

**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,	)	
<u>Appellee.</u>	)	

**APPELLANT'S SUPPLEMENTAL APPLICATION PURSUANT TO  
U.S. VET. APP. RULE 39(b) FOR AN AWARD OF  
REASONABLE ATTORNEYS' FEES AND EXPENSES**

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) (1994), and the Court's Rule 39(b), appellant, Robert H. Gray, through counsel, applies to the Court for a supplemental award of reasonable attorneys fees and expenses in the amount of \$3,050.25.

The basis for this supplemental application is as follows:

**Pertinent Procedural History**

On April 23, 2015, this Court issued a Panel Opinion setting aside the Board's November 6, 2013 adverse decision that denied Mr. Gray's claim for benefits pursuant to the provisions of 38 U.S.C. § 1116 (2000). *See Gray v. McDonald*, 27 Vet.App. 313 (2015). On August 12, 2015, through counsel, Mr. Gray timely filed with the Court his original application for an award of attorney fees and expenses pursuant to 28 U.S.C. § 2412(d) (hereinafter "EAJA"). In pertinent part, in his application he alleged that he was

entitled to the EAJA award because he was a prevailing party and the litigation position of the Secretary before the Court was not substantially justified. In response, the Secretary filed his September 17, 2015 opposition to the EAJA application, asserting the Secretary's litigation position in the case was substantially justified. In the alternative, the Secretary also asserted that the hours claimed in the EAJA application were not reasonable and should be decreased.

Mr. Gray's reply to the Secretary's opposition to his EAJA application was filed on November 18, 2015. Mr. Gray's EAJA reply argued that the Secretary's response was without merit and did not establish that the Secretary's litigation position was substantially justified. As well, the EAJA reply asserted that all of the hours expended and billed in the original EAJA application were reasonable, with certain limited exceptions. On November 23, 2015 the matter was assigned to Judge Schoelen for disposition.

On February 19, 2016 the Court issued its Memorandum Decision, which granted Mr. Gray's EAJA application in part, and denied it in part. In particular, in granting the EAJA application the Court found that the litigation position of the Secretary before the Court was not substantially justified. *See Gray v. McDonald*, slip op. at 6, U.S. Vet. App. 13-3339(E), Mem. Dec. (February 19, 2016).

**Itemized Statement of Supplemental Services Rendered and  
Amount of Additional Reasonable Fees that Are Warranted**

Appellant has claimed a reasonable amount of supplemental attorneys fees,

predicated upon "the number of hours reasonably expended on the [EAJA] litigation multiplied by a reasonable hourly rate." *Ussery v. Brown*, 10 Vet.App. 51, 53 (1997) (quoting *Elczyn*, 7 Vet.App. at 176-177). To document the amount of fees and expenses requested, the EAJA provides that an applicant "shall" include in the application "the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 28 U.S.C. § 2412(d)(1)(B).

Accordingly, appellant's counsel states and submits the following itemization of the actual supplemental time expended and billed, and the rate at which the fees were computed:

**Attorney Supplemental Time Expended,  
and the Nature of the Work Performed**

**Attorney Michael E. Wildhaber:**

<u>Date</u>	<u>Time Expended</u>	<u>Nature of Work Performed</u>
11/16/15	0.50 hours	Research and preparation of reply to appellee's opposition to EAJA application--review and analyze appellee's opposition to EAJA application;
	1.00 hours	Research and preparation of reply to appellee's opposition to EAJA application--review and digest case law authority cited by appellee in opposition to EAJA application;
11/17/15	1.60 hours	Research and preparation of reply to appellee's opposition to EAJA application--research and digest substantial justification case law;

	0.70 hours	Research and preparation of reply to appellee's opposition to EAJA application--prepare reply argument outline;
	2.50 hours [0.4 hours not billed]	Research and preparation of reply to appellee's opposition to EAJA application--draft Introduction and Argument I;
11/18/15	1.60 hours	Research and preparation of reply to appellee's opposition to EAJA application--draft Argument I;
	2.00 hours	Research and preparation of reply to appellee's opposition to EAJA application--draft Argument II;
	0.80 hours	Research and preparation of reply to appellee's opposition to EAJA application--draft Argument III;
	2.80 hours [0.6 hours not billed]	Research and preparation of reply to appellee's opposition to EAJA application--draft Argument IV;
	1.00 hours	Research and preparation of reply to appellee's opposition to EAJA application---conduct final review of draft and prepare final edits;
2/19/16	0.40 hours	Review and analyze Memorandum Decision;
2/25/16	0.80 hours	Research and prepare draft of supplemental application for award of reasonable attorney fees and expenses.

**Total Hours Expended: 15.7**

**Total Hours Billed: 14.7**

Exercising billing judgment, appellant's counsel has not billed the government for a total of **1.0** hours expended on behalf of the appellant as noted above. This amount of hours excluded from the billing equals **6.4 percent** of the total time actually expended by counsel on behalf of the appellant.

The appellant seeks attorneys fees at the rate of **\$207.50** per hour for the cost of attorney representation services before this Court.<sup>1</sup> This rate per hour, multiplied by the number of attorney hours billed (**14.7**), results in an amount of **\$3,050.25** that is sought by the appellant as reasonable supplemental attorney fees in this case.

### **Itemization of Expenses**

Appellant does not seek reimbursement for any costs related to this supplemental EAJA application.

Accordingly, the total amount of supplemental attorneys fees for which appellant seeks reimbursement for legal representation services before the Court on his behalf is **\$3,050.25**.

Respectfully submitted,

/s/ Michael E. Wildhaber  
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February 25, 2016

Co-Counsel for Appellant

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<sup>1</sup> This is the same rate per hour for attorney Wildhaber as billed in the original EAJA application filed by Mr. Gray.