

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

JACLYN R. MOLITOR,)	
Appellant,)	
)	
v.)	Vet. App. No. 15-2585
)	
DAVID J. SHULKIN, M.D.,)	
Secretary of Veterans Affairs)	
)	
Appellee.)	

**APPELLANT’S APPLICATION FOR AN AWARD OF REASONABLE
ATTORNEY FEES AND EXPENSES UNDER 28 U.S.C. § 2412(D)**

Pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. §2412(d), Appellant, Jaclyn R. Molitor, moves this Court for an award of reasonable attorney fees and expenses. Appellant seeks an award in the amount of \$19,723.73 for litigating the merits of this appeal, and drafting this petition. In support of this motion, Appellant submits that: (1) she is entitled to an award of attorney fees and expenses under EAJA, 28 U.S.C. § 2412(d); and, (2) an award of \$19,723.73 is reasonable and appropriate.

PRELIMINARY STATEMENT

In 1980, Congress passed the EAJA in response to its concern that persons “may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.” Pub. L. No. 96-481, tit. II, §204(a), (c), 94 Stat. 2327, 2329 (1980); *Sullivan v. Hudson*, 109 S.Ct. 2248, 2253 (1989). As the Senate observed, in instances in which the cost of securing vindication exceeds the amount at stake, “it is more practical to endure an injustice than to contest it.” S. Rep. No. 96-253, 96th Cong., 1st Sess. 5 (1979). The purpose of the EAJA’s fee-shifting provisions is thus

“to eliminate for the average person the financial disincentive to challenge unreasonable government actions.” *Commissioner, I.N.S. v. Jean*, 110 S.Ct. 2316, 2321 (1990).

It has since become clear that the EAJA applies to proceedings in this Court. In the Federal Courts Administration Act of 1992, Congress amended section 2412(d)(2)(F) to add the United States Court of Veterans Appeals (now Court of Appeals for Veterans Claims) to the definition of Courts authorized to make awards under the EAJA. Pub. L. No. 102-572, tit. V § 506(b), 106 Stat. 4506, 4513 (1993) (found at 28 U.S.C. § 2412 note); S. Rep. No. 342, 102d Cong., 2d Sess. 39 (1992), [hereinafter “S. Rep”]). *See Jones v. Principi*, 985 F.2d 582 (Fed. Cir. 1992) (vacating and remanding *Jones v. Derwinski*, in light of the Federal Courts Administration Act). In amending the EAJA to apply to appeals to this Court, Congress affirmed the Act’s objective of eliminating financial deterrents to defend against unreasonable government action, observing that “[v]eterans are exactly the type of individuals the statute was intended to help.” S. Rep. at 39.

It is also clear that the EAJA amendment applies in this case. The amendment applies, *inter alia*, “to any case pending before the United States Court of Veterans Appeals on the date of the enactment of this Act, to any appeal filed in that court on or after such date in the United States Court of Appeals for the Federal Circuit.” Pub. L. No. 102-572, tit. V, §506(b), 106 Stat. 4506, 4513 (1992) (found at 28 U.S.C. §2412 note). The instant case was pending in the United States Court of Appeals for Veterans Claims after October 29, 1992, when the EAJA amendment became effective.

SUMMARY OF PROCEEDINGS

This case involves the Board's decision dated May 12, 2015, to the extent it denied entitlement to service connection for a psychiatric disability, to include post-traumatic stress disorder (PTSD).

In June 2017, the Court issued a panel decision that set aside and remanded the above-noted claim. Specifically, the Court determined that the Board failed to provide an adequate statement of reasons or bases where it neglected to properly discuss a relevant law and evidence pertinent to the claim.

ARGUMENT

There are three basic statutory requirements that a party must satisfy to be eligible for an award of attorney's fees under EAJA 28 U.S.C. § 2412(d). They are: (1) the party must have been a "prevailing party and [be] eligible to receive an award under this subsection;" (2) the position of the United States must not have been "substantially justified;" and (3) there must be no special circumstances which would make an award unjust. If these requirements are met, the Court "shall award" reasonable fees and expenses. *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1466 (Fed. Cir. 1986) (en banc). As shown below, Appellant meets these requirements.

A. Appellant is a Prevailing Party

A party prevails with respect to the EAJA if they "succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983) (citations omitted); *see also Sullivan v. Hudson*, 109 S. Ct. 2248, 255 (1989); *Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486, 1491-92 (1989). In making this inquiry "substance should prevail over form." *Devine v. Sutermeister*, 733 F.2d 892 (Fed. Cir. 1984). In *Lematta v. Brown*, 8 Vet. App. 504 (1996), this Court held "[I]t is enough for the Court to make some 'substantive determination in [the] appeal, based

upon the record, the parties' pleadings, and the Court's precedent, that is favorable to the appellant." *Id.* at 508 (quoting *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994)).

The Federal Circuit has issued several decisions relating to the attainment of prevailing party status under the EAJA. In *Vaughn v. Principi*, 336 F. 3d 1360 (Fed. Cir. 2003), the court held that a remand to an administrative agency, to consider the effects of legislation enacted while the case is on appeal does not constitute securing relief on the merits for prevailing party purposes. *Id.*, at 1366. There, the Court affirmed the CAVC's findings that prevailing party status did not attach based on, *inter alia*, the catalyst theory. *Id.*, citing *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (2001)(Rejecting the catalyst theory as a basis for fee awards and holding that enforceable judgments on the merits and court-ordered consent decrees create the "material alteration of the legal relationship of the parties). Notably, that case involved a remand for re-adjudication solely in light of the enactment of the VCAA – as opposed to based on VA error. See *Vaughn v. Principi*, 15 Vet. App. at 280; see also *Akers v. Sec'y of Veterans Affairs* 04-7132 (Fed. Cir. May 26, 2005) (affirming the CAVC determination that Appellant was not a prevailing party inasmuch as the Board decision on appeal was vacated and remanded as a result of a change in law subsequent to the Board's decision and did not involve a direct finding by the Court on the merits or an order to do anything as a result of an error found either by the Court or the parties.)

In *Former Employees of Motorola Ceramic Products v. United States*, 336 F. 3d 1360 (Fed. Cir. 2003), the Federal Circuit addressed the meaning of "prevailing party" and appeared to clarify its decision in *Vaughn*. There, the court made clear, *inter alia*, that "where a plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party [] without regard to the outcome of the agency proceedings where

there has been no retention of jurisdiction by the court. . .” *Id.*, at 1360; *see also Rice Services, Ltd., v. United States*, 405 F.3d 1017 (Fed. Cir. 2005) (Acknowledging *Motorola* for the principle that a remand order to an administrative agency from a court proceeding constitutes the securing of relief on the merits sufficient to attain prevailing party status).

In this case, unlike the facts in either *Vaughn* or *Akers*, *supra*, the Court of Appeals for Veterans Claims issued a memorandum decision that vacated and remanded the Board’s decision. Specifically, the Court determined that the Board failed to provide an adequate statement of reasons or bases where it neglected to properly discuss a relevant law and evidence pertinent to the claim.

B. Appellant is a Person Eligible to Receive an Award Under 28 U.S.C. § 2412(2).

In order to be eligible to file a petition for fees under 28 U.S.C. § 2412(d), a prevailing party must not be: (i) an individual whose net worth exceeded \$2,000,000.00 at the time the litigation began, nor (ii) a business entity whose net worth exceeded \$7,000,000.00 and which had more than 500 employees at the time the litigation began. 28 U.S.C. § 2412(d)(2)(B)(i), (ii).

Appellant had a net worth *under* \$2,000,000.00 on the date this action was commenced. (See Exhibit A, Certification of Net Worth). Moreover, Appellant was not a business entity. Therefore, Appellant is a person eligible to receive an award under the EAJA.

C. The Position of the Government was not Substantially Justified.

In order to be considered “substantially justified” under the EAJA, the government must show that its position was “justified to a degree that could satisfy a reasonable person,” i.e., has a reasonable basis in both law and fact. *Pierce v. Underwood*, 108 S. Ct. 2541, 2549-50 (1988); *Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989). The burden is on the Secretary to demonstrate that his

position was substantially justified. *Brewer v. American Battle Monument Comm’n*, 814 F.2d 1964, 1569 (Fed. Cir. 1987); *Gavette*, 808 F.2d at 1465-66; *Essex Electro Eng’rs v. United States*, 757 F.2d 247, 252 (Fed. Cir. 1985).

To determine whether the government’s position was substantially justified, the Court is “instructed to look at the entirety of the government’s conduct and make a judgment call whether the government’s overall position has a reasonable basis both in law and fact.” *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). The “overall” position is that taken by the government “both prior to and during litigation.” *Id.* Thus, to prevail on “substantial justification” in this case, the government must demonstrate that the agency action leading to litigation, i.e. the denial of Appellant’s claim, as well as its litigation position in this Court, were “overall reasonable.”

This Court further explained substantial justification in *Moore v. Gober*, 10 Vet. App. 436 (1997). In *Moore*, the Court held that in order “[t]o determine whether the Secretary’s position was ‘reasonable’ during the administrative proceedings, the Court looks to the relevant determinative circumstances, including the state of the law at the time of the BVA decision.” *Id.* at 440 (citing *Bowyer v. Brown*, 7 Vet. App. 549, 552 (1995)).

In this case, the government’s position leading up to, and throughout this litigation was not “substantially justified” where the Court issued a memorandum decision that vacated and remanded the above-noted claim. Specifically, the Court determined that the Board failed to provide an adequate statement of reasons or bases where it neglected to properly discuss a relevant law and evidence pertinent to the claim.

D. No Special Circumstances Make an Award Unjust on this Appeal.

The Secretary does not meet the heavy burden of proving that “special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). *See Devine v. Sutermeister*, 733 F.2d 892, 895 (Fed. Cir. 1984); *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991). Courts narrowly construe the “special circumstances” exception so as not to interfere with the Congressional purpose for passing the EAJA, i.e., to insure that litigants have access to the courts when suing the Government. *See Martin v. Heckler*, 772 F.2d 1145, 1150 (11th Cir. 1985); *Taylor v. United States*, 815 F.2d 249, 253 (3d Cir. 1987). “[T]hat few courts apparently have relied upon this exception to EAJA awards in denying fee applications is evidence that the circumstances of a case will infrequently justify a denial of an award.” There is no reason or special circumstance to deny this Fee Petition.

THE COURT SHOULD AWARD APPELLANT REASONABLE ATTORNEY FEES AND EXPENSES OF \$19,723.73.

The EAJA provides that a court “shall” award “fees and other expenses” when the other prerequisites of the statute have been met. 28 U.S.C. § 2412(d)(1)(A). The statute defines “fees and other expenses” to include reasonable attorney fees.” 28 U.S.C. § 2412(d)(2)(A).

When Congress has authorized the award of “reasonable” attorney fees, the amount to be awarded is based upon “the number of hours expended on the litigation multiplied by a reasonable hourly rate.” *See Hensley*, 461 U.S. at 433; *National Ass’n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982).

A. Hours Reasonably Expended

As the Declaration of Glenn R. Bergmann, Esq. (attached hereto as Exhibit B) documents, in the exercise of sound billing judgment, Appellant’s counsel is not asking for payment for time spent on administrative matters such as copying or filing,

nor for communications (either written or oral) among co-counsel. Moreover, being mindful of the reasonableness requirement, Appellant is not requesting compensation for **87.6 hours – totaling \$16,975.12** -- of billable attorney time. (See Exhibit B). Appellant’s counsel submits that a reasonable attorney, exercising sound billing judgment, would charge for time spent on all matters included in Exhibit B – this may have included limited time expended for a “peer review” where necessary to ensure that any briefs prepared contained comprehensive and complete arguments pertinent to the underlying appeal. To the extent peer review hours were expended, such involved senior attorneys and would have taken the place of supervisory review of that pleading.

B. Reasonable Hourly Rate

Under the EAJA, the amount of fees awarded “shall be based upon the prevailing market rates for the kind and quality of services furnished” but “shall not be awarded in excess of \$125.00 per hour unless the Court determines that an increase in the cost of living” is necessary. Appellant’s counsel, Glenn R. Bergmann, avers that the usual and customary fee for working on similar matters is between \$175.00 and \$250.00 per hour.

1. The EAJA Statutory Cap of \$125.00 Should be Adjusted Upward to Reflect the Increase in the Cost of Living.

Under 28 U.S.C. § 2412(d)(2)(A)(ii), attorneys may demonstrate that an increase in the cost of living justifies an increase in the \$125.00 per hour statutory cap. See *Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988) (referring to a cap of \$75.00 per hour “adjusted for inflation.”); *Philips v. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991). An increase for cost of living is generally allowed. *Johnston v. Sullivan*, 919 F.2d 503, 508-10 (8th Cir. 1990); *Animal Lovers Volunteer Ass’n, inc. v. Carlucci*, 867 F.2d 1224, 1227 (9th Cir. 1989); *Coup v. Heckler*, 839

F.2d 313, 320 (3d Cir. 1987); *Baker v. Brown*, 839 F.2d 1075 (5th Cir. 1988) (allowed except in unusual circumstances).

This Court in *Elczyn v. Brown*, 7 Vet. App. 170 (1994), decided for the first time that an Appellant's attorney can petition for a fee in excess of the then statutory cap of \$75.00 per hour based upon the Consumer Price Index as published by the Bureau of Labor Statistics. *Id.* at 179-181. This Court further directed attorneys filing for an increased fee based upon the CPI to choose a mid-point in the litigation to establish the appropriate date for calculating the cost of living increase. *Id.* at 181. In this case, the Court issued a panel decision in June 2017. Appellant selects April 2016, as the date for calculating the CPI increase. *See Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994).

Appellant submits that the Court should increase the \$125.00 per hour cap by the general inflationary index in the cost of living since March of 1996, as reflected by the CPI-U for the South Region.¹ According to the most recent report from the Bureau of Labor Statistics, the CPI-U for the South Region – Size Class A – rose 55.02% between March 1996, and April 2016. Applying the increase in the CPI to the statutory rate, Appellant's counsel should be compensated at the rate of \$193.78 per hour. This rate was calculated by subtracting the CPI-U for April 2016 (234.864) from that of March 1996 (151.5), and dividing the result (83.36) by the CPI-U for March 1996. The result (.5502), representing the increase between March 1996 and April 2016 was then multiplied by the statutory rate (\$125.00), demonstrating an increase of \$68.78, which was added to the \$125.00 statutory rate to arrive at the inflation-adjusted rate of \$193.78 per hour.

¹ This Court determined that the local CPI-U should be used to calculate the cost-of-living increase, when available, and that when not available, the regional CPI-U should be used. *Mannino v. West*, 12 Vet. App. 242 (1999). Based upon the size/population density in the Baltimore/Washington area, Appellant's counsel has selected "Size Class A" for the South Region. "Size Class A" refers to an area population of >1.5 mil., which is consistent with the local area population.

Considering the foregoing, Appellant's counsel request a fee of \$19,688.04 based upon 101.6 hours of work and \$35.69 in expenses (See exhibit B) for a total of \$19,723.73.

Respectfully submitted,

/s/ Glenn R. Bergmann
GLENN R. BERGMANN, ESQ.
Bergmann & Moore, LLC
7920 Norfolk Ave. Suite 700
Bethesda, Maryland 20814
(301) 986-0841

Counsel for Appellant

CERTIFICATE OF NET WORTH

I, Glenn R. Bergmann, of Bethesda, Maryland, hereby declare that at no time during the course of this appeal to the Court of Appeals for Veterans Claims, did Appellant, Jaclyn R. Molitor, have a net worth of, or in excess of, \$2,000,000.00.

/s/ Glenn R. Bergmann

Glenn R. Bergmann

Exhibit A

DECLARATION OF APPELLANT’S COUNSEL,
GLENN R. BERGMANN

In support of Appellant’s application for attorney’s fees under 28 U.S.C. § 2412(d), I Glenn R. Bergmann hereby declare as follows:

1. I am an attorney licensed to practice in the State of Maryland and the District of Columbia, and am admitted to practice before the United States Court of Appeals for Veterans Claims.
2. I have represented Jaclyn R. Molitor, in the matter of Molitor v. Shulkin, Vet. App. No. 15-2585 without charge.
3. In August 2017 I visited the website maintained by the U.S. Dept. of Labor, Bureau of Labor Statistics. From that website I ascertained the Consumer Price Index for the South Region rose by 68.78 between March 1996, when the EAJA was amended, and April 2016.

The following is a statement of the exact service rendered and expenses incurred in the representation of the Appellant in this appeal by attorneys of Bergmann & Moore. In addition to Glenn R. Bergmann, Esq., (“GB”) attorneys who may have worked on this appeal include: Joseph R. Moore, Esq. (“JM”); Kim Sheffield, Esq. (“KS”); Tom Polseno, Esq. (“TP”); Daniel D. Wedemeyer, Esq. (“DW”); Andrea Timashenka, Esq. (“AT”); Bryan Anderson, Esq. (“BA”); Aniela Szymanski, Esq. (“AS”); Maria R. Infanger, Esq. (“MI”); Corey Creek, Esq. (“CC”); Tiffany Guglielmetti, Esq. (TG); Kathleen Nardella, Esq. (“KN”); Sun H. Choi, Esq. (“SC”); Livhu Ndou, Esq. (“LN”); Nicole Steers, Esq. (“NS”); Cheryl Wilhelm, Esq. (“CW”) and Rosalee Hoffman, Esq. (“RH”). All are members of the Court’s bar.

Exhibit B

BERGMANN & MOORE, LLC

7920 NORFOLK AVE. SUITE 700
 BETHESDA, MD 20814
 TEL. 301-986-0841
 FAX: 301-986-0845
 bergmannlaw@msn.com

Timesheet: Jaclyn R. Molitor (15-2585)**September 1, 2017***Legal Services Rendered:*

Date	Description of Services	Hours	Misc. expense
7/27/15	BVA decision case screen (KS/GB)	.7	
7/27	T/c to client sign up (KS)	.2	LD
	Correspondence to veteran w/ att's	.1	Pstg. 6.45
7/31	T/c from client re: questions on POA (NS)	.1	
9/30	Reviewed documents from veteran including POA docs	.1	
	Prepared/filed appearance/POA	.1	
9/1	T/c to client, re: POA status, responded to questions as far as scope (KS)	.2	LD
8/1	Prepare new client correspondence outlining appellate process (KS/GB)	.3	Pstg. 0.49
10/5	Received RBA CD (4317pgs.)	(.2)n/c	
10/7	Enter appearance as co-counsel (LN)	.2	
10/19	Draft & file 45-day RBA response extension (LN)	(.2)n/c	
10/26	RBA page-by-page review for legibility/completeness pursuant to R.10; confirmed accuracy of all evidence/documents relied upon in BVA decision; determined relevance of incomplete/illegible documents, pp. 1-1070 (3.0 hrs)(NS)	2.0 (1.0)n/c	
	RBA page-by-page review for legibility/completeness pursuant to R.10; confirmed accuracy of all evidence/documents relied upon in BVA decision; determined relevance of incomplete/illegible documents, pp. 1071-2141 (3.0 hrs) (NS)	1.8 (1.2)n/c	
	RBA page-by-page review for legibility/completeness pursuant to R.10; confirmed accuracy of all evidence/documents relied upon in BVA decision; determined relevance of incomplete/illegible documents, pp. 2142-2497 (NS)	1.0	

10/27	RBA page-by-page review for legibility/completeness pursuant to R.10; confirmed accuracy of all evidence/documents relied upon in BVA decision; determined relevance of incomplete/illegible documents, pp. 2498-3567 (3.0 hrs) (NS)	1.8 (1.2)n/c
	RBA page-by-page review for legibility/completeness pursuant to R.10; confirmed accuracy of all evidence/documents relied upon in BVA decision; determined relevance of incomplete/illegible documents, pp. 3568-4317 (2.1 hrs) (NS)	1.5 (.6)n/c
	Prepare report re: RBA completeness/legibility; e-correspondence re: RBA review (NS)	.6
	Ecorres Sec re dispute (LN)	.1
11/17	Ecorres Sec f/u RBA dispute (LN)	.1
11/18	Ecorres Sec re RBA dispute (LN)	.1
11/19	Draft & file RBA acceptance (LN)	.2
	Review notice to file brief (LN)	.1
12/16	Review order sched BC (LN)	.1
	Ecorres from Sec re resched BC (LN)	.1
	Review lit file, outlining potential issues (LN)	1.1
12/18	Review RBA on the merits (ignoring illegible/incomplete docs prev deemed irrelevant at R.10) identifying potential bases for alternative resolution, pgs. 1-350, taking notes in preparation for memo (LN)	2.0
12/21	Review RBA on the merits (ignoring illegible/incomplete docs prev deemed irrelevant at R.10) identifying potential bases for alternative resolution, pgs. 351-770, taking notes in preparation for memo (LN)	1.5
12/22	Review RBA on the merits (ignoring illegible/incomplete docs prev deemed irrelevant at R.10) identifying potential bases for alternative resolution, pgs. 771-1625, taking notes in preparation for memo (LN)	3.0
	Review RBA on the merits (ignoring illegible/incomplete docs prev deemed irrelevant at R.10) identifying potential bases for alternative resolution, pgs. 1625-2500, taking notes in preparation for memo (LN)	3.0
12/23	Review RBA on the merits (ignoring illegible/incomplete docs prev deemed irrelevant at R.10) identifying potential bases for alternative resolution, pgs. 2501-3520, taking notes in preparation for memo (LN)	3.0

12/23	Review RBA on the merits (ignoring illegible/incomplete docs prev deemed irrelevant at R.10) identifying potential bases for alternative resolution, pgs. 3520-4317, taking notes in preparation for memo (LN)	1.4	
1/4/16	Legal research (3.304, <i>Dyment/Williams</i> , Adj Proc Manual); Outline args (2.4 hrs)(LN)	1.7 (.7)n/c	
	Draft R33 memo, 3 dta args (LN)	2.8	
	Draft R33 memo, r&b arg (LN)	.9	
	Revise memo; prepare RBA extractions (LN)	(.6)n/c	
	Ecorres Sec & CLS re attached memo (LN)	.1	
	Notes/merits recommendation (LN)	.2	
	Draft & file cert of svc (LN)	.2	
1/15	Prep for BC (LN)	.3	
	Attend BC (LN)	.2	
	Post BC notes (LN)	.1	
3/4	T/c with client re status of case (LN)	.1	
3/24	Begin brief; set up template, begin drafting facts section pgs. 1-1700 (3.0 hrs)(LN)	2.3 (.7)n/c	
	Continue drafting facts section, pgs. 1701-3690 (LN)	3.0	
	Finish drafting facts section, pgs. 3690-4317 (LN)	.9	
3/25	Conduct addtl research for brief: Adj Proc Manual, <i>Durham</i> , relevant Mem Decs (LN)	(.9)n/c	
	Begin drafting brief arguments, dta args re notice & development (LN)	2.7	
	Finish drafting brief arguments, <i>Stegall</i> and r&b (LN)	2.3	
3/28	Revise brief, cutting down facts, supplementing arguments (LN)	1.7	
	Review and supervisory revision of LN principal brief (29 pgs), adding material to prejudice section of notice argument & separate RvB argument re third-party records; comments re Rule 30(a), <i>D'Aries</i> , legal basis of lay evidence arguments under § 3.304 (2.9 hr) (TP)	2.0 (.9)n/c	
3/30	Revise brief per TP (LN)	1.3	
	Review tables, finalize brief, file (LN)	(.6)n/c	
4/1	Correspondence to client with attach brief	.1	Pstg. 6.45
6/2	T/c from client re case/brief (LN)	.3	
7/22	T/c from client re status update (LN)	(.2)n/c	
8/17	Review lit file, Sec brief, taking notes/outlining args for reply brief (LN)	2.4	
8/25	Draft reply brief, dta arg (LN)	2.6	

8/25	Draft reply brief, r&b arg (LN)	2.2	
	Review and supervisory revision of LN reply brief, adding material & comments re add'l discussion of Op. 05-14 (TP)	1.6	
8/26	Revise brief per TP (LN)	.9	
8/29	Review tables, finalize brief, file (LN)	(.4)n/c	
8/30	Correspondence to client with attach reply brief	.1	Pstg. 6.45
9/6	Reviewed ROP for compliance with Rule 28.1 and note findings, pp 1203-401 (RH)	1.4	
9/7	Reviewed ROP for compliance with Rule 28.1 and note findings, pp 401-1 (RH)	.7	
9/7	Review RH ROP review; ecorres Sec (LN)	(.3)n/c	
9/14	Review Amended ROP for compliance with Rule 28.1 and note findings (RH)	(1.2)n/c	
9/14	Review RH ROP review; draft & file ROP acceptance (LN)	(.3)n/c	
9/22	Review case assignment: J Bartley (LN)	.1	
10/14	T/c from client re case status (LN)	.2	
	Review order assigning case to panel (LN)	.1	
11/28	Review order sched oral argument (LN)	.1	
11/30	Ecorres from Sec re Mot for Clarification (LN)	.1	
12/2	Review lit file/briefs, prepare summary of issues in case (LN)	.3	
	Meet with GB re oral argument for strategy session & brainstorming, reviewing issues and merits of case (LN)	.3	
	Meeting with LN re case/OA (GB)	(.3)n/c	
	T/c to client re oral arg (LN)	.3	LD
	Review Sec mot for clarif (LN)	.1	
12/6	Ecorres from Sec re resched oral arg (LN)	.1	
	Review ct order re clarification of issues for oral arg (LN)	.1	
	Review Sec mot to resched oral arg (LN)	.1	
12/7	Review Ct order grant resched oral arg (LN)	.1	
12/9	Begin preparing for oral argument, reviewing lit file/briefs & Bd dec (85 pgs) and outlining arguments, spotting key issues to investigate further (2.4 hrs)(LN)	1.9 (.5)n/c	
12/13	Review order re oral arg resched (LN)	.1	
12/29	Return client call (LN)	.2	
1/3/17	Rev order sched oral arg (LN)	.1	
2/21	Review supp auth, draft recommendation/response (LN)	1.5	
2/27	T/c from client re eff date & status of case (LN)	.2	
3/1	Review/read/shepardize all cases (25 cases) cited in appellant briefs, taking notes on facts & relevant law (3.1 hrs) (LN)	1.5 (1.6)n/c	

3/1	Review/read/shepardize all cases (23 cases) cited in secretary's briefs, taking notes on facts & relevant law (3.4 hrs) (LN)	2.0 (1.4)n/c
3/6	Review all regulations/statutes (approx. 11) cited in all 3 briefs, including review of related case law in antic. Of Oral arg. (3.0 hrs)(LN)	1.0 (2.0)n/c
	Continue reviewing all regulations/statutes (approx. 11) cited in all 3 briefs, including review of related case law in antic. Of Oral arg. (LN)	(2.2)n/c
3/7	Review OGC Precedential Opinions, search for other relevant OGC Prec Ops in antic. Of Oral arg. (3.1 hrs)(LN)	1.6 (1.5)n/c
	Research citations in Prec Op (3.0 hrs)(LN)	1.5 (1.5)n/c
3/8	Review Adjudication Procedure Manual, re PTSD and other DTA provisions (3.3 hrs)(LN)	1.8 (1.5)n/c
	Review Court's "Guide for Counsel" (LN)	(1.2)n/c
	Create outline of arguments and potential issues to address, noting potential questions from judges/weaknesses in argument (2.0 hrs) (LN)	1.0 (1.0)n/c
3/9	Review case list/summaries, insert in argument where appropriate (2.4 hrs)(LN)	1.4 (1.0)n/c
	Create timeline of important procedural history/facts (1.5 hrs) (LN)	.7 (.8)n/c
	Additional research, including: presumption of soundness, medical literature on effects of depression medication on memory, notice requirements, etc. (3.6 hrs) (LN)	1.1 (2.5)n/c
3/10	Continue researching, including: probative value of private medical opinions, standard of review (LN)	(3.3)n/c
3/13	Continue researching, including: <i>Prickett</i> "fair play", <i>Maggitt</i> "remand issue 1 st raised on appeal", <i>Golz</i> "can't review factfinding re relevance", (3.0 hrs)(LN)	1.0 (2.0)n/c
	Continue researching, including: Mem Decs on DTA & MST, <i>Moreau</i> "credible supporting evidence, cases on when reversal warranted, case law on what constitutes "adequately identified" (4.2 hrs)(LN)	1.2 (3.0)n/c
3/15	Continue researching, including: <i>Newhouse</i> "presumption Board considered all evidence", retroactivity, addtl neg. credibility cases (LN)	(2.5)n/c
	Draft full 30-minute argument, as well as "cut to the chase" outline (LN)	2.3
	Participate in moot of case (LN)	(1.5)n/c

3/15	Review pleadings & conduct legal research in prep for moot (DW)	(3.5)n/c
	Review pleadings & conduct legal research in prep for moot (GB)	(2.5)n/c
	Review pleadings & authorities in prep for moot; participate in moot court for oral argument (TP)	(4.2)n/c
3/16	Participate in moot court (DW)	(1.5)n/c
	T/c from client re status of case (LN)	.1
	Attend oral argument, check in with Clerk's office (LN)	(2.0)n/c
3/17	Research administrative law/deference, including <i>Fountain, Skidmore, Wanless, Chevron</i> , and related cases (3.5 hrs)(LN)	1.0 (2.5)n/c
	Review notes from moot (LN)	.3
	Research 3.304(f) MST regulations and relation to DTA regs, military hierarchy/command chain including size of platoon vs battalion vs company, issues with updated OGC Prec vs original (2.5 hrs) (LN)	2.0 (.5)n/c
3/21	Review record for other references to witnesses, similarly situated servicewomen, args re why relevant (LN)	(1.5)n/c
	Issues with updated OGC Prec vs original (LN)	(1.5)n/c
	Prepare notice of appearance as co-counsel (second chair for oral argument) (TP)	.1
3/27	Prepare for and participate in follow-up moot court for oral argument (TP)	(1.7)n/c
	Revise argument, adding feedback from moot (2.5 hrs) (LN)	1.0 (1.5)n/c
	Prepare materials for argument binder, shepardizing relevant cases, noting all potential records to be requested, review credibility argument, review relevant factual evidence (3.0 hrs)(LN)	1.0 (2.0)n/c
3/28	Addtl research of other MST cases, practice argument, adding/subtracting addtl points (2.0 hrs)(LN)	.6 (1.4)n/c
	Review pleadings in prep for 2d moot; participate in 2d moot (DW)	(1.0)n/c
	T/c to client re case update/ argument (LN)	.3
	Prepare for 2 nd moot: review argument binder, specifically issues to include in opening, prepare closing, review of most relevant law, research addtl dta cases, legislative history of OGC Prec? (LN)	(4.0)n/c
	Review relevant file and participate in follow-up moot court for oral argument (GB)	(1.2)n/c

3/28	Participate in 2 nd moot (LN)	(.8)n/c	
	Review notes from moot, add to arg.: scope of request, JSRRC requests/codes, research dta vs credibility finding (2.4 hrs)(LN)	.9 (1.5)n/c	
3/29	Review AZ case, research percentage of cases that are MST (LN)	(1.5)n/c	
	Listen to <i>Ramsay</i> oral arg. (LN)	(1.3)n/c	
	Shepardize OGC Prec Op and major cases; prepare rebuttal; make final revisions to argument, taking final notes (4.2 hrs)(LN)	1.7 (2.5)n/c	
3/30	Travel time to oral arg (LN)	1.2	
	Meet with clerk re oral arg; final review of notes with TP (LN)	.4	
	Participate in oral arg (LN)	1.0	
3/31	Post oral arg notes (LN)	.4	
	T/c from client re oral arg (LN)	(.2)n/c	
	T/c from client re oral arg (LN)	.3	
	Travel time to oral argument (second chair) (TP)	(.8)n/c	\$2.85 (metro)
	Participate in oral argument (total time at courthouse including prep. w/ clerk) (TP)	(2.0)n/c	
	Travel time from oral argument (TP)	(.7)n/c	\$2.35 (metro)
5/11	T/c from client f/u status of case (LN)	.2	
6/1	Review Prec Op (19 pgs) & lit file; draft R35 memo re summary of outcome, potential motion for recon, recs for client (LN)	.8	
	T/c to client re Prec Op (LN)	.3	LD
	Review & annotate panel remand order (19 pgs); provide supervisory review & comment re Rule 35 practice (TP)	.6	
6/12	Commenced client correspondence re: case disposition, next steps (NS)	.7	
6/20	Completed client correspondence re: case disposition, next steps (NS)	.6	Pstg. 6.65
6/23	Review judgment	.1	
8/23	Review mandate	.1	
8/30	Compiled time sheet (EG)	(.7)n/c	
	Prepared EAJA application (EG)	(.6)n/c	
9/1	Reviewed/revised EAJA application (GB)	.2	

n/c = no charge - reduction based on counsel's express consideration of billing judgment, avoidance of redundant time, and reasonableness, totaling (87.6 hours) **(16,975.12)**

Total Current Services Rendered	101.6 hrs	<u>19,688.04</u>
--	------------------	-------------------------

Expenses

Long distance (LD)	4.00
Research (lexis/nexis)	(0.00) n/c
Copies (x .10)	(0.00) n/c
Metro	5.20
Postage	<u>26.49</u>

Total expenses	35.69	35.69
----------------	-------	-------

Total current services rendered plus expenses	<u>\$ 19,723.73</u>
--	----------------------------

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

<u>/s/Glenn R. Bergmann</u>	<u>September 1, 2017</u>
Glenn R. Bergmann	Date