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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 13-3339(E)

ROBERT H. GRAY, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: Before the Court is the appellant's August 19, 2015, application for an award of reasonable attorney fees and expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), in the amount of $25,054.44. Appellant's Application for Attorney Fees and Expenses (Appl.) at 1. The appellant filed his EAJA application within the 30-day period set forth in 28 U.S.C. § 2142(d)(1)(B), and his application satisfies that section's content requirements. *See Scarborough v. Principi*, 541 U.S. 401, 408 (2004). The Secretary has filed a response challenging the EAJA application, in which he argues that the appellant's EAJA application should be denied because the Secretary's position was substantially justified. In the alternative, he challenges the reasonableness of the fees sought. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons discussed below, the Court will grant the EAJA application in part and award reduced attorney's fees in the amount of $23,494.07.

I. BACKGROUND

Under 38 C.F.R. § 1116(a) a veteran who "served in the Republic of Vietnam" between January 6, 1962, and May 7, 1975, is presumed service connected for certain conditions likely caused by exposure to Agent Orange, including type II diabetes mellitus, even if he cannot prove he was

ever actually exposed to qualifying herbicide. 38 U.S.C. § 1116(a). "'Service in the Republic of Vietnam' includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (2015).

VA has interpreted the language of this regulation as limiting the presumption of exposure to veterans who served on or visited the Vietnamese landmass or its inland waterways and excluding veterans who served exclusively offshore in ocean-going ships. *Haas v. Peake*, 525 F.3d 1168, 1182-83 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 149 (2009). After finding the Agent Orange statute and regulation ambiguous, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) recognized that "[t]he entire predicate for the Agent Orange Act and its regulations was exposure to herbicides in general and Agent Orange in particular." *Id.* at 1185. Accordingly, the Federal Circuit found that for purposes of determining herbicide exposure, it was reasonable for VA to distinguish between inland waterways and offshore waterways because "Agent Orange was sprayed only on land, and therefore, the best proxy for exposure is whether a veteran was present within the land borders of the Republic of Vietnam." *Id.* at 1192.

In the proceedings below, the appellant, through counsel, appealed a November 6, 2013, Board of Veterans' Appeals (Board) decision that denied disability compensation for (1) diabetes mellitus (diabetes), (2) neuropathy of the left and right lower extremities, (3) ischemic heart disease, and (4) hypertension – all to include as due to herbicide exposure – and (5) erectile dysfunction, to include as due to herbicide exposure, secondary to diabetes, or both. *Gray v. McDonald*, 27 Vet.App. 313, 315 (2015). The Board found that the appellant was not entitled to the Agent Orange presumption because, although his ship anchored in Da Nang Harbor, VA consideres Da Nang offshore waters. *Id.* In an April 23, 2015, panel decision, the Court found that the Agency's interpretation was inconsistent with the purpose of 38 C.F.R. § 3.307(a)(6)(iii) and did not reflect VA's considered judgment on the matter. *Id.* at 326. Accordingly, the Court found the interpretation was not entitled to deference and vacated the Board's decision and remanded the matter. *Id.* at 326-27.

II. ANALYSIS

A. Substantially Justified

The Court will award attorney fees to a prevailing party "unless the Court finds that the position of the United States was substantially justified," or unless other statutory requirements are not met. 28 U.S.C. § 2412(d)(1)(A); *Cline v. Shinseki*, 26 Vet.App. 325, 326 (2013). Once an EAJA applicant alleges that the Secretary's position was not substantially justified, the burden shifts to the Secretary to demonstrate that his position was substantially justified at the administrative and litigation stages. *See Locher v. Brown*, 9 Vet.App. 535, 537 (1996) ("[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."); *Stillwell v. Brown*, 6 Vet.App. 291, 301 (1994). Substantially justified means "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Even an incorrect position can be justified "if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.2; *see Stillwell*, 6 Vet.App. at 302. Whether a position is substantially justified is determined by the totality of circumstances, which includes consideration of the "merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the Court." *Stillwell*, 6 Vet.App. at 302; *see White v. Nicholson*, 412 F.3d 1314, 1317 (Fed. Cir. 2005) ("The totality of circumstances, by its very description, does not exclude any valid issue from consideration.").

1. Parties' Arguments

The appellant argues that the Secretary's litigating position was not substantially justified. Appl. at 5; Appellant's Reply (Reply) at 4-6. The appellant asserts that the Court in *Gray* determined that there was no reasonable basis for the Secretary's interpretation of the regulation. Reply at 5. Therefore, relying on *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011), he contends that the Secretary was not substantially justified where the Court found his interpretation was inconsistent with the regulatory purpose, irrational, and not entitled to deference. *Id*. at 7-8.

The Secretary argues that the appellant's prevailing party status is a result of "new, different or more stringent requirements" and that his position – based on past practice, a reasonable interpretation, and Agency guidance – was reasonable and substantially justified. Secretary's Brief

(Br.) at 9. The Secretary maintains that at the Agency level, the Board reasonably relied on VA policy identifying Da Nang harbor as blue water as stated in the *VA Adjudication Procedures Manual Rewrite* (M21-1MR), the December 2008 *Compensation and Pension Bulletin*, and Training Letter 10-06. *Id.* He further argues that his litigating position was substantially justified because *Gray* raised an issue of first impression, his position was consistent with VA's long-standing policy espoused in the three identified documents, and his position adhered to the Federal Circuit's decision in *Haas* finding the blue-water-brown-water distinction reasonable. *Id.* at 10-15.

2. Totality of the Circumstances

As noted above, the Court's analysis is based on the totality of the circumstances surrounding the resolution of the dispute. *Coleman v. Nicholson*, 21 Vet.App. 286, 389 (2007). Accordingly, the Court will now consider the parties' arguments in light of the factors identified in *Stillwell*. Because, for the reasons discussed below, the Court finds that the Secretary's litigating position was not substantially justified, the Court need not consider whether the Secretary was substantially justified at the administrative phase. *See Stillwell*, 6 Vet.App. at 302 (noting that both the Government's position and the action of the Agency must be substantially justified).

The Secretary specifically argues that his litigating position was consistent with precedent because *Haas* had already found VA's blue-versus-brown-water distinction was not unreasonable. Secretary's Br. at 11. But by describing *Haas* with such broad strokes, the Secretary misses the key point in *Haas*: VA may draw a line *based on the probability of exposure to herbicides from spraying*. *Gray*, 27 Vet.App. at 321-22. Although the Secretary argued that his interpretation was consistent with *Haas*, the only ascertainable basis for designating Da Nang as blue water was ease of entry, which has no discernable relationship to the probability of exposure based on herbicide use. *Gray*, 27 Vet.App. at 324. During specific questioning at oral argument, the Secretary was not able to connect his designation of Da Nang Harbor as blue water to the probability of exposure to herbicides based on spraying. *Gray*, 27 Vet.App. at 324. Because the only reason underlying VA's determination, ease of entry, had no relationship to the probability of exposure based on spraying, the interpretation was not consistent with the Federal Circuit's decision in *Haas* or the purpose of the regulation. *Id.* at 325 (finding that unlike *Haas*, VA's policy resulted in inconsistent and arbitrary

outcomes). Thus, the Secretary's argument that his litigating position was consistent with precedent does not hold water.

The Secretary further argues that *Gray* presented a question of first impression, noting that the Court in *Gray* found that *Haas* had not answered the precise question at issue. Secretary's Br. at 14-15. However, there is no per se rule that issues of first impression will always render the Government's position substantially justified. *Felton v. Brown*, 7 Vet.App. 276, 281 (1994). Moreover, whether *Gray* presented an issue of first impression is only one factor for the Court to consider. *Id.* Here, this factor is not particularly persuasive. Noting that "[t]he entire predicate for the Agent Orange Act and its regulations was exposure to herbicides," *Haas* found that drawing a line between inland and offshore waters was a reasonable proxy for actual herbicide exposure. *Haas*, 525 F.3d at 1185, 1192-93. Therefore, this is not a case where VA was sailing in uncharted waters without prior judicial guidance. There was a clearly established principle for VA to follow in drawing its line: the probability of exposure to herbicides based on spraying. *Gray* merely dealt with a specific application of that principle.

Finally, contrary to the Secretary's argument, the Court did not find that the three policy documents "supported [the Secretary's] position." Secretary's Br. at 9. The Court did note that the Secretary relied on these documents as well as citations to the Federal Register. *Gray*, 27 Vet.App. at 323. But, the Court went on to find that these documents baldly stated a policy without explaining how VA's designation of Da Nang Harbor related to the probability of exposure based on herbicide use. *Id.* The only basis for Da Nang's designation appeared to be that the harbor is easily entered. *Id*. As noted above, this rationale has no ascertainable connection to the probability of exposure to herbicides. *Id.* at 323-24. Thus, these documents demonstrate that the Secretary's position did not have a basis in fact and consequently, they do not support the Secretary's assertion that his litigating position was substantially justified.

Based on the foregoing, the Court finds that the Secretary has failed to offer sufficient reasons to find that his litigating position was substantially justified, particularly in light of the Court's finding that the Secretary's interpretation of his regulation was not worthy of deference. The combination of factors, including that the Agency's position had no basis in fact – there was no explanation connecting the blue water designation of Da Nang Harbor to the probability of exposure

to sprayed herbicides – and that the Agency's position had no basis in law – it was inconsistent with prior precedent and contrary to the purpose of the regulation – weigh heavily against the Secretary. *Id.* at 324-26. Therefore, the Court finds that considering the totality of the circumstances, a reasonable person could not find that the Secretary's position was substantially justified. *See Stillwell*, *supra*.

B. Reasonableness of Fees

Having found that the Secretary's position was not substantially justified, the Court will now address the Secretary's arguments regarding the reasonableness of the appellant's fees. "The Court has wide discretion in the award of attorney fees under the EAJA." *Chesser v. West*, 11 Vet.App. 497, 501 (1998) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *Chiu v. United States*, 948 F.2d 711, 713 (Fed. Cir. 2001); and *Vidal v. Brown*, 8 Vet.App. 488, 493 (1996)); *see Evington v. Principi*, 18 Vet.App. 331, 334 (2004); *see also Abbey v. Principi*, 17 Vet.App. 282, 290 (2003). "[T]he 'product of reasonable hours times a reasonable rate' normally provides a 'reasonable' attorney's fee." *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (quoting *Hensley*, 461 U.S. at 433); *Abbey*, 17 Vet.App. at 290. In determining reasonableness, the Court will consider whether the hours claimed are (1) unreasonable on their face; (2) otherwise contraindicated by the factors for determining reasonableness itemized in *Hensley*, 461 U.S. at 430 n.3, or *Ussery v. Brown*, 10 Vet.App. 51, 53 (1997); or (3) persuasively opposed by the Secretary. *See Chesser*, 11 Vet.App. at 502.

The Secretary argues that the Court should reduce the appellant's fees to the extent that the appellant's EAJA application includes vague expenditures, impermissible multiple representation, and unsuccessful legal arguments. Secretary's Br. at 15-24.

The Secretary argues that the appellant should not receive fees for work related to the appellant's unsuccessful arguments in *Gray*. Secretary's Br. at 21. Relying on *Hensley*, the Secretary asserts that because the Court in *Gray* rejected the appellant's request for reversal based on the United Nations Convention on the Territorial Sea and the Contiguous Zone and his argument that the Board violated the Equal Protection Clause of the Fifth Amendment of the U.S. Constitution, fees should not be awarded. *Id.* The Secretary's reliance on *Hensley* is misplaced. In *Hensley*, the Supreme Court stated that "[w]here a plaintiff has obtained excellent results, his attorney should

recover a fully compensatory fee." 461 U.S. 424, 435 (1983). Emphasizing that it is the result that matters, the Supreme Court noted that "[l]itigants 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." *Id.* Here, the arguments the Secretary identifies all pertained to the appellant's allegation that the Board erred in finding that he was not entitled to the Agent Orange presumption. *Hensley* clearly indicates that an appellant is entitled to an award of attorney fees for arguments about a single claim, even if one of the arguments is not the basis for remand. *Hensley*, 461 U.S. at 435 (noting that "the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit"); *see also Vidal v. Brown*, 8 Vet.App. 488, 493 (1996) ("[C]ounsel for the appellant is entitled to an award of attorney fees because, regardless of her exact rationale for seeking remand of the appeal, all of her arguments relate to one claim."); *Camphor v. Brown*, 8 Vet.App. 272, 277 (1995) (where only one claim was on appeal, the Court saw "no reason why the award should be reduced . . . just because the appellant was unsuccessful in her attempt to get a reversal").

Reviewing the itemized statement and the appellant's reply to the Secretary's opposition, the Court is satisfied that the identified expenses are sufficiently specific and detailed to allow the Court to review them. *Baldridge v. Nicholson*, 19 Vet.App. 227, 235 (2005). Furthermore, the Court recognizes that, particularly when preparing for oral argument, there may be a benefit to having multiple attorneys working in concert. However, the Court agrees with the Secretary that some of the fees included on the itemized statement are duplicative or excessive. Specifically, the Secretary contends that there is a discrepancy in the amount of time billed for oral argument for Michael E. Wildhaber (MEW) – 1.6 hours – and Matthew D. Hill (MDH) – 2.2 hours. Secretary's Br. at 18. Although the Court does not find that in this instance, the presence of two attorneys at oral argument was improper or excessive, the application does not include any justification for the discrepancy between the hours, and therefore, the hours for MDH will be reduced to match the hours for MEW.

The Secretary further challenges the fees billed for a conference call on January 27, 2015, between MDH, MEW, and Shannon L. Brewer (SLB). Secretary's Br. at 20. Although the appellant's response asserts that for this conference, only MEW's hours were billed, the itemized statement in fact reflects 0.7 hours for each attorney's participation in a telephone conference on that

date, albeit with slight alterations in the specific description attached to the telephone conference. Reply at 16; Appl., Exhibit 3. As the appellant's reply indicates that he intended to bill for only one attorney, the Court will reduce the hours billed for the teleconference accordingly.

The Secretary also argues that the fees for the 2.3 hours of SLB's review of the record of proceedings (ROP) and deference standards on February 24, 2015, is duplicative and excessive because she did not actually participate in the oral argument. Secretary's Br. at 19. The appellant does not object to reducing SLB's hours accordingly. Reply at 19.

Finally, the Secretary argues that the time spent by MDH reviewing the ROP and deference standards on February 23, 2015, as well as the facts and amicus brief on February 22, 2015, is duplicative. Secretary's Br. at 20. As the appellant's representative before the Board and the Court, MDH is presumably familiar with the record and the facts in the briefs. Thus, the Court agrees that the fees for this review by lead counsel lack sufficient justification.

Based on the foregoing, the Court will, in its discretion, reduce the total hours billed for (1) SLB by 3 and (2) MDH by 5.2. Accordingly, the Court will award EAJA fees and expenses in the reduced amount of $23,494.07.

III. CONCLUSION

Upon consideration of the pleadings, and for the reasons stated in this decision, the appellant's EAJA application is GRANTED, IN PART, in the reduced amount of $23,494.07.

DATED: February 19, 2016

Copies to:

Shannon L. Brewer, Esq.

VA General Counsel (027)