

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBBY TURNER,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 16-1171
)	
ROBERT L. WILKE,)	
Acting 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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Appellant,)	
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v.)	Vet. App. No. 16-1171
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ROBERT L. WILKE,)	
Acting Secretary of Veterans Affairs,)	
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Appellee.)	

**APPELLANT’S APPLICATION FOR 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, Robby Turner, applies for an award of reasonable attorneys’ fees and expenses in the amount of **\$ 13,527.12.**

PROCEDURAL HISTORY

On January 14, 2016, the Board of Veterans’ Appeals (“Board” or “BVA”) issued a decision that determined that new and material evidence had not been received to reopen a claim of entitlement to service connection for epilepsy. Appellant filed a timely Notice of Appeal to this Court on April 5, 2016.

On June 3, 2016, the Secretary served on Appellant’s counsel the 566-page Record Before the Agency (“RBA”). On June 23, 2016, the Court issued its order to file Appellant’s brief within sixty days. On June 26, 2016, the Court scheduled a Rule 33 Staffing Conference for July 12, 2016.

Pursuant to the Court’s Order, Appellant’s counsel prepared a Rule 33 Summary of the Issues addressing the legal errors committed by the Board in the

decision on appeal, which she served on counsel for the Secretary and Central Legal Staff (“CLS”) counsel on July 12, 2016. On July 26, 2016, the Rule 33 conference was held as scheduled but failed to result in joint resolution.

Accordingly, on October 11, 2016, Appellant filed his 17-page brief (App. Br.) with the Court. In his brief, Appellant first argued that the Board’s finding that new and material evidence had not been received must be reversed as clearly erroneous, and that the Court should order the Board to adjudicate his initial September 2005 claim on the merits, because June 2006 VAMC treatment records were dated within one year of his February 2006 rating decision. Appellant’s Brief (App. Br.) at 5-6. Appellant noted that receipt of new and material evidence during the one-year period for submitting a Notice of Disagreement to a rating decision vitiates the finality of that rating decision. 38 C.F.R. § 3.156(b); *Beraud v. McDonald*, 766 F.3d 1402, 1406 (Fed. Cir. 2014); App. Br. at 7. Appellant argued that in this case, June 2006 VAMC treatment records were new and material because they documented a current diagnosis of epilepsy and linked that disability to his PTSD. 38 C.F.R. § 3.156(a); App. Br. at 7. Citing *Shade v. Shinseki*, Appellant noted that the Court had held that VA’s definition of “material” evidence creates a low threshold that requires VA to consider whether “newly submitted evidence, combined with VA assistance and considering the other evidence of record, raises a reasonable possibility of substantiating the claim.” 24 Vet. App. 110, 117 (2012), App. Br. at 7-8. Appellant contended that because the June 2006 VAMC treatment records are dated within

a year of the February 2006 rating decision, the Court should reverse the Board's decision that new and material evidence has not been received and order the Board to adjudicate the initial September 2005 claim on the merits.

In the alternative, Appellant argued that the Board's finding that new and material evidence had not been received must be reversed because the evidence that was received after the expiration of the one-year period to appeal the February 2006 rating decision was *a/so* new and material. App. Br. at 6. The missing element necessary to substantiate his claim in the February 2006 rating decision--evidence of current disability of epilepsy--was established by a July 2010 statement by Dr. Courtney, and February 2006 statements by Appellant and his representative. See 38 C.F.R. § 3.156(a); *Shade*, 24 Vet. App. at 12-13.

At the very least, Appellant argued, vacatur and remand was required for the Board to provide an adequate statement of reasons or bases for its findings. App. Br. at 6, 15; 38 U.S.C. § 7104(d)(1).

On December 12, 2016, the parties filed a joint motion to stay the proceedings until January 11, 2017, for possible joint resolution, which the Court granted. However, the parties were ultimately unable to resolve the issues through a joint dispositive motion, and on January 9, 2017, the Secretary filed, and the Court granted, a motion to extend time to file Appellee's brief until February 27, 2017. On February 27, 2017, Appellee filed his brief (Sec. Br.) with the Court. In his brief, the Secretary conceded that the Board failed to provide an adequate statement of reasons or bases "in failing to address whatsoever the

June 2006 VAMC treatment records documenting a diagnosis of epilepsy and connecting that condition to [Appellant's] epilepsy." Sec. Br. at 5. Thus, the Secretary argued, that remand rather than reversal was warranted for the Board to provide an adequate statement of reasons or bases for its determination that new and material evidence had not been submitted. Sec. Br. at 5.

However, the Secretary argued against Appellant's assertion that his June 2006 medical records were received within one year of the February 2006 decision and negated the finality of that decision. Sec. Br. at 6. Instead, the Secretary argued, the treatment records were printed and made part of the record on October 18, 2007, in connection with Appellant's claim for service connection for posttraumatic stress disorder (PTSD), and considered in the October 22, 2010 rating decision. Sec. Br. at 6. Further, the Secretary alleged that Appellant did not, nor had ever alleged that he filed a Notice of Disagreement or that he submitted additional evidence in support of his claim between February 24, 2006, the date of the denial, and March 16, 2007, the date the denial became final. Sec. Br. at 6. Further, although the record was a VAMC treatment record, neither the Board, nor the RO would be presumed to be aware of this record after adjudication of Appellant's claim without notice by the Appellant that he was receiving unrelated psychiatric treatment, or submission of copies of those records before the rating decision became final. Sec. Br. at 7.

The Secretary also argued that the Board did not commit reversible error in finding the February 2006 decision was not based on the lack of a current

diagnosis. Sec. Br. at 7.

The Secretary argued that remand, rather than reversal, was the appropriate remedy, because the Board failed to fully discuss the favorable evidence contained in medical records in conjunction with his PTSD claim. See *Pond v. West*, 12 Vet.App. 341, 346 (1999); Sec. Br. at 8-9. Specifically, the Secretary argued that the Board failed to adequately address the June 2006 VAMC treatment record and provide sufficient bases for its determination that it was not new and material evidence in light of its link to Appellant's service connected PTSD. Sec. Br. at 9-10. Deficiencies in the Board's analysis, the Secretary argued, should not be assessed for probative value as indicative of a conclusion that it was new and material; rather, they preclude effective judicial review, warranting remand. See *Simington v. West*, 11 Vet.App. 41, 45 (1998); see also *Gilbert v. Derwinski*, 1. Vet.App. at 57; Sec. Br. at 10.

On April 27, 2017, Appellant filed his 8-page brief (Rep. Br.) with the Court. In his reply brief, Appellant first argued against the Secretary's assertion that the June 2006 VAMC treatment records were not received during the one-year period for appealing his February 2006 rating decision was inconsistent with both the record and the law. Rep. Br. at 2. Appellant argued that record directly contradicted the Secretary's assertion that VA adjudicators did not have notice of the existence of these records, because the record showed that he explicitly notified the regional office that he "receive[d] medication for depression through the Mental Health Clinic at VAMC-N. Little Rock" in July 2006, four months after

the February 2006 rating was issued. See *Beraud*, 766 F.3d at 1407; Rep. Br. at 3. Even if he had not submitted notice of the June 2006 VAMC treatment records, Appellant argued, the records must be considered constructively received pursuant to the Court's holding in *Bell v. Derwinski*, 2 Vet. App. 611, 613 (1992); Rep. Br. at 3. Accordingly, Appellant urged the Court to reversal of the Board's finding that the February 2006 rating decision had become final. *Gilbert*, 1 Vet. App. at 52; Rep. Br. at 4.

Addressing the Secretary's response to his alternative argument, Appellant noted that the Secretary offered no response to his arguments that both his and his representative's statements constituted new and material evidence. Rep. Br. at 6. Appellant again argued that these statements indicated that there was some in-service aggravation of his epilepsy and making it impossible for the Board to show clearly and unmistakably that the presumption of soundness had been rebutted when epilepsy was not noted on his August 1967 entrance examination report. *Crowe v. Brown*, 7 Vet. App. 238, 244 (1994); Rep. Br. at 6-7. Further, the Secretary offered no response to Appellant's argument that the February 2015 VAMC treatment record and August 2015 statement establishing that he suffered from increased seizures when he was stressed were material. Rep. Br. at 7. These failures to respond, Appellant argued, should be construed as a concession of error, further supporting reversal of the Board's clearly erroneous finding that new and material evidence had not been received. See *Macwhorter v. Derwinski*, 2 Vet. App. 133, 136 (1991); Rep. Br. at 7.

On May 10, 2017, the Secretary filed the record of proceedings. On September 18, 2017, the Court ordered the case be submitted to a panel for decision. On September 27, 2017, the Court issued its order to both parties to file a Supplemental brief within 21 days addressing three questions related to the relationship between 38 C.F.R. § 3.156(b) and the Court's holding in *Bell*, 2 Vet.App. 611. On October 5, 2017, the Court ordered oral argument in the case set for December 5, 2017, at 10 a.m., allocating 30 minutes to each party for presentation of arguments.

On October 18, 2017, Appellant filed his 9-page supplemental brief (App. Supp. Br.) with the Court. In his brief, Appellant argued that VAMC treatment records dated during the one-year period for appealing a rating decision should be regarded as “received” during that period, regardless of whether the claimant provided any notice of the existence of those records, or, in the alternative that VAMC treatment records should be considered to have been “received” for purposes of 38 C.F.R. § 3.156(b) on the date that VA received notification of the existence of the records. App. Supp. Br. at 6, 8.

Also on October 18, 2017, the Secretary filed his 12-page supplemental brief (Sec. Supp. Br.) with the Court. In his brief, the Secretary argued that that the holding in *Bell*, 2 Vet.App. 611, does not apply in the context of 38 C.F.R. § 3.156(b), and actual receipt of any new and material VA treatment records within the one-year period is required. Sec. Supp. Br. at 1-2.

On December 5, 2017, the case was argued before Chief Judge Davis and

Judges Pietsch and Allen.

On February 8, 2018, the Court issued its Decision (“Dec.”) in favor of the Appellant, setting aside the Board’s January 14, 2016 decision, and remanding the matter for the VA to comply with its duties under 38 C.F.R. § 3.156(b) and take any other actions consistent with the Court’s decision. Dec. at 1-2, 16.

In the decision, the Court agreed that Appellant provided the regional office with sufficient knowledge of the existence of VA treatment records to trigger constructive receipt of those records, warranting consideration of his claim under 38 C.F.R. § 3.156(b). Dec. at 15. The Court concluded that the word “received” in § 3.156(b) is ambiguous, but means something different than “submitted” or “associated.” Dec. at 6-8. The Court also concluded that the Secretary held no single position to which to defer. Dec. at 9. The Court agreed with Appellant that it was clear that constructive receipt applies in the context of § 3.156(b). Applying constructive receipt to this appeal, the Court agreed with Appellant that his statement in July 2006 to the RO was sufficient to provide VA adjudicators at the VBA with knowledge of the existence of his VA treatment records, triggering constructive receipt. Dec. at 14. Further, the Court agreed with Appellant and the Secretary that the Board’s January 2016 decision on appeal completely failed to mention the VA treatment records as issued, agreeing with Appellant that § 3.156(b) entitles him to a review of the evidence of record at the time of the original decision plus any new and material evidence received within the one-year appeal period in this case. Dec. at 15. Given the disposition, the Court did

not address the remaining arguments and issues that Appellant raised. See *Best v. Principi*, 15 Vet.App. 18, 20 (2001); Dec. at 15.

On March 5, 2018, the Court entered Judgment on Appellant's claim and entered Mandate on May 7, 2018, pursuant to U.S. Vet. App. R. 41(a).

ARGUMENT

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

Under 28 U.S.C. § 2412(d), a Court shall award to a prevailing party fees and other expenses incurred by that party in any civil action, including proceedings for judicial review of agency action. To obtain "prevailing party" status, a party need only to 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)).

In this case, Appellant is a prevailing party entitled to an award of fees and costs 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). The 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. & 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 their net worth did not exceed \$2 million (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 million (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 million (seven million dollars) and which had more than 500 employees. See *Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996).). In addition, Appellant submitted a Declaration of Financial Hardship, which was accepted for filing by the Court on April 5, 2016. 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 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 Sys. 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 the Board's January 14, 2016 that determined that new and material evidence had not been received to reopen a claim of entitlement to service connection for epilepsy, and remanded the matter for further proceedings. Specifically, the Court held that Appellant had provided the regional office with sufficient knowledge of the existence of VA treatment records to trigger constructive receipt of those records to warrant consideration of his claim under 38 C.F.R. § 3.156(b), and remand was warranted for the Board to consider whether the VA treatment records constructively before VA during the one-year appeal period constitute new and material evidence sufficient to vitiate the finality of the February 2006 rating decision. Dec. at 15 (citing 38 U.S.C. § 7104(d)(1)); *Allday v. Brown*, 7 Vet .App. 517, 527 (1995); *Tucker v. West*, 11 Vet. App. 369, 374 (1998); *Hensley v. West*, 212 F.3d 1255, 1263 (Fed. Cir. 2000). These errors, and the other errors made by the Board, had no reasonable basis in fact or in law.

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 **14.3** hours of attorney time and **6.0** hours of paralegal and 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). Related to the work of NVLSP attorneys, the \$125 attorney fee rate, adjusted for inflation for the Washington Metropolitan Area, was \$200.53 in October 2016 the month Appellant filed their initial brief. See Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV area for inflation between March 1996 and January 2018. See Exhibit C; *Mannino v. West*, 12 Vet. App. 242 (1999); The market rates for Appellant’s attorneys exceeded the requested rates 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 Dorrie Popovski and law clerks Brendan Ryan and Kulia Petzoldt was at least \$154.00 per hour for the period from June 1, 2015 to May 31, 2016, and \$157.00 from June 1, 2016, to the present. (Exhibit D) See *Sandoval v. Brown*, 9 Vet. App. 177, 181 (1996); see also *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008).

<u>Name</u>	<u>Rate</u>	<u>Hours</u>	<u>Fee Amount</u>
Barton F. Stichman (1974 law graduate)	\$ 200.53	4.5	\$ 902.39
Alexis Ivory (2005 law graduate)	\$ 200.53	14.2	\$ 2,847.53
Amy F. Odom (2006 law graduate)	\$ 200.53	34.7	\$ 6,958.39
Raymond Kim (2014 law graduate)	\$ 200.53	8.7	\$ 1,744.61
Dorrie Popovski (paralegal)	\$ 157.00	0.9	\$ 141.30
Kulia Petzoldt (law clerk)	\$ 164.00	4.2	\$ 688.80
Brendan Ryan (law clerk)	\$ 157.00	1.3	\$ 204.10

SUBTOTAL: \$ 13,487.12

The reasonable expenses for which Appellant seeks compensation are:

<u>Nature of Expense</u>	<u>Expense Amount</u>
Federal Express and USPS Charges	\$ 25.00
Duplication Charges	\$ 15.00

SUBTOTAL: \$ 40.00

TOTAL: \$ 13,527.12

WHEREFORE, Appellant respectfully requests that the Court award attorneys' fees and expenses in the total amount of **\$ 13,527.12**.

Respectfully submitted,

FOR APPELLANT:

Date: May 28, 2018

/s/ Amy F. Odom

Amy F. Odom

Barton F. Stichman

National Veterans Legal Services Program

1600 K Street, NW, Suite 500

Washington, DC 20006-2833

(202) 621-5676

Counsel for Appellant

EXHIBIT A

**NVLSP Staff Hours for Robby Turner
Vet. App. No. App 16-1171**

Date: 3/2/2016 0.3 Staff: Amy F. Odom
Review and analyze BVA decision and prepare memorandum regarding issues to raise on appeal.

Date: 3/3/2016 0.0 Staff: Amy F. Odom
Provide legal advice to A. Ivory regarding issues to raise on appeal **[0.1 hours eliminated in the exercise of billing judgment]**.

Date: 3/14/2016 0.0 Staff: Alexis Ivory
Review and analyze BVA decision and identify issues to raise on appeal **[0.2 hours eliminated in the exercise of billing judgment]**.

Date: 3/15/2016 0.2 Staff: Dorrie Popovski
Draft letter to client regarding BVA decision and issues to raise on appeal. Submit to attorney for review.

Date: 3/22/2016 0.2 Staff: Alexis Ivory
Teleconference with client regarding BVA decision and issues to raise on appeal.

Date: 3/28/2016 0.2 Staff: Dorrie Popovski
Draft letter to client regarding status of appeal, with documents for client to execute and return. Submit to attorney for review.

Date: 3/28/2016 0.1 Staff: Alexis Ivory
Teleconference with client regarding case status.

Date: 4/5/2016 0.2 Staff: Dorrie Popovski
Draft Notice of Appeal and notices of appearance.

Date: 4/6/2016 0.3 Staff: Dorrie Popovski

Draft letter regarding status of appeal, including informing client that a Notice of Appeal and Notices of Appearance have been filed with the Court and projected timeline of appeal. Submit to attorney for review (0.2); Forwarded signed VA consent form (0.1).

Date: 6/17/2016 3.0 Staff: Alexis Ivory

Review of 566-page Record Before the Agency (RBA) to ensure legibility and completeness and flag pertinent documents in preparation for drafting Rule 33 Summary of the issues (3.0) **[additional 0.4 hours eliminated in the exercise of billing judgment]**.

Date: 6/21/2016 0.0 Staff: Richard Spataro

Conference with and legal advice to A.. Ivory regarding arguments to raise on appeal **[0.2 hours eliminated in the exercise of billing judgment]**.

Date: 6/21/2016 3.2 Staff: Alexis Ivory

Conference with and legal advice from R. Spataro regarding issues to raise on appeal (0.2); begin drafting Rule 33 Summary of the Issues (3.0) **[additional 0.5 hours eliminated in the exercise of billing judgment]**.

Date: 6/30/2016 0.0 Staff: Alexis Ivory

Continue drafting Rule 33 Summary of the Issues **[2.2 hours eliminated in the exercise of billing judgment]**.

Date: 7/7/2016 0.0 Staff: Alexis Ivory

Conference with and legal advice from R. Abrams and C. Hill regarding issues to raise in Rule 33 Summary of the Issues **[0.3 hours eliminated in the exercise of billing judgment]**.

Date: 7/7/2016 0.0 Staff: Christine Cote Hill

Conference with and legal advice to A. Ivory and R. Abrams regarding issues to raise in Rule 33 Summary of the Issues **[0.3 hours eliminated in the exercise of billing judgment]**.

Date: 7/8/2016 0.0 Staff: Alexis Ivory
Continue drafting Rule 33 Summary of the Issues **[0.4 hours eliminated in the exercise of billing judgment]**.

Date: 7/11/2016 0.0 Staff: Alexis Ivory
Continue drafting Rule 33 Summary of the Issues **[0.2 hours eliminated in the exercise of billing judgment]**.

Date: 7/12/2016 0.7 Staff: Alexis Ivory
Telephone conference with client about status of case, Rule 33 Summary of the Issues, and settlement authority (0.2); finalize Rule 33 Summary of the Issues (0.4); draft and finalize letter to client regarding Rule 33 Summary of the Issues and settlement authority, with enclosure (0.1).

Date: 7/26/2016 0.7 Staff: Alexis Ivory
Prepare for Rule 33 Staff Conference, including review of Rule 33 Summary of the Issues and relevant evidence (.1); participate in Rule 33 Staff Conference (.2); teleconference with client regarding Rule 33 Staff Conference (.1); conference with and legal advice from R. Abrams about Rule 33 Staff Conference and litigation strategy (.3).

Date: 8/2/2016 0.0 Staff: Alexis Ivory
Conference with and legal advice from A. Odom regarding Rule 33 conference and litigation strategy **[0.1 hours eliminated in the exercise of billing judgment]**.

Date: 8/2/2016 0.1 Staff: Amy F. Odom
Conference with and legal advice to A. Ivory regarding issues to raise in brief.

Date: 8/24/2016 0.0 Staff: Alexis Ivory
Draft and finalize motion for extension of time within which to file opening brief for Appellant **[0.6 hours eliminated in the exercise of billing judgment]**.

Date: 8/31/2016 2.5 Staff: Alexis Ivory
Outline opening brief for Appellant **[0.8 hours eliminated in the exercise of**

billing judgment]; Draft Statement of the Facts for brief (2.5)

Date: 9/1/2016 0.0 Staff: Amy F. Odom
Conference with and legal advice to A. Ivory regarding issues to raise in brief
[0.1 hours eliminated in the exercise of billing judgment].

Date: 9/6/2016 0.0 Staff: Alexis Ivory
Draft Statement of the Facts **[1.1 hours eliminated in the exercise of billing judgment].**

Date: 9/7/2016 0.0 Staff: Alexis Ivory
Draft argument **[1.7 hours eliminated in the exercise of billing judgment].**

Date: 9/13/2016 1.4 Staff: Alexis Ivory
Draft argument.

Date: 9/21/2016 0.0 Staff: Amy F. Odom
Initial review of brief **[0.2 hours eliminated in the exercise of billing judgment].**

Date: 10/6/2016 1.7 Staff: Amy F. Odom
Review pertinent portions of RBA and prepare inserts for statement of facts to include additional pertinent detail.

Date: 10/9/2016 1.0 Staff: Amy F. Odom
Begin drafting Argument I.A for brief.

Date: 10/11/2016 3.7 Staff: Amy F. Odom
Finish drafting Argument I.A (1.0); draft Argument I.B (1.5); draft Argument II and summary of argument (1.2).

Date: 10/11/2016 1.7 Staff: Alexis Ivory
Review final brief **[1.3 hours eliminated in the exercise of billing judgment];**

prepare and review table of authorities and contents, including RBA citations (1.6); telephone conference with client regarding status of appeal and issues raised in brief (.1); file brief **[0.1 hours eliminated in the exercise of billing judgment]**.

Date: 10/12/2016 0.2 Staff: Alexis Ivory
Draft letter to client regarding status of appeal and brief, with enclosures.

Date: 12/12/2016 0.3 Staff: Alexis Ivory
Email exchange with VAGC attorney regarding proposed bases for remand and motion for stay of proceedings (.2); conference with A. Odom about VA General Counsel's proposed bases for remand **[0.1 hours eliminated in the exercise of billing judgment]**; conference with client about VA General Counsel's proposed bases for remand – advise to reject (.1).

Date: 12/12/2016 0.2 Staff: Amy F. Odom
Review Appellant's brief and provide legal advice to A. Ivory regarding VAGC attorney's proposed bases for remand - advise to reject.

Date: 12/13/2016 0.1 Staff: Alexis Ivory
Draft and finalize email to VA General Counsel rejecting proposed bases for remand.

Date: 12/20/2016 0.0 Staff: Amy F. Odom
Draft and finalize notice of appearance **[0.1 hours eliminated in the exercise of billing judgment]**.

Date: 12/20/2016 0.1 Staff: Alexis Ivory
Teleconference with client regarding status of appeal.

Date: 3/13/2017 0.0 Staff: Amy F. Odom
Draft and finalize motion for extension of time to file reply brief **[0.2 hours eliminated in the exercise of billing judgment]**.

Date: 4/16/2017 0.2 Staff: Amy F. Odom
Conduct legal research regarding relationship between 3.156(b) and *Bell v. Derwinski* in preparation for drafting reply brief.

Date: 4/25/2017 3.4 Staff: Amy F. Odom
Draft Argument I for reply brief (1.6); draft Argument II for reply brief (1.2); telephone conference with client regarding status of appeal and arguments raised in reply brief (.2); draft introduction, proofread brief, and prepare inserts to add persuasive value (.4).

Date: 4/26/2017 0.7 Staff: Barton F. Stichman
Review of VA brief and draft reply brief and prepare inserts to draft reply brief.

Date: 4/27/2017 0.4 Staff: Amy F. Odom
Prepare inserts for brief per B. Stichman's legal advice **[0.1 hours eliminated in the exercise of billing judgment]**; prepare table of authorities (.4); prepare table of contents and file **[0.1 hours eliminated in the exercise of billing judgment]**.

Date: 5/12/2017 0.5 Staff: Brendan Ryan
Began reviewing Record of Proceeding (ROP) to ensure completeness.

Date: 5/16/2017 0.8 Staff: Brendan Ryan
Finish reviewing ROP to ensure completeness.

Date: 7/25/2017 0.1 Staff: Amy F. Odom
Telephone conference with client regarding status of appeal.

Date: 7/28/2017 0.3 Staff: Amy F. Odom
Draft and finalize letter to client regarding status of appeal and briefs filed in appeal, with attachments.

Date: 9/20/2017 0.2 Staff: Amy F. Odom
Telephone conference with client regarding status of appeal and panel order.

Date: 10/16/2017 0.8 Staff: Amy F. Odom
Conduct legal research regarding *Bell v. Derwinski* and its progeny in preparation for drafting supplemental brief.

Date: 10/17/2017 3.8 Staff: Amy F. Odom
Draft argument I for supplemental brief (2.7); draft argument II for supplemental brief (1.1).

Date: 10/17/2017 0.4 Staff: Barton F. Stichman
Review of and prepare to A. Odom's draft supplemental brief.

Date: 10/18/2017 0.0 Staff: Amy F. Odom
Prepare inserts for supplemental brief per B. Stichman's advice and finalize same **[0.7 hours eliminated in the exercise of billing judgment]**.

Date: 10/23/2017 0.0 Staff: Raymond Kim
Draft and finalize Notice of Appearance **[0.1 hours eliminated in the exercise of billing judgment]**.

Date: 11/22/2017 0.0 Staff: Amy F. Odom
Schedule moot courts with B. Stichman and R. Kim **[0.3 hours eliminated in the exercise of billing judgment]**.

Date: 11/30/2017 1.5 Staff: Raymond Kim
Review parties' briefs and supplemental briefs in preparation for participating in moot courts and in oral argument as second chair.

Date: 12/1/2017 2.0 Staff: Barton F. Stichman
Participate in first moot court.

Date: 12/1/2017 4.7 Staff: Amy F. Odom
Prepare for and participate in first moot argument (3.4); update oral argument outline based on moot argument session and conduct legal research regarding same (1.2); telephone conference with client regarding status of appeal (0.1).

Date: 12/1/2017 2.7 Staff: Raymond Kim
Prepare for and participate in first moot court.

Date: 12/4/2017 1.5 Staff: Raymond Kim
Prepare for and participate in final moot court.

Date: 12/4/2017 7.6 Staff: Amy F. Odom
Further revisions to oral argument outline (1.8); telephone conference with client (0.1); draft motion for leave to file supplemental authorities (never filed) (0.5); review Federal Circuit cases cited by VA in letter of supplemental authorities (0.5); prepare for and participate in second moot court (1.7); update oral argument outline based on second moot argument (0.5); prepare oral argument notebook and review materials for same (2.5).

Date: 12/4/2017 1.4 Staff: Barton F. Stichman
Prepare for and participate in final moot court (1.0); prepare inserts to final oral argument outline (0.4).

Date: 12/5/2017 3.8 Staff: Amy F. Odom
Review materials in preparation for oral argument (0.4); travel to/from CAVC and participate in oral argument and pre-argument conference (3.4).

Date: 12/5/2017 3.0 Staff: Raymond Kim
Travel to and from Court and participate in oral argument and pre-argument conference as second chair.

Date: 12/7/2017 0.1 Staff: Amy F. Odom
Draft email to client regarding status of appeal and link to audio recording of oral argument.

Date: 2/8/2018 0.4 Staff: Amy F. Odom
Review and analyze CAVC decision in preparation for telephone conference with client regarding same.

Date: 2/9/2018 0.3 Staff: Amy F. Odom
Telephone conference with and email to client regarding CAVC decision and next steps.

Date: 2/13/2018 0.0 Staff: Barton F. Stichman
Review Court decision **[0.4 hours eliminated in the exercise of billing judgment]**.

Date: 2/18/2018 0.0 Staff: Christine Cote Hill
Draft and finalize notice of appearance **[0.1 hours eliminated in the exercise of billing judgment]**.

Date: 5/14/2018 0.7 Staff: Kulia Petzoldt
Begin Drafting application for reasonable attorneys' fees and expenses under the Equal Access to Justice Act (EAJA), including recitation of procedural history.

Date: 5/14/2018 0.1 Staff: Amy F. Odom
Telephone conference with client regarding status of appeal and Court's Mandate.

Date: 5/15/2018 1.5 Staff: Kulia Petzoldt
Continue drafting application for reasonable attorneys' fees and expenses under EAJA, including recitation of procedural history (0.5); Prepare list of itemized hours to be attached as exhibit to EAJA application (1.0).

Date: 5/17/2018 2.0 Staff: Kulia Petzoldt
Continue drafting application for reasonable attorneys' fees and expenses under EAJA, including recitation of procedural history (2.0); continue drafting application for reasonable attorneys' fees and expenses under EAJA, including recitation of procedural history **[3.0 hours eliminated in the exercise of billing judgment]**.

Date: 5/18/2018 0.0 Staff: Kulia Petzoldt
Finish drafting application for reasonable attorneys' fees and expenses under EAJA, including recitation of procedural history **[3.0 hours eliminated in the exercise of billing judgment]**.

Date: 5/28/2018 1.5 Staff: Amy F. Odom

Add insertion to application for reasonable attorneys' fees and expenses under the EAJA, eliminate hours in the interest of billing judgment, and finalize EAJA application (1.5) **[additional 1.5 hours eliminated in the exercise of billing judgment]**.

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: May 28, 2018

/s/ Amy F. Odom
Amy F. Odom

EXHIBIT B

Databases, Tables & Calculators by Subject

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Change Output Options:

From: 1996 To: 2016 GO

☐ include graphs ☐ include annual averages

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Data extracted on: August 16, 2016 (10:56:08 AM)

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: [xls](#) [xlsx](#)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
1996											100.0				
1997	100.4		100.8		100.5		101.1		101.4		100.5		100.8	100.6	101.0
1998	101.0		101.6		101.5		102.8		102.9		102.4		102.1	101.5	102.7
1999	102.8		103.2		103.6		104.6		105.4		105.0		104.2	103.4	105.1
2000	105.4		107.1		106.7		108.4		108.7		108.5		107.6	106.6	108.6
2001	108.9		109.7		110.1		110.8		111.7		110.9		110.4	109.7	111.1
2002	110.9		111.9		112.8		113.4		114.0		114.0		113.0	112.1	113.9
2003	114.6		115.9		115.7		116.8		117.2		116.7		116.2	115.6	116.9
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		155.522		154.926		154.847	154.626	155.069
2015	153.376		154.984		155.880		155.546		156.278		155.820		155.353	154.886	155.820
2016	155.519		156.493		157.770		157.673							156.770	

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

USAO ATTORNEY'S FEES MATRIX — 2015-2018*Revised Methodology starting with 2015-2016 Year*

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17	2017-18
31+ years	568	581	602
21-30 years	530	543	563
16-20 years	504	516	536
11-15 years	455	465	483
8-10 years	386	395	410
6-7 years	332	339	352
4-5 years	325	332	346
2-3 years	315	322	334
Less than 2 years	284	291	302
Paralegals & Law Clerks	154	157	164

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 (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use 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 has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-

Legal Services index measures. Although it is a national index, and not a local one, *cf. Eley v. District of Columbia*, 793 F.3d 97, 102 (D.C. Cir. 2015) (noting criticism of national inflation index), the PPI-OL index has historically been generous relative to other possibly applicable inflation indexes, and so its use should minimize disputes about whether the inflator is sufficient.

4. The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed 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), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore (DC-MD-VA-WV) area. Because the USAO rates for the years 2014-15 and earlier have been generally accepted as reasonable by courts in the District of Columbia, see note 9 below, the USAO rates for those years will remain the same as previously published on the USAO's public website. That is, the USAO rates for years prior to and including 2014-15 remain based on the prior methodology, *i.e.*, the original *Laffey* Matrix updated by the CPI-U for the Washington-Baltimore area. See *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice*, --- F. Supp. 3d ---, 2015 WL 6529371 (D.D.C. 2015) and Declaration of Dr. Laura A. Malowane filed therein on Sept. 22, 2015 (Civ. Action No. 12-1491, ECF No. 46-1) (confirming that the USAO rates for 2014-15 computed using prior methodology are reasonable).
5. Although the USAO will not issue recalculated *Laffey* Matrices for past years using the new methodology, it will not oppose the use of that methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods prior to June 2015, provided that methodology is used consistently to calculate the entire fee amount. Similarly, although the USAO will no longer issue an updated *Laffey* Matrix computed using the prior methodology, it will not oppose the use of the prior methodology (if properly applied) to calculate reasonable attorney's fees under applicable fee-shifting statutes for periods after May 2015, provided that methodology is used consistently to calculate the entire fee amount.
6. The various "brackets" in the column headed "Experience" refer to the attorney's years of experience practicing law. Normally, an attorney's experience will be calculated starting from the attorney's graduation from law school. Thus, the "Less than 2 years" bracket is generally applicable to attorneys in their first and second years after graduation from law school, and the "2-3 years" bracket generally becomes applicable on the second anniversary of the attorney's graduation (*i.e.*, at the beginning of the third year following law school). See *Laffey*, 572 F. Supp. at 371. An adjustment may be necessary, however, if the attorney's admission to the bar was significantly delayed or the attorney did not otherwise follow a typical career progression. See, *e.g.*, *EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 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). The various experience levels were selected by relying on the levels in the ALM Legal Intelligence 2011 survey data. Although finer gradations in experience level might yield different estimates of market rates, it is important to have statistically sufficient sample sizes for each experience level. The experience categories in the current USAO Matrix are based on statistically significant sample sizes for each experience level.
7. ALM Legal Intelligence's 2011 survey data does not include rates for paralegals and law clerks. Unless and until reliable survey data about actual paralegal/law clerk rates in the D.C. metropolitan area become available, the USAO will compute the hourly rate for Paralegals & Law Clerks using the most recent historical rate from the USAO's former *Laffey* Matrix (*i.e.*, \$150 for 2014-15) updated with the PPI-OL index. The formula is \$150 multiplied by the PPI-OL index for May in the year of the update, divided by 194.3 (the PPI-OL index for May 2014), and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
8. The USAO anticipates periodically revising the above matrix if more recent reliable survey data becomes available, especially data specific to the D.C. market, and in the interim years updating the most recent survey data with the PPI-OL index, or a comparable index for the District of Columbia if such a locality-specific index becomes available.
9. 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 USAO 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 USAO's *Laffey* Matrix, rather than the so-called "*Salazar* Matrix" (also known as the "LSI Matrix" or the "Enhanced *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., *Joaquin v. Friendship Pub. Charter Sch.*, 188 F. Supp. 3d 1 (D.D.C. 2016); *Prunty v. Vivendi*, 195 F. Supp. 3d 107 (D.D.C. 2016); *CREW v. U.S. Dep't of Justice*, 142 F. Supp. 3d 1 (D.D.C. 2015); *McAllister v. District of Columbia*, 21 F. Supp. 3d 94 (D.D.C. 2014); *Embassy of Fed. Republic of Nigeria v. Ugwuonye*, 297 F.R.D. 4, 15 (D.D.C. 2013); *Berke v. Bureau of Prisons*, 942 F. Supp. 2d 71, 77 (D.D.C. 2013); *Fisher v. Friendship Pub. Charter Sch.*, 880 F. Supp. 2d 149, 154-55 (D.D.C. 2012); *Sykes v. District of Columbia*, 870 F. Supp. 2d 86, 93-96 (D.D.C. 2012); *Heller v. District of Columbia*, 832 F. Supp. 2d 32, 40-49 (D.D.C. 2011); *Hayes v. D.C. Public Schools*, 815 F. Supp. 2d 134, 142-43 (D.D.C. 2011); *Queen Anne's Conservation Ass'n v. Dep't of State*, 800 F. Supp. 2d 195, 200-01 (D.D.C. 2011); *Woodland v. Viacom, Inc.*, 255 F.R.D. 278, 279-80 (D.D.C. 2008); *American Lands Alliance v. Norton*, 525 F. Supp. 2d 135, 148-50 (D.D.C. 2007). But see, e.g., *Salazar v. District of Columbia*, 123 F. Supp. 2d 8, 13-15 (D.D.C. 2000). Since initial publication of the instant USAO Matrix in 2015, multiple courts similarly have employed the USAO Matrix rather than the *Salazar* Matrix for fees incurred since 2015. E.g., *Electronic Privacy Information Center v. United States Drug Enforcement Agency*, --- F. Supp. 3d ---, 2017 U.S. Dist. LEXIS 111175, at *17 (D.D.C. 2017) ("After examining the case law and the supporting evidence offered by both parties, the Court is persuaded that the updated USAO matrix, which covers billing rates from 2015 to 2017, is the most suitable choice here.") (requiring re-calculation of fees that applicant had computed according to *Salazar* Matrix); *Clemente v. FBI*, No. 08-1252 (BJR) (D.D.C. Mar. 24, 2017), slip op. at 9-10 (applying USAO Matrix, as it is "based on much more current data than the *Salazar* Matrix"). The USAO contends that the *Salazar* Matrix is fundamentally flawed, does not use the *Salazar* Matrix to determine whether fee awards under fee-shifting statutes are reasonable, and will not consent to pay hourly rates calculated with the methodology on which that matrix is based.