

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DAVID R. GAGNE,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 14-0334
)	
ROBERT A. MCDONALD,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**TABLE OF CONTENTS FOR APPELLANT’S APPLICATION
FOR AWARD OF REASONABLE ATTORNEYS’ FEES AND
EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)**

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v.)	
)	Vet. App. No. 14-0334
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**APPELLANT'S APPLICATION FOR AN AWARD OF REASONABLE
ATTORNEYS' FEES AND EXPENSES PURSUANT TO
28 U.S.C. § 2412(d)**

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) and U.S. Vet. App. Rule 39, Appellant, David R. Gagne, applies for an award of reasonable attorneys' fees and expenses in the amount of **\$12,782.32**.

PROCEDURAL HISTORY

On November 8, 2013, the Board of Veterans' Appeals ("Board" or "BVA") issued a decision that denied entitlement to service connection for an acquired psychiatric disorder, to include posttraumatic stress disorder ("PTSD") and a depressive disorder with mixed anxiety features. Appellant filed a timely Notice of Appeal to this Court on February 6, 2014.

On April 3, 2014, the Secretary served on Appellant's counsel the 384-page Record Before the Agency ("RBA"). On April 23, 2014, the Court issued a Notice to File Appellant's Brief within sixty days. On April 24, 2014, the Court issued an Order scheduling a May 22, 2014 Rule 33 Staff Conference. Pursuant to the Court's Order, Appellant's counsel prepared a detailed 7-page Rule 33

Summary of the Issues addressing the legal errors committed by the Board in the decision on appeal, which he served on counsel for the Secretary and Central Legal Staff (“CLS”) counsel on May 8, 2014. On May 22, 2014, the Rule 33 Staff Conference was held, but failed to result in a joint disposition despite the good faith efforts of the parties. On June 23, 2014, Appellant filed a motion to extend the time to file Appellant’s brief until August 7, 2014, which was granted by the Court.

Appellant filed his 17-page brief with the Court on August 7, 2014. In his brief, Appellant argued that the Court should vacate and remand the Board’s decision. First, Appellant argued that the Court should reverse the Board’s finding that the duty to assist was satisfied because the Board erred by failing to ensure that the VA satisfied its duty to assist Appellant in the development of his claim for service connection in violation of 38 U.S.C. § 5103A and C.F.R. § 3.159. Appellant’s Brief (“App. Br.”) at 6-7. Specifically, Appellant argued that the Board erroneously concluded that the VA satisfied its obligations even though it refused to submit a request for service records to the U.S. Army Joint Service Records Research Center (“JSRRC”) that might corroborate Appellant’s in-service stressor. *Id.* at 9-10. Appellant contended that sufficient information had been provided to enable the VA to request verification from the JSRRC of Appellant’s in-service stressor. *Id.* Appellant noted that VA’s strict adherence to the VA Adjudication Procedures Manual (M21-1MR) requirement that a veteran must provide “the approximate date (within a two-month period) of the incident” in

order for the VA to submit a request to the JSRRC violated the duty to assist. App. Br. at 12-13. Appellant further argued that there was no reason why VA could not have submitted multiple requests to JSRRC, each for a 60-day period, but covering the whole year that Appellant was stationed in Thailand. *Id.* As a result, the VA fell short of its statutory duty to assist under 38 U.S.C. § 5103A(c) when it refused to submit requests to the JSRRC for records that might corroborate Appellant's in-service stressor. *Id.* at 14.

Next, Appellant argued that VA erred by failing to research the documents available on the Compensation Service Intranet site and "PTSD Rating Job Aid Web site" for information to corroborate Appellant's in-service stressor. App. Br. at 14. Appellant noted that there was no indication in the record that the VA made any attempt to verify Mr. Gagne's in-service stressor through these resources, or otherwise determined that any attempt to do so would be futile. *Id.* See 38 U.S.C. § 5103A(c)(2). *Id.* at 15. Appellant argued that VA's failure to verify Appellant's in-service stressors via these resources also constituted a violation of the duty to assist. *Id.*

Appellant argued, in the alternative, that the Board failed to provide an adequate statement of reasons or bases for its finding that the duty to assist was satisfied, in violation of 38 U.S.C. § 7104(d)(1). App. Br. at 15. Appellant explained that the Board determined that the duty to assist was satisfied without any mention of the fact that the VA never attempted to corroborate Appellant's in-service stressor through either the JSRRC or the VA's Compensation Service

Intranet site. *Id.* at 16. Appellant argued that if the Court found that reversal of the Board's finding that the duty to assist was satisfied was not warranted, then the Board's decision should be vacated and remanded so that the Board can provide an adequate statement of reasons or bases for its findings. *Id.* at 16-17.

On October 6, 2014, the Secretary filed a motion to extend the time to file his brief until November 20, 2014, which was granted by the Court. On November 20, 2014, the Secretary filed his responsive brief in which he argued that the Court should affirm the Board's November 8, 2013 decision. Secretary's Brief ("Sec. Br.") at 3. In his brief, the Secretary argued that Appellant had not satisfied his burden of establishing that the Board's finding regarding the duty to assist was clearly erroneous or that any purported duty-to-assist error resulted in prejudice. *Id.* at 4. The Secretary explained that the VA did not need to submit a request for verification of a stressor to the JSRRC because Appellant did not provide the minimum requested information to facilitate a search. *Id.* at 5. The Secretary argued that the VA Adjudication Manual provides that a claim for service connection for PTSD may be denied without requesting corroboration of an in-service stressor from an official records custodian, such as JSRRC, if the claimant fails to provide the minimum information required to conduct a search. *Id.* The Secretary further argued that the VA Adjudication Manual also provides that the month and the year of a claimed stressor must be provided to the JSRRC, noting that the JSRRC will only search records dated 30 days before and 30 days after the date provided by the veteran. *Id.* The Secretary also noted

that Appellant only stated that the stressors occurred between 1967 and 1968, which is a 2-year time frame and not the required 60-day timeframe required by the JSRRC. Sec. Br. at 5-6. As a result, the Secretary contended that the Board properly found that Appellant had not provided sufficient information for the JSRRC to conduct a search of its records.

Next, the Secretary contended that VA was not required to research the documents available on the Compensation Service Intranet site to verify Appellant's in-service stressor. Sec. Br. at 7. The Secretary explained that Appellant's statements concerning the stressful incidents were simply too broad in order to conduct a meaningful search through either the JSRRC or the VA intranet site. *Id.* Accordingly, the Secretary argued that Appellant had not demonstrated that the Board's finding that the duty to assist had been satisfied was clearly erroneous. *Id.*

On December 4, 2014, Appellant filed a motion to extend the time to file his reply brief until January 20, 2015, which was granted by the Court. On January 20, 2015, Appellant filed his 13-page reply brief with the Court. In his reply brief, Appellant argued that the Court should reject the Secretary's argument that the VA was not required to assist Appellant in the development of his claim for service connection by requesting stressor verification from the JSRRC. Appellant's Reply Brief ("App. Rep. Br.") at 2. Specifically, Appellant argued that there is no provision in the M21-1MR that precludes VA from submitting multiple requests to the JSRRC when, as here, the veteran is unable

to narrow the approximate date of the claimed stressor to a 60-day time frame. App. Rep. Br. at 3. Appellant further argued that the very spirit of the veteran-friendly statutorily-mandated duty to assist would be violated if the VA could refuse to assist a veteran by not submitting multiple requests to the JSRRC, provided that the number of requests required is reasonable and when the Appellant has provided the approximate time and place of the incident and a description of the individuals involved. *Id.* Appellant explained that 38 U.S.C. § 5103A(c)(1)(A) is clear that a veteran need only provide the VA with “information sufficient to locate” records pertaining to a veteran’s active service that are held by any federal department or agency in order to trigger the duty to assist. *Id.* Appellant argued that “Secretary’s interpretation of the phrase “information sufficient to locate” as requiring at minimum “the approximate date (within a two-month period) of the incident” in order for the VA to submit a request to the JSRRC is erroneous as a matter of law. *Id.*

Next, Appellant contended that the Secretary’s argument regarding VA’s duty to research the Compensation Service Intranet site is nothing more than a *post-hoc* rationalization. App. Rep. Br. at 9. Appellant noted that the Secretary argued in his brief that “a one or two year time frame is too broad in order to facilitate a meaningful search for records through either the JSRRC or the VA intranet site.” *Id.* Appellant explained that the Secretary was attempting to impose the same 60-day requirement from the JSRRC on the VA’s research of its own Compensation and Pension Service Intranet site for evidence to verify the

in-service stressor. *Id.* Appellant further explained that nothing in the M21-1MR or VA Training Letter 07-02 states that a veteran must provide a 60-day period in order for VA to research its own intranet. *Id.* at 9-10. Appellant argued that the Board's decision failed to make findings or even address the VA's duty to assist with respect to the Compensation and Pension Intranet site, which meant that the Secretary's arguments in the first instance on appeal must be rejected as nothing more than *post-hoc* rationalizations. *Id.* at 10. Finally, Appellant explained that the errors committed by the Secretary were prejudicial because Appellant was denied the opportunity to advance his claim when the VA erroneously determined that it was not required to assist Appellant in the development of his claim for service connection under 38 U.S.C. § 5103A(c)(1)(A). *Id.* at 12.

On February 24, 2015, the Secretary filed the Record of Proceedings ("ROP") with the Court. On March 24, 2015, the case was assigned to Judge Greenberg. On August 13, 2015, the Court issued an Order scheduling oral argument for September 10, 2015. The case was argued before Judges Kasold, Davis, and Greenberg on September 10, 2015.

On October 19, 2015, the Court issued a Panel Decision (hereinafter "Pan. Dec.") vacating the Board's November 8, 2013 decision and remanding the matter to allow the VA to submit to the JSRRC multiple requests for records of a stressor event, each request encompassing a different 60 day period, to cover Appellant's relevant service period from July 1967 to September 1968 as a truck driver with the 91st Engineer Company. Pan. Dec at 1. The Court agreed with

Appellant that the Board erred by failing to ensure that the duty to assist was satisfied because Appellant provided information sufficient to locate records, but VA did not, at the very least, submit multiple requests to the JSRRC, each covering a 60 day period. *Id.* The Court noted that the statutory duty to assist requires that VA “continue” to try to obtain records in the possession of a government agency until such a search becomes futile, and the Court has determined that “futile” means a search for service records that no longer exist or are not in the custodian’s possession. 38 U.S.C. § 5103A(c)(2); 38 C.F.R. § 3.159(c)(2). *Id.* at 8. The Court agreed that the Secretary failed to establish that further efforts to obtain verification of Appellant’s alleged stressors would be futile. *Id.* at 9.

On November 10, 2015, the Court entered Judgment pursuant to U.S. Vet. App. R. 36. On January 12, 2016, the Court entered Mandate pursuant to U.S. Vet. App. R. 41(a).

ARGUMENT

I. APPELLANT IS A PREVAILING PARTY AND ELIGIBLE TO RECEIVE AN AWARD

To obtain “prevailing party” status, a party need only have obtained success “on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing the suit.” *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993) (quoting *Hudson, Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989)). Appellant is a prevailing party because the

Court vacated the Board's decision based on administrative error and remanded the case for further development and adjudication in accordance with its decision. See *Zuberi v. Nicholson*, 19 Vet. App. 541 (2006); *Sumner v. Principi*, 15 Vet. App. 256 (2001) (en banc). This Court-ordered relief creates the "material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fees." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Garland Indep. Sch. Dist.*, 489 U.S. at 792).

Appellant is a party eligible to receive an award of reasonable fees and expenses because his net worth did not exceed \$2,000,000 (two million dollars) at the time this civil action was filed. As an officer of the Court, the undersigned counsel hereby states that Appellant's net worth did not exceed \$2,000,000 (two million dollars) at the time this civil action was filed, nor did he own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7,000,000 (seven million dollars), and which had more than 500 employees. See *Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996). In addition, Appellant filed a Declaration of Financial Hardship, which was accepted for filing by the Court on February 6, 2014. See *Owens v. Brown*, 10 Vet. App. 65, 67 (1997).

II. THE POSITION OF THE SECRETARY OF VETERANS AFFAIRS WAS NOT SUBSTANTIALLY JUSTIFIED

The Secretary of Veterans Affairs can defeat Appellant's application for fees and costs only by demonstrating that the government's position was substantially justified. See *Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The U.S. Supreme Court has held that for the position of the government to be substantially justified, it must have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); accord, *Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

In this case, the Secretary's administrative and litigation positions were not substantially justified. As described more fully in the "Procedural History," *supra*, the Court vacated and remanded the Board's November 8, 2013, decision based on administrative error. Specifically, the Court held that the Board erred by failing to ensure that VA satisfied its duty to assist by making multiple requests to JSRRC for records of stressor events to cover Appellant's relevant service period in Thailand.

In addition, the litigation position of the Secretary, who defended the Board's decision despite the above-referenced errors, had no reasonable basis in fact or in law.

III. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES

An itemized statement of the services rendered and the reasonable fees and expenses for which Appellant seeks compensation is attached to this application as Exhibit A. Included in Exhibit A is a certification that lead counsel has “(1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all counsel and (2) considered and eliminated all time that is excessive or redundant.” *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005). In the exercise of billing judgment, Appellant has eliminated **19.3** hours of attorney time and **2.6** hours of paralegal/law clerk time from this itemized statement and this fee petition.

Appellant seeks attorneys’ fees at the following rates for representation in the Court of Appeals for Veterans Claims:¹

¹ A rate in excess of \$125 per hour for the attorneys for Appellant in this case is justified based on the increase in the cost of living since the EAJA was amended in March 1996. See 28 U.S.C. § 2412(d)(2)(A)(ii). The \$125 attorney fee rate, adjusted for inflation for the Washington Metropolitan Area, was \$197.46 in July 2014, the month before Appellant filed his initial brief. See Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the CPI-U for the Washington-Baltimore-D.C.-MD-VA area for inflation between March 1996 and November 1996 and by using the CPI-U for Washington-Baltimore-D.C.-MD-VA-W.VA area for inflation between November 1996 and January 2014. See Exhibit B; *Mannino v. West*, 12 Vet. App. 242 (1999). The market rates for Appellant’s attorneys exceeded \$197.46 per hour during the relevant time period. See *Covington v. District of Columbia*, 839 F. Supp. 894, 904-05 (D.D.C. 1993), *aff’d*, 58 F.3d 1101 (D.C. Cir. 1995). The prevailing market rate for the work done by paralegal Clara Javier and law clerk and Tivara Grant was at least \$145.00 per hour from June 1, 2012, to May 31, 2014, and \$150.00 per hour from June 1, 2014, to the present. See *Sandoval v. Brown*, 9 Vet. App. 177, 181

<u>Name</u>	<u>Rate</u>	<u>Hours</u>	<u>Fee Amount</u>
Barton F. Stichman (1974 law graduate)	\$197.46	0.7	\$ 138.22
David Sonenshine (2004 law graduate)	\$197.46	27.9	\$ 5,509.13
Amy F. Odom (2006 law graduate)	\$197.46	25.9	\$ 5,114.21
Clara Javier (paralegal)	\$145.00	1.0	\$ 145.00
Matthew Letten (law clerk)	\$150.00	10.6	\$ 1,590.00
Tivara Grant (law clerk)	\$150.00	1.7	\$ 255.00
SUBTOTAL:			\$ 12,751.56

An itemization of expenses for which reimbursement is sought is as follows:

<u>Nature of Expenses</u>	<u>Amount</u>
Federal Express and USPS Charges	\$ 20.96
Duplication Charges	\$ 9.80
SUBTOTAL:	\$ 30.76
TOTAL:	\$ 12,782.32

(1996); see also *Richlin Security Service Co. v. Chertoff, Secretary of Homeland Security*, 553 U.S. 571 (2008).

WHEREFORE, Appellant respectfully requests that the Court award attorneys' fees and expenses in the total amount of **\$12,782.32** in this matter.

Respectfully submitted,

Date: February 4, 2016

/s/ David Sonenshine
David Sonenshine
Barton F. Stichman
Amy F. Odom
National Veterans Legal
Services Program
1600 K Street, NW, Suite 500
Washington, DC 20006-2833
(202) 621-5681

Counsel for Appellant

EXHIBIT A

**NVLSP Staff Hours for David R. Gagne
Vet. App. No. 14-0334**

Date: 12/26/2013 0.4 Staff: Amy F. Odom
Review and analyze Board of Veterans' Appeals ("BVA") decision to identify issues to raise on appeal; prepare analysis memorandum regarding issues to raise on appeal.

Date: 12/27/2013 0.0 Staff: Ronald B. Abrams
Review analysis memorandum; provide legal advice to D. Sonenshine regarding issues to raise on appeal. **[0.2 eliminated in the exercise of billing judgment]**.

Date: 1/3/2014 0.2 Staff: Clara Javier
Prepare letter to client regarding BVA decision and issues to raise on appeal, submit to lead attorney to finalize.

Date: 1/6/2014 0.0 Staff: David Sonenshine
Review and edit letter to client regarding BVA decision and issues to raise on appeal. **[0.1 eliminated in the exercise of billing judgment]**.

Date: 1/9/2014 0.2 Staff: Clara Javier
Prepare letter to client regarding appeal, case initiation, and next steps with enclosures.

Date: 2/6/2014 0.2 Staff: Clara Javier
Prepare Notice of Appeal and Notices of Appearance.

Date: 2/10/2014 0.2 Staff: Clara Javier
Prepare letter to client regarding status of appeal and projected timeline for case, with enclosures.

Date: 2/10/2014 0.3 Staff: David Sonenshine
Telephone conference with client regarding status of appeal and next steps (0.2); review and add greater detail concerning timeline of case to letter to client regarding status of appeal (0.1).

Date: 4/9/2014 0.9 Staff: David Sonenshine
Review 384-page Record Before the Agency (RBA) to ensure legibility and completeness, to tab relevant documents in order to prepare Rule 33 summary of issues, and to identify and additional issues to raise on appeal.

Date: 5/8/2014 3.3 Staff: David Sonenshine
Outline and prepare introduction of Rule 33 summary of issues with brief recitation of facts and procedural history (0.6); review tabbed RBA-pages 68-90 and 214-322 in order to draft Rule 33 summary of issues (0.3); draft duty to assist argument (1.4); draft reasons or bases argument (0.7); draft Rule 33 certificate of service; draft email to VA General Counsel and Court Central Legal Staff regarding Rule 33 Staff Conference and summary of issues (0.3).

Date: 5/12/2014 0.2 Staff: Clara Javier
Prepare letter to client regarding status of appeal, Rule 33 conference, and settlement authority, with enclosure.

Date: 5/12/2014 0.1 Staff: David Sonenshine
Review and add detail regarding issues to be raised to letter to client regarding Rule 33 summary of issues and settlement authority, and prepare relevant attachment.

Date: 5/16/2014 0.1 Staff: David Sonenshine
Telephone conference with client regarding status of case and Rule 33 summary of issues.

Date: 5/22/2014 0.3 Staff: David Sonenshine
Prepare for Rule 33 Staff Conference, including review of Rule 33 summary of the issues and relevant evidence (0.1); participate in Rule 33 Staff Conference (0.2).

Date: 6/20/2014 0.0 Staff: David Sonenshine
Email exchange with VA attorney T. Springs regarding motion for extension of time to file Appellant's brief. **[0.1 eliminated in the exercise of billing judgment]**.

Date: 7/14/2014 0.0 Staff: David Sonenshine
Conference with M. Letten regarding Appellant's brief and litigation strategy for same. **[0.1 eliminated in the exercise of billing judgment]**.

Date: 7/14/2014 3.2 Staff: Matthew Letten
Review Rule 33 summary of issues, Board decision, and other relevant documents to draft Appellant's brief **[0.4 eliminated in the exercise of billing judgment]**; review tabbed RBA-pages regarding procedural history of case to include in Appellant's brief (1.0)**[additional 1.0 eliminated in the exercise of billing judgment]**; draft statement of facts (2.2).

Date: 7/15/2014 4.3 Staff: Matthew Letten
Continue to draft statement of facts (3.0); outline argument regarding duty to assist and reasons or bases (1.3)**[additional 0.5 eliminated in the exercise of billing judgment]**.

Date: 7/16/2014 3.1 Staff: Matthew Letten
Draft argument regarding duty to assist (2.0)**[additional 1.0 eliminated in the exercise of billing judgment]**; draft argument regarding reasons or bases (0.5); review and edit brief (0.6).

Date: 8/5/2014 5.4 Staff: Amy F. Odom
Review BVA decision and draft brief **[0.3 eliminated in the exercise of billing judgment]**; conduct legal research of memorandum decisions regarding JSRRC requests and 60-day window and Compensation intranet stressor verification (2.3); prepare inserts to argument I.A regarding JSRRC (2.7); draft Argument I.B (0.4).

Date: 8/7/2014 1.0 Staff: Amy F. Odom
Prepare final inserts for brief, to include style edits to add persuasive value to argument (0.6); prepare Table of Authorities (0.4); prepare Table of Contents

[0.3 eliminated in exercise of billing judgment].

Date: 10/6/2014 0.1 Staff: David Sonenshine
Email exchange with VA attorney T. Springs regarding VA motion for extension of time to file brief.

Date: 12/3/2014 0.0 Staff: David Sonenshine
Email exchange with VA attorney T. Springs regarding motion for 45-day extension of time to file reply brief. **[0.1 eliminated in the exercise of billing judgment].**

Date: 12/4/2014 0.0 Staff: David Sonenshine
Prepare motion for 45-day extension of time to file reply brief. **[0.2 eliminated in the exercise of billing judgment].**

Date: 1/9/2015 0.4 Staff: Amy F. Odom
Review VAGC brief in preparation for conference with D. Sonenshine regarding issues to raise in reply brief (0.2); conference with and legal advice to D. Sonenshine regarding arguments to raise in appeal and Court's holding in *Trafter v. Shinseki* regarding statutory interpretation (0.2).

Date: 1/9/2015 0.0 Staff: David Sonenshine
Review Secretary's brief and other pleadings to prepare outline of arguments for reply brief **[0.3 eliminated in the exercise of billing judgment]**; conference with A. Odom regarding same **[0.1 eliminated in the exercise of billing judgment]**.

Date: 1/13/2015 5.9 Staff: David Sonenshine
Draft preliminary statement and introduction to argument section of reply brief (0.7); draft argument regarding records request to JSRRC (2.8); draft argument regarding search of VA C&P intranet site (2.1); review cases including *Gobber* for argument in reply brief to rebut Secretary's use of same (0.3).

Date: 1/15/2015 0.0 Staff: Amy F. Odom
Review draft reply brief. **[0.4 eliminated in the exercise of billing judgment]**

Date: 1/18/2015 1.5 Staff: Amy F. Odom
Continue review of draft reply brief and prepare inserts for same.

Date: 1/20/2015 0.7 Staff: Amy F. Odom
Complete review of draft reply brief and prepare final inserts for same.

Date: 1/20/2015 2.9 Staff: David Sonenshine
Revise reply brief per inserts from A. Odom **[2.8 hours eliminated in the exercise of billing judgment]**; prepare reply brief for filing to include cite checking of RBA references and case citations, style edits to add persuasive value to argument (0.9).

Date: 1/21/2015 0.2 Staff: David Sonenshine
Draft letter to client regarding status of case and reply brief.

Date: 2/3/2015 0.1 Staff: David Sonenshine
Email exchange with VA attorney T. Springs regarding VA motion for extension of time to file ROP.

Date: 3/3/2015 0.4 Staff: David Sonenshine
Review Record of Proceedings for completeness.

Date: 6/15/2015 0.5 Staff: Amy F. Odom
Review CAVC Order staying case and pleadings in *Ford*.

Date: 6/15/2015 0.0 Staff: David Sonenshine
Email exchange with A. Odom regarding *Ford* case and Court's order staying case pending outcome of *Ford*. **[0.1 eliminated in the exercise of billing judgment]**.

Date: 7/13/2015 0.2 Staff: Amy F. Odom
Conference with D. Sonenshine and B. Stichman regarding potential motion for oral argument.

Date: 7/13/2015 0.0 Staff: Barton F. Stichman
Conference with D. Sonenshine and A. Odom regarding potential motion for oral argument. **[0.2 eliminated in the exercise of billing judgment]**

Date: 7/13/2015 0.0 Staff: David Sonenshine
Conference and email exchange with A. Odom and B. Stichman regarding motion for oral argument. **[0.2 eliminated in the exercise of billing judgment]**.

Date: 8/14/2015 0.0 Staff: David Sonenshine
Email exchange with A. Odom regarding oral argument and discussion with B. Stichman regarding same. **[0.1 eliminated in the exercise of billing judgment]**

Date: 8/17/2015 0.0 Staff: Barton F. Stichman
Conference with A. Odom regarding issues to raise in oral argument. **[0.2 eliminated in the exercise of billing judgment]**

Date: 8/17/2015 0.5 Staff: Amy F. Odom
Conferences with and legal advice to D. Sonenshine and B. Stichman regarding issues to raise in oral argument.

Date: 8/25/2015 0.1 Staff: David Sonenshine
Review VA motion for clarification of issues to address during oral argument.

Date: 8/26/2015 0.2 Staff: David Sonenshine
Email exchange with VA attorney T. Springs regarding motion for clarification of issues to address during oral argument (0.1); telephone conference with client regarding same (0.1).

Date: 8/31/2015 0.7 Staff: Barton F. Stichman
Evaluate VA settlement offer (0.4); review and consider Court Order regarding issues for oral argument, outline for discussion with client (0.3).

Date: 8/31/2015 0.1 Staff: David Sonenshine
Telephone conference and email exchange with VA attorney C. Wallace regarding possible JMR and proposed bases for remand.

Date: 9/1/2015 0.2 Staff: David Sonenshine
Telephone conference with client regarding possible JMR and proposed bases for remand (0.1); email exchange with VA attorney C. Wallace regarding client's rejection of same (0.1).

Date: 9/2/2015 0.5 Staff: Amy F. Odom
Conference with and legal advice from B. Stichman and D. Sonenshine regarding oral argument strategy.

Date: 9/2/2015 0.0 Staff: Barton F. Stichman
Conference with A. Odom and D. Sonenshine regarding oral argument strategy. **[0.5 eliminated in the exercise of billing judgment]**

Date: 9/2/2015 0.2 Staff: David Sonenshine
Telephone conference with VA counsel C. Wallace regarding proposed bases for remand and possible JMR (0.2); email exchange with B. Stichman and A. Odom regarding same **[0.3 eliminated in the exercise of billing judgment]**.

Date: 9/3/2015 0.1 Staff: David Sonenshine
Telephone conference with client regarding Secretary's revised remand offer and possible JMR (0.1); telephone conference with VA counsel C. Wallace regarding rejection of revised remand offer **[0.2 eliminated in the exercise of billing judgment]**.

Date: 9/3/2015 0.0 Staff: Barton F. Stichman
Preliminary discussion with A. Odom and D. Sonenshine and conference with

VA attorney C. Wallace regarding VA remand offer. **[0.2 eliminated in the exercise of billing judgment]**

Date: 9/3/2015 0.0 Staff: Amy F. Odom

Telephone conference with client regarding Secretary's remand offer **[0.1 eliminated in the exercise of billing judgment]**; telephone conference with VA attorney C. Wallace regarding client's rejection of remand offer and conference with B. Stichman and D. Sonenshine regarding next steps **[0.2 eliminated in the exercise of billing judgment]**.

Date: 9/4/2015 2.3 Staff: David Sonenshine

Oral argument moot with A. Odom and B. Stichman (1.3); follow-up discussion with A. Odom regarding same **[0.2 eliminated in the exercise of billing judgment]**; perform legal research regarding authority for JSRRC mission and the duties of agency with respect to VA disability claims; email exchange with A. Odom regarding research for same (1.0).

Date: 9/4/2015 4.0 Staff: Amy F. Odom

Review pleadings in preparation for oral argument (0.5); conduct legal research and prepare outline in preparation for oral argument (1.6); prepare for and participate in first moot (1.3); conduct legal research regarding M21-1MR provisions in preparation for oral argument (0.6).

Date: 9/4/2015 0.0 Staff: Barton F. Stichman

Oral argument moot with A. Odom and David Sonenshine in preparation for oral arguments. **[1.3 eliminated in the exercise of billing judgment]**

Date: 9/8/2015 0.3 Staff: David Sonenshine

Email exchange with VA attorney T. Springs regarding Court's Order to provide transcript of BVA hearing; review RBA for relevant information regarding same.

Date: 9/8/2015 1.4 Staff: Amy F. Odom

Conference with D. Sonenshine regarding Court's Order to produce transcript of BVA hearing **[0.3 eliminated in the exercise of billing judgment]**; perform legal research regarding 38 U.S.C. § 5106 and potential remedies in

preparation for oral argument (1.4).

Date: 9/8/2015 0.0 Staff: Barton F. Stichman
Email exchanges with Kinnaird and Shumsky regarding question on remedy for violation of § 5106. **[0.6 eliminated in the exercise of billing judgment]**

Date: 9/9/2015 3.0 Staff: David Sonenshine
Telephone conference with VA attorney C. Wallace regarding Secretary's concessions of error and conference with B. Stichman and A. Odom regarding oral argument strategy (1.5); participate in moot oral argument for A. Odom. (1.5).

Date: 9/9/2015 7.2 Staff: Amy F. Odom
Telephone conference with VAGC attorney regarding concession of error and conference with and legal advice from B. Stichman and D. Sonenshine regarding oral argument strategy (1.5); draft new outline of argument in light of Secretary's concessions (1.2); participate in second moot (1.5); review ROP and flag relevant documents in preparation for oral argument, finalize outline, and organize case law for citation during oral argument (3.0).

Date: 9/9/2015 0.0 Staff: Barton F. Stichman
Conference with Chris Wallace regarding VA concessions and then conference with A. Odom and D. Sonenshine to prepare for oral argument **[1.5 eliminated in the exercise of billing judgment]**; Moot Court with A. Odom and D. Sonenshine **[1.5 eliminated in the exercise of billing judgment]**.

Date: 9/10/2015 1.8 Staff: David Sonenshine
Support role at oral argument; sit second chair during oral argument for case (1.8); follow-up discussion with A. Odom regarding oral argument and VA motion to clarify position after oral argument **[0.2 eliminated in the exercise of billing judgment]**.

Date: 9/10/2015 2.0 Staff: Amy F. Odom
Participate in pre-argument briefing and prepare for and participate in oral argument (1.8); conference with B. Stichman and VA attorney C. Wallace

regarding Secretary's proposed motion for leave to clarify position (0.2).

- Date: 9/10/2015 0.0 Staff: Barton F. Stichman
Travel to/from oral argument; support role in oral argument **[1.8 eliminated in the exercise of billing judgment]**; teleconference with VA attorney C. Wallace regarding VA proposed motion for leave to clarify position **[0.2 eliminated in the exercise of billing judgment]**.
- Date: 10/19/2015 0.0 Staff: Barton F. Stichman
Review Panel Decision. **[0.3 eliminated in the exercise of billing judgment]**.
- Date: 10/19/2015 0.2 Staff: Amy F. Odom
Review and analyze Panel Decision in order to provide update to client.
- Date: 10/20/2015 0.3 Staff: David Sonenshine
Draft letter to client regarding Panel Decision and next steps.
- Date: 10/28/2015 0.3 Staff: David Sonenshine
Telephone conference with client regarding Court's decision and his questions regarding next steps.
- Date: 1/21/2016 0.0 Staff: Tivara Grant
Review briefs and other relevant documents in preparation for drafting application for reasonable attorneys' fees and expenses under the Equal Access to Justice Act (EAJA); begin to draft application for reasonable attorneys' fees and expenses under the EAJA including recitation of procedural history. **[2.0 eliminated in the exercise of billing judgment]**.
- Date: 1/22/2016 1.0 Staff: Tivara Grant
Continue drafting application for reasonable attorneys' fees and expenses under the Equal Access to Justice Act (EAJA). (1.0)**[additional 0.6 eliminated in the exercise of billing judgment]**.

Date: 1/26/2016 0.7 Staff: Tivara Grant
Complete draft application for reasonable attorneys' fees and expenses under the Equal Access to Justice Act (EAJA).

Date: 1/28/2016 2.0 Staff: David Sonenshine
Review and add inserts to procedural history section of draft application for reasonable attorneys' fees and expenses (1.5); begin to prepare itemized list of hours for EAJA petition, and propose billing judgment (0.5).

Date: 1/29/2016 2.0 Staff: David Sonenshine
Complete itemized list of hours for EAJA petition; eliminate hours in billing judgment.

Date: 2/4/2016 0.0 Staff: Christine Cote Hill
Add inserts to draft application for reasonable attorneys' fees and expenses; eliminate more time than recommended in the exercise of billing judgment.
[1.2 eliminated in the exercise of billing judgment].

Date: 2/4/2016 0.4 Staff: David Sonenshine
Draft NVLSP closing letter to client.

CERTIFICATION

As lead counsel in this appeal, I have reviewed the combined billing statement above and I am satisfied that it accurately reflects the work performed by all counsel and others entitled to be included above and I have considered and eliminated all time that I believe could be considered excessive or redundant.

Date: February 4, 2016

/s/ David Sonenshine
David Sonenshine

EXHIBIT B

Databases, Tables & Calculators by Subject

FONT SIZE: 

Change Output Options:

From: 2004 To: 2014 [GO](#)


☐ include graphs

[More Formatting Options](#) 

Data extracted on: August 19, 2014 (2:57:08 PM)

Consumer Price Index - All Urban Consumers

Series Id: CUURA311SA0, CUUSA311SA0
Not Seasonally Adjusted
Area: Washington-Baltimore, DC-MD-VA-WV
Item: All items
Base Period: NOVEMBER 1996=100

Download:  [xlsx](#)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
2004	117.1		118.1		118.9		120.2		120.8		120.9		119.5	118.3	120.7
2005	121.3		122.7		123.6		125.0		126.7		125.4		124.3	122.8	125.8
2006	126.3		126.8		128.8		130.7		130.2		129.3		128.8	127.7	130.0
2007	129.956		131.945		132.982		134.442		134.678		135.151		133.464	132.000	134.927
2008	136.293		138.090		139.649		142.065		142.036		138.547		139.499	138.490	140.509
2009	137.598		138.620		139.311		140.810		140.945		140.718		139.814	138.777	140.850
2010	141.124		141.741		142.025		141.966		142.738		142.915		142.218	141.700	142.736
2011	144.327		146.044		147.554		147.747		147.658		147.565		146.975	146.259	147.691
2012	148.163		150.074		150.155		149.838		151.732		150.646		150.212	149.603	150.822
2013	150.845		152.188		151.908		152.657		153.532		153.160		152.500	151.798	153.203
2014	153.700		154.600		155.198		155.220							154.626	

TOOLS

Areas at a Glance
Industries at a Glance
Economic Releases
Databases & Tables
Maps

CALCULATORS

Inflation
Location Quotient
Injury And Illness

HELP

Help & Tutorials
FAQs
Glossary
About BLS
Contact Us

INFO

What's New
Careers @ BLS
Find It! DOL
Join our Mailing Lists
Linking & Copyright Info

RESOURCES

Inspector General (OIG)
Budget and Performance
No Fear Act
USA.gov
Benefits.gov
Disability.gov

EXHIBIT C

LAFFEY MATRIX -- 2003-2014
(2009-10 rates were unchanged from 2008-09 rates)

	Years (Rate for June 1 - May 31, based on prior year's CPI-U)										
Experience	03-04	04-05	05-06	06-07	07-08	08-09	09-10	10-11	11-12	12-13	13-14
20+ years	380	390	405	425	440	465	465	475	495	505	510
11-19 years	335	345	360	375	390	410	410	420	435	445	450
8-10 years	270	280	290	305	315	330	330	335	350	355	360
4-7 years	220	225	235	245	255	270	270	275	285	290	295
1-3 years	180	185	195	205	215	225	225	230	240	245	250
Paralegals & Law Clerks	105	110	115	120	125	130	130	135	140	145	145

Explanatory Notes:

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. The matrix is intended to be used in cases in which a "fee-shifting" statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412 (b) (Equal Access to Justice Act). The matrix does **not** apply in cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. This matrix is based on the hourly rates allowed by the District Court in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). It is commonly referred to by attorneys and federal judges in the District of Columbia as the "Laffey Matrix" or the "United States Attorney's Office Matrix." The column headed "Experience" refers to the years following the attorney's graduation from law school. The various "brackets" are intended to correspond to "junior associates" (1-3 years after law school graduation), "senior associates" (4-7 years), "experienced federal court litigators" (8-10 and 11-19 years), and "very experienced federal court litigators" (20 years or more). *See Laffey*, 572 F. Supp. at 371.
3. The hourly rates approved by the District Court in *Laffey* were for work done principally in 1981-82. The Matrix begins with those rates. *See Laffey*, 572 F. Supp. at 371 (attorney rates) & 386 n.74 (paralegal and law clerk rate). The rates for subsequent yearly periods were determined by adding the change in the cost of living for the Washington, D.C. area to the applicable rate for the prior year, and then rounding to the nearest multiple of \$5 (up if within \$3 of the next multiple of \$5). The result is subject to adjustment if appropriate to ensure that the relationship between the highest rate and the lower rates remains reasonably constant. Changes in the cost of living are measured by the Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Baltimore, DC-MD-VA-WV, as announced by the Bureau of Labor Statistics for May of each year.
4. Use of an updated *Laffey* Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the United States Attorney's Office as evidence of prevailing market rates for litigation counsel in the Washington, D.C. area. *See Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n. 14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Lower federal courts in the District of Columbia have used this updated *Laffey* Matrix when determining whether fee awards under fee-shifting statutes are reasonable. *See, e.g., Blackman v. District of Columbia*, 59 F. Supp. 2d 37, 43 (D.D.C. 1999); *Jefferson v. Milvets System Technology, Inc.*, 986 F. Supp. 6, 11 (D.D.C. 1997); *Ralph Hoar & Associates v. Nat'l Highway Transportation Safety Admin.*, 985 F. Supp. 1, 9-10 n.3 (D.D.C. 1997); *Martini v. Fed. Nat'l Mtg Ass'n*, 977 F. Supp. 482, 485 n.2 (D.D.C. 1997); *Park v. Howard University*, 881 F. Supp. 653, 654 (D.D.C. 1995).

LAFFEY MATRIX – 2014-2015

Years (Rate for June 1 – May 31, based on prior year's CPI-U)

Experience	14-15
20+ years	520
11-19 years	460
8-10 years	370
4-7 years	300
1-3 years	255
Paralegals & Law Clerks	150

Explanatory Notes:

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia. The matrix is intended to be used in cases in which a "fee-shifting" statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. This matrix is based on the hourly rates allowed in *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). It is commonly referred to by attorneys and federal judges in the District of Columbia as the "Laffey Matrix" or the "United States Attorney's Office Matrix." The various "brackets" in the column headed "Experience" refer to the years following the attorney's graduation from law school, and are intended to correspond to "junior associates" (1-3 years after law school graduation), "senior associates" (4-7 years), "experienced federal court litigators" (8-10 and 11-19 years), and "very experienced federal court litigators" (20 years or more). Thus, the "1-3 years" bracket is generally applicable to attorneys in their first, second, and third years after graduation from law school, and the "4-7 years" bracket generally becomes applicable on the third anniversary of the attorney's graduation (*i.e.*, at the beginning of the fourth year following law school). *See Laffey*, 572 F. Supp. at 371; *but cf. EPIC v. Dep't of Homeland Sec.*, No. 11-2261, ___ F. Supp. 2d ___, 2013 WL 6047561, *6 -*7 (D.D.C. Nov. 15, 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate); *EPIC v. Dep't of Homeland Sec.*, 982 F. Supp.2d 56, 60-61 (D.D.C. 2013) (same).
3. The hourly rates approved in *Laffey* were for work done principally in 1981-82. The matrix begins with those rates. *See Laffey*, 572 F. Supp. at 371 (attorney rates) & 386 n.74 (paralegal and law clerk rate). The rates for subsequent yearly periods were determined by adding the change in the cost of living for the Washington, D.C. area to the applicable rate for the prior year, and then rounding to the nearest multiple of \$5 (up if within \$3 of the next multiple of \$5). The result is subject to adjustment if appropriate to ensure that the relationship between the highest rate and the lower rates remains reasonably constant. Changes in the cost of living are measured by the Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Baltimore, DC-MD-VA-WV, as announced by the Bureau of Labor Statistics for May of each year.
4. Use of an updated Laffey Matrix was implicitly endorsed by the Court of Appeals in *Save Our Cumberland Mountains v. Hodel*, 857 F.2d 1516, 1525 (D.C. Cir. 1988) (en banc). The Court of Appeals subsequently stated that parties may rely on the updated *Laffey* Matrix prepared by the United States Attorney's Office as evidence of

prevailing market rates for litigation counsel in the Washington, D.C. area. See *Covington v. District of Columbia*, 57 F.3d 1101, 1105 & n.14, 1109 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1115 (1996). Most lower federal courts in the District of Columbia have relied on the United States Attorney's Office Matrix, rather than the so-called "Updated Laffey Matrix," as the "benchmark for reasonable fees" in this jurisdiction. *Miller v. Holzmann*, 575 F. Supp. 2d 2, 18 n.29 (D.D.C. 2008) (quoting *Pleasants v. Ridge*, 424 F. Supp. 2d 67, 71 n.2 (D.D.C. 2006)); see, e.g., *Berke v. Bureau of Prisons*, 942 F. Supp. 2d 71, 77 (D.D.C. 2013); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 40-49 (D.D.C. 2011); *American Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 150 (D.D.C. 2007). But see *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 14-15 (D.D.C. 2000). The United States Attorney's Office does not use the "Updated Laffey Matrix" to determine whether fee awards under fee shifting statutes are reasonable.