U.S.C. § 2412(d)(2)(B). The burden of establishing that VA's litigation position was substantially justified rests squarely with the Secretary. *See Patrick v. Shinseki*, 668 F.3d 1325, 1330 (Fed. Cir. 2011) (internal citation omitted). In Mr. Gray's case the Secretary fails to overcome this burden. Nothing the Secretary argues in support of his assertion of substantial justification is persuasive. The Secretary's failure in this regard is clear simply based on a reading of the plain language in the Court's decision on the merits. *See Gray v. McDonald, supra*.

In light of the Court's reasoning in the merits decision, in which it found the Secretary erroneously interpreted 38 C.F.R. § 3.307(a)(7)(iii) to deny Mr. Gray's claim, no reasonable person could find that the Secretary's actions were substantially justified. As an initial matter, Mr. Gray agrees with the Secretary (Appellee Response at 7) that the standard for determining whether VA's litigation position was substantially justified is set forth in the Supreme Court's seminal EAJA decision in *Pierce v. Underwood*, 487 U.S. 552, 108 S.Ct. 541, 158 L.Ed.2d 490 (1988). In *Pierce* the Supreme Court explained that "substantially justified" means the government's position was "justified in substance or in the main", which is the equivalent of "having a reasonable basis both in law and fact." *See* 487 U.S. at 565 (internal citations omitted). Then, in its own words, the Supreme Court in *Pierce* boiled this standard down, stating that it means "justified to a degree that could satisfy a ***reasonable*** person." *See id.* (emphasis added).

Upon applying the *Pierce* "substantial justification" standard to VA's litigation position in Mr. Gray's case, no reasonable person would find that the VA was substantially justified. Simply by reading the plain language contained in the four corners of the Court's decision it is clear that any reasonable person would conclude the opposite. *See Gray, supra*. The Court, throughout its assessment of the VA's actions in Mr. Gray's case, repeatedly stated that it found the VA was "irrational", "arbitrary and capricious", and did not demonstrate that it exercised "the Agency's fair and considered judgment." When read by a reasonable person, all of these assessments by the Court of VA's actions in Mr. Gray's case belie any assertion by the Secretary that VA's litigation position, either at the administrative or judicial levels, was substantially justified.

For example, in support of the Secretary's assertion of "substantial justification", throughout VA's response to Mr. Gray's EAJA application (at 2-15), the Secretary refers to the three-fold sources of VA's "policy" to interpret § 3.307(a)(7)(iii) to exclude Da Nang Harbor from Vietnam's inland waterways. Specifically, the Secretary cites to a December 2008 "C&P Bulletin", a VBA "training letter", and VA's procedure manual M21-1MR as the authority documenting "VA's official position on this matter." *See* Appellee Response at 3, 9-10. Simply because this "authority" existed, the Secretary asserts, it was reasonable for the Board and the Secretary to rely on it and, in turn, this reliance showed that the Secretary's litigation position was substantially justified. Appellee Response at 12-13. The problem with this assertion is that the Court's decision

on the merits found entirely to the contrary. That is, the Court found the Secretary's reliance on this so-called "authority" to be ***unreasonable***.

In the merits decision, this Court noted that the "Secretary seeks to support the definition of inland waterways" challenged by Mr. Gray by relying on the foregoing authority. *See Gray*, 27 Vet.App. at 323. However, the Court expressly rejected these sources of authority, stating, "contrary to the Secretary's assertions, they do not explain how VA's designation of Da Nang Harbor relates to the probability of exposure based on herbicide use. . . . There is no discussion in the manual, letter, or bulletin of the likelihood of herbicide exposure based on spraying." *Id*. Accordingly, the Court rejected the Secretary's entire premise that these items of "authority" provided a legitimate, but more importantly, a ***reasonable*** basis for the Secretary's interpretation of § 3.307(a)(7) to deny Mr. Gray's claim. Thus, to the extent the Secretary now argues that these three items of "authority" provided a rationale to support its interpretation, thus rendering its litigation position "substantially justified", the Court's decision unambiguously establishes that any such assertion is without merit. *See id*. at 322 (". . . with respect to Da Nang Harbor, the manner in which VA defines inland waterways is both inconsistent with the regulatory purpose ***and*** irrational. Therefore, the Court cannot find VA's definition ***reasonable***. . . .") (emphasis added).

The Secretary also argues that VA's litigation position before this Court was substantially justified because "the Secretary made clear that he was following his own

policy." Appellee Response at 14. Inexplicably, in support of this argument the Secretary then refers to this Court's discussion of the *Haas v. Peake* case in its decision, and the Court's description that *Haas* "laid the foundation for the blue-versus-brown-water distinction." *See* Appellee Response at 14 (citing *Gray* at 320 (citation to *Haas* omitted)). Here, it seems the Secretary attempts to rely on the *Haas* case, in which the Secretary prevailed, to show that somehow the Secretary was substantially justified in its litigation position in Mr. Gray's case. This effort to conflate the *Haas* case with the Secretary's litigation position in Mr. Gray's case is puzzling because it is a complete *non sequitur*. The Court in Mr. Gray's case made this perfectly clear in its decision on the merits.

This Court in Mr. Gray's case stated that it was not engaging in a reexamination of the Federal Circuit's holding in *Haas*, which held that it was reasonably within the scope of the Secretary's discretion for "VA to distinguish between offshore and inland waterways" for purposes of determining which veterans were entitled to herbicide-related compensation benefits. *See Gray* at 320-21. This issue was entirely dissimilar to the issue in Mr. Gray's case, which was a challenge to the validity of VA's definition of "inland waterways." *Id.* at 321. Despite the Secretary's attempt during the merits stage of the case to conflate the holding in the *Haas* decision with the issues to be decided in Mr. Gray's appeal, this Court rejected this "litigation position" out of hand. To the contrary, the Court in *Gray* found that *Haas* "did not decide the specific question before the Court." *Id.* Indeed, the Court in *Gray* clarified that ". . . this case asks the Court to

examine how VA exercised [its] discretion and, more specifically, whether VA's definition of inland waterways---which does not include Da Nang Harbor---is entitled to deference: a question ***not*** addressed by *Haas v. Peake*." *See id.* (emphasis added).

With respect to the issue of whether the Secretary was substantially justified in its litigation of Mr. Gray's case, perhaps the most pertinent decision issued by the Federal Circuit is *Patrick v. Shinseki, supra*. In the *Patrick* case, the Federal Circuit assessed whether VA's litigation position was substantially justified in light of its interpretation of a statute in a manner that was adverse to the claimant despite that interpretation being contrary to "both the statute's plain language and its legislative history." *See* 668 F.3d. at 1331. In light of these circumstances, the Federal Circuit concluded that the Secretary was ***not*** substantially justified. The Federal Circuit in *Patrick* explained that

> 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. *See Pierce*, 487 U.S. at 566 n. 2, 108 S.Ct. 2541 (emphasizing that an erroneous position could be substantially justified "if a reasonable person could think it correct"). Where, however, the government 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. *See Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir. 2004) (concluding that the government's position was not substantially justified where "it was wholly unsupported by the text of the applicable regulations" (citations and internal quotation marks omitted)).

See id. at 1330-31 (emphasis added) (further string citations omitted).

The Federal Circuit's explanation for finding the Secretary not substantially justified in *Patrick* is wholly applicable to Mr. Gray's case. As noted above, to support

the VA's assertion that its litigation position was substantially justified the Secretary proffered the C&P Bulletin, Fast Letter, and M21-1MR provision as items of "authority" that it claims supported the Secretary's interpretation of § 3.307(a)(7)(iii). However, it its decision on the merits, this Court found that "[t]here [wa]s no discussion in the manual, letter, or bulletin of the likelihood of herbicide exposure based on spraying." *Gray* at 323. Therefore, the Court determined that ". . . with respect to Da Nang Harbor, the manner in which VA defines inland waterways is both ***inconsistent with the regulatory purpose*** and ***irrational***. Therefore, the Court cannot find VA's definition ***reasonable***. . . ." *See id.* at 322 (emphasis added). Given this description of the Secretary's litigation position by the Court in Mr. Gray's case, ***no*** "reasonable person could think it correct." *See Patrick*, 668 F.3d at 1330-31 (citing *Pierce v. Underwood, supra*).

In sum, nothing the Secretary argues in his response to Mr. Gray's EAJA application is sufficient to overcome the obvious lack of substantial justification for VA's litigation position before both the administrative and judicial levels. Upon reading the Court's decision on the merits, no reasonable person could conclude that the Secretary's actions in this case were "justified in substance or in the main" or had a "reasonable basis both in law and fact." *See Pierce*, 487 U.S. at 565. Any doubt about this issue was resolved where the Court vacated the Board's decision on grounds that it was "arbitrary and capricious because the decision was based on VA's flawed interpretation of 38 C.F.R. § 3.307(a)(7) (iii)." *Gray v. McDonald* at 326. *See also Gray* at 324 (". . . the

Court cannot discern any rhyme or reason in VA's determination . . .") *and* at 325 (". . . VA is not free to label bodies of water by flipping a coin, yet the outcomes here appear just as arbitrary.").

II. THE SECRETARY'S UNDERSTANDING OF THE SUPREME COURT'S HOLDING IN *HENSLEY v. ECKHART* REGARDING ALTERNATIVE ARGUMENTS IN SUPPORT OF A SINGLE OUTCOME IS INCORRECT

Anticipating that the Court will find the Secretary's litigation position not substantially justified, the Secretary asserts in the alternative that Mr. Gray's application for an award of EAJA fees and expenses should be reduced because of his "unsuccessful legal arguments." Appellee's Response at 21-24. With a great degree of certitude, the Secretary asserts, "This Court and the U.S. Supreme Court have also made clear that unsuccessful arguments are not subject to EAJA fees." Appellee's Response at 21. As authority for this assertion the Secretary cites to *Hensley v. Eckhart*, 461 U.S. 424, 436 (1983) and *Vazquez-Flores v. Shinseki*, 26 Vet.App. 9, 15 (2012). However, the Secretary is mistaken in both his specific assertion and the case law he cites in support of it. Whether by design or negligence, the Secretary's assertion here demonstrates a gross misunderstanding of the case law he cites as it relates to the specific circumstances of Mr. Gray's case before this Court. For this reason, there absolutely is no merit to the Secretary's argument that Mr. Gray's EAJA award should be reduced on this basis.

Mr. Gray's case involves a ***single*** claim---that he is entitled to service- connected benefits pursuant to 38 U.S.C. § 1116---, the resolution of which involves a ***single*** issue

---that it should be presumed that he was exposed to herbicides in service. The multiple arguments in his brief are all in support of this single claim and the favorable resolution of the single issue the claim presents. *See* Appellant's Brief at 10-25. It is true that the Court did not accept all of Mr. Gray's arguments in its decision on the merits of his appeal.[1] However, the entire thrust of his principal argument was that the Board's decision to deny Mr. Gray's claim based on the Secretary's exclusion of Da Nang Harbor from the category of Vietnam's inland waterways was arbitrary and capricious. *See* Appellant's Brief at 10-18. Indeed, this argument was ***thoroughly*** vindicated by the Court's essential holding: ". . . the Court will vacate the Board decision as arbitrary and capricious because the decision was based on VA's flawed interpretation of 38 C.F.R. § 3.307(a)(7)(iii)." *Gray v. McDonald* at 326.

The Secretary's gross misunderstanding of how *Hensley* and *Vazquez-Flores, supra*, apply to Mr. Gray's case is based on the Secretary equating Mr. Gray's multiple ***arguments*** in his brief in support of his ***single*** claim with the multiple ***claims*** at issue in both *Hensley* and *Vazquez-Flores.* In the Secretary's thesis sentence about this argument,

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[1] The Court declined to adopt the definition of a harbor or bay, as described in *United States v. Louisiana*, 394 U.S. 11, 22-23 (1968), as suggested in Appellant's Brief at 15-16, because the Court found it inappropriate. *See* 27 Vet.App. at 326-27. The Court also rejected appellant's argument that his right to equal protection of the laws was violated. *See id.* at 327-28. Lastly, although the Court did not expressly address Mr. Gray's "reasons or bases" argument, *see* Appellant's Brief at 23-25, in effect the Court agreed with this argument in light of its remand of the case for VA to "reevaluate its definition of inland waterways." *Gray* at 326-27.

see Appellee's Response at 21, his assertion is that *Hensley* and *Vazquez* support that "unsuccessful ***arguments*** are not subject to fees." In fact, this case law stands for no such proposition. In finding that the plaintiff in *Hensley* was not entitled to certain fees to be paid by the government, the Supreme Court's opinion makes clear this was with respect to ***some*** of the plaintiff's "distinctly different ***claims*** for relief." *See* 461 U.S. 424, 434-35 (emphasis added). In other words, in *Hensley* the focus of the Supreme Court's holding was the multiple "claims" the plaintiff had appealed, ***not*** the plaintiff's specific "arguments" that might have been submitted in support of those ***multiple claims***.

> In point of fact, the essential holding in *Hensley* reads as follows:
>
> In some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on ***different*** facts and legal theories. In such a suit, even where the claims are brought against the same defendants---often an institution and its officers, as in this case---counsel's work on ***one claim*** will be unrelated to his work on ***another claim***. Accordingly, work on an unsuccessful ***claim*** cannot be deemed to have been "expended in pursuit of the ultimate result achieved." The Congressional intent to limit awards to prevailing parties requires that these ***unrelated claims*** be treated as if they had been raised in ***separate lawsuits***, and therefore no fee may be awarded for services on the ***unsuccessful claim***.

See id. (emphasis added) (internal citations omitted). However, unlike in *Hensley*, Mr. Gray had only a ***single*** lawsuit with a ***single*** claim, and this single claim was ***entirely*** "successful", ***not*** unsuccessful. Accordingly, the Secretary's reliance on the Supreme Court's holding in *Hensley* is entirely off base. The same assessment is true of the Secretary's reliance on the *Vazquez-Flores* case. Unfortunately, the Court in *Vazquez-Flores* did use the term "arguments" on several occasions when referring to the

"unsuccessful" portions of the appellant's appeal. However, it is clear from reading the Court's opinion in that case that the Court was referring to the appellant's "arguments" regarding his distinct, unsuccessful ***rating increase*** claim, not any of his arguments with respect to his ***separate*** neuropsychiatric ***service-connection*** claim. As to the latter "claim", the Court found the appellant was a prevailing party and entitled to an EAJA award. *See* 26 Vet.App. 9 (2012).

In fact, an accurate understanding of the full holding in *Hensley* shows that this case law provides substantial ***support*** for Mr. Gray's application for the full EAJA award he seeks. In pertinent part, the Supreme Court held, "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation. . . ." 461 U.S. at 435. Mr. Gray would submit that in his case he "obtained excellent results" and therefore his application for an EAJA award should be paid in full. *Id*. This is so despite the fact that the Court did not accept all of his arguments in support of his claim. The Supreme Court in *Hensley* also explained why this is so:

> Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is ***not*** a sufficient reason for reducing a fee. The result is what matters.

See id. (emphasis added).

In light of the actual effects that flow from the *Hensley* opinion, the Court should reject the Secretary's reliance on this case law as supporting a reduction in Mr. Gray's

EAJA award. To the contrary, the Court should recognize that the Hensley opinion supports that Mr. Gray's EAJA award should not be reduced simply because some of his "good faith" arguments to the Court on behalf of Mr. Gray's claim were not found persuasive. *Id*.

III. NONE OF THE LITIGATION EXPENDITURES MR. GRAY PRESENTED FOR REIMBURSEMENT ARE VAGUE OR REDUNDANT

The Secretary also asserts that some of Mr. Gray's claimed expenses related to the litigation of his case should be excluded from his EAJA award because they are "vague." *See* Appellee's Response at 17-18. The basis for this assertion by the Secretary is unclear. While the expense amounts cited by the Secretary are stated as lump-sum amounts in Exhibit 3 attached to the EAJA application ($774.64 Wildhaber invoice and $290.72 "Budget" expense), these specific amounts are itemized at page 6 of the EAJA application itself. It appears the Secretary did not see page 6 of the EAJA application, which contains the itemization for the "expenses incurred in conjunction with this case."

At page 6 of the EAJA application, the "vague" $774.64 amount for "oral argument invoice for Michael Wildhaber" is itemized, breaking down to include $421.70 for airfare to and from the February 2015 oral argument; $176.97 hotel expense related to the oral argument; $114.77 rental car travel expense related to the oral argument; and $61.20 taxi travel expense related to the oral argument. Nothing is vague about these expenses, and they appear to be exceptionally reasonable in terms of the actual amounts expended. Similarly, regarding the purportedly "vague" $290.72 expense labeled

"Hearing Expense - Budget", for lead counsel Matthew Hill, this specific expense also is itemized at page 6 of the EAJA application. Although at page 6, for the $290.72 expense, it reads "taxi", this is a typo. In fact, this amount was lead counsel Hill's expense to rent a car from "Budget" rental car to travel to the oral argument. Again, despite the easily deciphered typographical error between Exhibit 3 of the EAJA application and page 6 of the application, this oral argument-related travel expense is neither vague nor unreasonable.

In addition, under the argument heading of "vague expenditures", the Secretary also challenges the $839.20 cost of lead counsel Matthew Hill's airline ticket to travel to and from the February 2015 oral argument. It is unclear why the Secretary included this expense amount as part of the "vague expenditures" argument because clearly it is not, which the Secretary himself attests to given the Secretary's own description of it as Mr. Hill's "Southwest ticket." Appellee's Response at 17. Rather, the Secretary's argument here is that this travel expense was unnecessary because it was unnecessary for Mr. Hill to have attended the February 2015 oral argument at all. *See* Appellee's Response at 18-20. This assertion by the Secretary, and his other assertions that Mr. Gray's EAJA award should be reduced because there was "impermissible multiple representation", is rebutted immediately below.

IV. THE REPRESENTATION SERVICES THE SECRETARY ASSERTS ARE IMPERMISSIBLY REDUNDANT ARE JUSTIFIED BASED ON THE ROLE OF EACH CO-COUNSEL IN THE CASE

The Secretary's final effort to secure a reduction of Mr. Gray's EAJA award is based on a challenge to the time expended by co-counsel which the Secretary alleges is duplicative. Appellee's Response at 18-20. In total, the Secretary appears to identify 14.5 combined hours expended by lead-counsel Matthew Hill and co-counsel Shannon Brewer, and 1.6 hours expended by co-counsel Michael Wildhaber, as demonstrating "instances" of "impermissible multiple representation." These "instances" are broken down as follows:

2/25/15	2.4 hours expended by lead counsel Matthew Hill to prepare for oral argument;
	2.2 hours expended by lead counsel Matthew Hill to attend the oral argument;
2/24/15	0.8 hours expended by lead counsel Matthew Hill conferring with co-counsel Michael Wildhaber in preparation for oral argument;
	1.2 hours expended by co-counsel Shannon Brewer to review deference standard case law;
	1.1 hours expended by co-counsel Shannon Brewer to review the Record Before the Agency;
2/23/15	1.1 hours expended by lead counsel Matthew Hill to review *Fountain* deference standard;
	1.4 hours expended by lead counsel Matthew Hill to review *Skidmore / Fountain* deference standard "with facts & VA precedent in this case";

2/22/15 1.4 hours expended by lead counsel Matthew Hill to "review ROP & facts in Brief and Amicus Brief";

2/18/15 1.3 hours expended by lead counsel Matthew Hill to review ROP "for specific citations for Oral Argument";

2/12/15 1.6 hours each expended by lead counsel Matthew Hill and co-counsel Michael Wildhaber in a telephone conference, described by Mr. Hill as "Gray planning discussion" and by Mr. Wildhaber as "Research and preparation for oral argument--telephone conference with co-counsel re: review and revision of oral argument outline, and strategies for presentation of oral argument.

The Secretary also alleges that "all three counsels' billing for .70 each for their 1/27/15 telephone conference" was duplicative. Appellee's Response at 20. However, the EAJA petition and its attachments show that only co-counsel Wildhaber's time for this joint conference was billed. *See* EAJA Application, Exhibits 3 & 4.

Although "there is no *per se* rule against an award of fees for multiple lawyers", in such "a case with multiple counsel" each can only be allowed EAJA fees "based on the distinct contribution of that individual counsel." *See Baldridge v. Nicholson*, 19 Vet.App. 227, 237 (2005). The Court in *Baldridge* noted that in such cases joint conferences are likely, and therefore this activity must be scrutinized because "such conferences may constitute duplicative or redundant work." *Id*. The Court in *Baldridge* did not say that all joint conferences in a multi-attorney case are duplicative and redundant. The Court said this ***may*** occur, and therefore the activity should be scrutinized accordingly. In Mr. Gray's case, in the two weeks prior to the seminal event of oral argument conducted in February 2015, lead-counsel Matthew Hill and co-counsel Michael Wildhaber billed for

two joint conferences (on February 12th and February 24th) that were directly related to counsel's preparation for oral argument. The Secretary argues these activities were impermissibly redundant, and should be excluded from Mr. Gray's EAJA award. *See* Appellee Response at 19-20.

In opposing Mr. Gray's billing for this time and activities, the Secretary provides no substantive reason to support this assertion other than the bald accusation that the time was "duplicative." This is insufficient to justify a reduction for these two events given their nature and purpose---preparing for oral argument---, which was a significantly important aspect of counsel's advocacy on behalf of Mr. Gray. Preparation for oral argument typically requires a substantial expenditure of counsel time. Moreover, such preparation also typically involves multiple attorneys, even in a case where there is only a single attorney who has entered an appearance for the appellant. In other words, adequate preparation for oral argument by an attorney virtually always involves assistance from other counsel, to both vet the substance of the argument and moot the actual presentation counsel intends at oral argument. Accordingly, there is nothing impermissibly redundant about lead counsel Hill assisting co-counsel Wildhaber to prepare for oral argument in this case, once two weeks before oral argument for a period of 1.6 hours, and a second time the day before oral argument for a period of 0.8 hours.

Similarly, lead counsel Matthew Hill's actual presence at oral argument was not redundant where he is lead counsel in the case and retained by Mr. Gray. Moreover, lead

counsel Hill prepared and presented the veteran's administrative case on the merits to the Board of Veterans' Appeals (Board), and thus is uniquely familiar with the evidence, facts, and legal issues in the case. His role at oral argument was essential to counsels' effective advocacy for Mr. Gray. He provided co-counsel Wildhaber with consultative support about the factual and legal bases for Mr. Gray's appeal both immediately before, and during oral argument. The Secretary provides no meritorious reason that activities such as these are not properly billed in an EAJA application. It is inappropriate for the Secretary to merely assert "bold, yet bald statement[s]" challenging the reasonableness of time expended and billed in an EAJA application. *Ussery v. Brown*, 10 Vet.App. 51, 54 (1997). Therefore, the Court should find no merit to the Secretary's request to reduce Mr. Gray's EAJA award on these grounds.

For the same reasons, there is no merit to the Secretary's challenge to the time expended by lead counsel Matthew Hill to review the record and pertinent case law prior to oral argument. *See* Appellee's Response at 19-20. As lead counsel in the case who provided co-counsel Wildhaber with critical consultation about the legal arguments to be presented at oral argument, it was essential that he be fully informed. Moreover, to the extent that the Secretary challenges the specificity of the description of lead counsel Hill's activities in the EAJA application, there is no merit to this accusation. Each of the challenged entries for Mr. Hill for the period from February 12 to 25, 2015 (see above) contains sufficient specificity as to purpose of each time he reviewed the Record of

Proceedings and case law in the days leading to the oral argument on February 25, 2015. *See* EAJA Application, Exhibit 3. Accordingly, the Secretary's specific objections to these billing entries amount to no more than a "bold, yet bald statement" that they are impermissibly redundant, which is an unacceptable basis to challenge the billing for this expenditure of counsel time. *Ussery, supra*.

Finally, the Secretary challenges as redundant two entries for time expended on February 24, 2015 by co-counsel Shannon Brewer that total 2.3 hours. All the other time expended by co-counsel Brewer is not challenged by the Secretary, and correctly so, because Ms. Brewer's distinct role in the case was to manage the case as a whole, conduct the initial review of the Record on Appeal, and prepare the Rule 33 Summary of the Issues memorandum. *See* EAJA Application, Exhibit 3. Although co-counsel Brewer's 2.3 hours of time expended prior to oral argument was of great assistance to Mr. Gray because she aided in the preparation of lead counsel Matthew Hill and co-counsel Michael Wildhaber for oral argument, Mr. Gray does not object if the Court were to order a reduction of his EAJA award based on this limited number of hours, i.e, 2.3 hours.

Conclusion

For the reasons discussed above, Mr. Gray requests that the Court reject the Secretary's opposition to his application for an award of reasonable EAJA attorney fees and expenses pursuant to 28 U.S.C. § 2412(d) because he is a prevailing party and the Secretary's litigation position both before the agency and before this Court was not

substantially justified.

Further, Mr. Gray also requests that the Court reject all of the various arguments asserted by the Secretary that his EAJA award should be reduced. The only exception to this latter request is that Mr. Gray would not object to a reduction of his EAJA award based on 2.3 hours expended by co-counsel Brewer on his behalf.

Respectfully submitted,

//s// Michael E. Wildhaber

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