

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 08-1475(E)

KAREN DIXON,

APPELLANT,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENBERG, *Judge*.

ORDER

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

GREENBERG, *Judge*: Before the Court is an application for an award of attorney fees, costs, and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The appellant filed her initial application in December 2016, seeking \$164,208.66 in attorneys fees and \$22,393.58 in connection with her representation by the law firm Arnold & Porter Kaye Scholer LLP (Arnold & Porter). She amended her application in January 2017, still requesting the same amount of fees and expenses. Appellant's Amended Application for Award of Attorneys' Fees & Expenses (EAJA Application).

On June 19, 2018, a panel of the Court found that the appellant was entitled to EAJA fees relating to her representation by Arnold & Porter for the entirety of the appeal, which began on August 24, 2012. The matter of the reasonableness of attorneys fees and expenses has been returned for single-judge consideration. The Court will grant the application in part.

On October 11, 2018, the appellant submitted a supplemental EAJA application for \$28,130.19 to compensate for time and expenses spent preparing and defending the EAJA Application. Amended Response to Court's Order of August 7, 2018, Including Supplemental Fee Request (Supplemental Fee Request). The Court will order the Secretary to respond to the Supplemental Fee Request.

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)). It must determine what a "reasonable" fee is for the services provided and costs and expenses incurred. *See Uttieri v. Brown*, 7 Vet.App. 415, 418 (1995) (citing *Comm'r, INS v. Jean*, 496 U.S. 154, 160-61 (1990)).

The Court begins its reasonable fee determination by calculating "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433; *see also Elczyn v. Brown*, 7 Vet.App. 170, 176 (1994).¹ The applicant's sworn affidavit documenting the time expended and the tasks performed during that time "provides the uncontradicted benchmark for the 'hours reasonably expended'" unless the hours claimed are unreasonable on their face or persuasively opposed by the Secretary. *Chesser*, 11 Vet.App. at 502. A reasonable hourly rate for attorneys is the lesser of either the prevailing market rate or \$125 per hour with a cost-of-living adjustment. *See* 28 U.S.C. § 2412(d)(2)(A); *Chiu v. United States*, 948 F.2d 711 (Fed. Cir. 1991); *Elczyn*, 7 Vet.App. at 181. A reasonable hourly rate for paralegals is the lesser of either the prevailing market rate or \$75 per hour with a cost-of-living adjustment. *See Sandoval v. Brown*, 9 Vet.App. 177, 181 (1996). The cost-of-living adjustment is determined by comparing the Bureau of Labor Statistics Consumer Price Index (CPI) between the date of passage of the statute and "a single mid-point date [in the litigation], such as the date upon which an appellant's principal brief, motion, or petition is filed with the Court." *Elczyn*, 7 Vet.App. at 179. There is also a presumption that an applicant's declaration of the prevailing market wages for attorney and paralegal services is accurate. *See Willis v. U.S. Postal Serv.*, 245 F.3d 1333, 1340-41 (Fed. Cir. 2001) ("[A]n attorney-affiant should be presumed to be knowledgeable and truthful unless and until he is shown to be otherwise.").

The Court concludes that the appellant correctly identified the appropriate hourly rates assigned to her attorneys and paralegals.² The appellant's CPI "mid-point" of 2014 is appropriate because the underlying case was litigated from August 2012 until December 2016. *See Elczyn*, 7 Vet.App. at 179; EAJA Application at 10. The appellant correctly identified the CPI in the Denver metropolitan area as 237.2 in 2014, as compared to 153.1 in 1996, the year in which EAJA came into effect.³ Applying the cost-of-living adjustment, the statutory maximum hourly rate is \$193.66 for attorneys and \$116.20 for paralegals.

In her EAJA application, the appellant declared that 6 attorneys worked for 775.8 hours combined, and 2 paralegals worked for 120.2 hours combined, on her case. EAJA Application at 11-12, Exhibit 1 Appendix A. For the purpose of the application, the appellant sought an hourly fee of \$193.66 for attorney work and \$116.20 for paralegal work. EAJA Application at 10-11.

The Secretary argues that the Court should not grant fees for time spent "on admission to this Court and the Federal Circuit, reviewing the procedural rules for both jurisdictions, and . . . in preparation for moot courts." Secretary's Response in Opposition to Appellant's Application for Attorney Fees and Expenses (Secretary's Opposition) at 18. The appellant contended in her

¹ For another example of fees and expenses being awarded under federal fee-shifting statutes, *see Endress v. Brookdale Community College*, 364 A.2d 1080, 1086 (N.J. App. Div. 1976) (fees awarded under 42 U.S.C. § 1983).

² The appellant declared that the customary rates for attorneys in the Denver, Colorado, area – where this office of Arnold & Porter is located – ranged from \$345 to \$875 per hour, and that the hourly rates for the paralegals on this case were "at least \$300 per hour." EAJA Application at 10-11. The Court presumes that these numbers were accurate during the pendency of the underlying litigation. *See Willis*, 245 F.3d at 1340-41.

³ https://data.bls.gov/pdq/SurveyOutputServlet?data_tool=dropmap&series_id=CUURS48BSA0,CUUSS48BSA0 (last visited Oct. 2, 2018).

application that her counsel had removed any activity or expense that might be considered "overhead," including time spent filing applications to be admitted to practice before the Court and time spent preparing to act as judges in a moot court. EAJA Application at 12.

Several items inadvertently billed, constituting 21 hours of attorney work, contradict the appellant's statement. On October 16, 2013, attorney LeBoeuf billed 3 hours for multiple tasks, including "coordinat[ing] with colleagues regarding moot court." *See* EAJA Application, Exhibit 1 Appendix A at 28. On October 30, 2013, attorney LeBoeuf billed 8 hours for multiple tasks, including "coordinat[ing] with colleagues regarding moot court." *See id.* at 29. Because the concept of coordinating with colleagues for moot court is vague, the Court cannot find that these tasks are distinct from preparing others to act as judges in moot court. *See Baldridge v. Nicholson*, 19 Vet.App. 227, 235 (2005) ("Large blocks of time associated with either many tasks or a single task with only generalized descriptions such as 'research' or 'conference' are not specific enough to permit the Court an adequate basis for review and are subject to reduction.").

Further, on November 27, 2012, attorney LeBoeuf billed 2.6 hours on tasks, including researching the procedure for waiving filing fees in the Federal Circuit. *See* EAJA Application, Exhibit 1 Appendix A at 12. On December 26, 2012, attorney LeBoeuf billed 1.2 hours on tasks, including researching the procedure for obtaining membership in the Federal Circuit bar. *See* EAJA Application, Exhibit 1 Appendix A at 13. On February 7, 2013, attorney LeBoeuf billed 5.2 hours on tasks, including reviewing Federal Circuit rules governing briefs and motions. *See* EAJA Application, Exhibit 1 Appendix A at 16. On April 16, 2015, attorney Kieffer billed 1 hour on tasks, including reviewing Federal Circuit rules governing briefs. *See* EAJA Application, Exhibit 1 Appendix A at 49. Because of the block billing used in these instances, the Court cannot parse how much time was expended on each activity, and thus the Court finds the entire blocks to be unreasonably billed to the Government. *See Baldridge*, 19 Vet.App. at 235. In total, the Court finds that 21 hours were billed unreasonably because they contradict the appellant's contentions in her EAJA application. *Id.*

The Secretary also asserted that the 896 combined billed hours were excessive for the scope of the appeal. *Id.* at 18-19. The Secretary has not persuaded the Court that the hours claimed by the appellant, outside the 21 hours accounted above, are unreasonable. *See Chesser*, 11 Vet.App. at 502. While 896 hours is an exceptional amount of time to spend on a veterans benefits claim, this case has an exceptional procedural history, which included two successful appeals to the Federal Circuit. *See Dixon v. McDonald*, 815 F.3d 799 (Fed. Cir. 2016); *Dixon v. Shinseki*, 741 F.3d 1367 (Fed. Cir. 2014). The measure of how many hours may be billed to the Secretary depends on the reasonableness of those hours, not the volume of them. *See Hensley*, 461 U.S. at 433; *Uttieri*, 7 Vet.App. at 418.

The Secretary objected to what he claims was "over 570 hours in block billing" because it made it impossible to "make effective arguments regarding the excessive and duplicative amount of time devoted to drafting pleadings before the Federal Circuit and this Court." *Id.* at 19. Vague descriptions of blocks of time are subject to reduction when they prevent judicial review of the billed hours. *See Baldridge*, 19 Vet.App. at 235 (holding that large blocks of time associated with many tasks or a single task with only general descriptions such as "research" are not specific enough to permit review). But here, the Court finds that block billing in the EAJA Application still

provided the Court enough specificity to review the reasonableness of the billed hours. *See, e.g., Scarborough v. Nicholson*, 19 Vet.App. 253, 266 (2005) (block billing using descriptions such as "work all day researching and writing argument section of petition" and "prepar[ing] first draft of cert petition; follow up research; assemble appendices, etc.," were reasonable in a procedurally complex case involving pleadings in both the Federal Circuit and Supreme Court, and allegedly requiring more than 300 hours of work); *Gutierrez v. Nicholson*, 21 Vet.App. 108, at *2 (Table 2006) (supporting the argument that "the number of hours billed were reasonably spent given the excellent work product and outcome obtained in this case"); *Stohl v. Nicholson*, 21 Vet.App. 100, at *2 (Table 2006) (block billing was accepted where it indicates "with sufficient detail that he performed various tasks on the days in question"); *Bailey v. Nicholson*, 21 Vet. App. 86, at *3 (Table 2006) (accepting block billing where the tasks listed are straightforward). Despite the abundance of hours billed in this case, the itemized list provided by Arnold & Porter is still detailed enough for the Court to understand what tasks the firm's employees were performing and to determine whether those tasks were reasonably necessary for the prosecution of the case.⁴ Further, the Court notes that the tasks listed are relatively straightforward enough to permit the Court to understand and that Arnold & Porter's work resulted in two successful appeals to the Federal Circuit. The Court concludes that the existence of block billing does not warrant a reduction in hours billable to the Secretary. *See Scarborough*, 19 Vet.App. at 266.

Based on the above considerations, the appellant is entitled to \$160,141.80 in attorney fees as of the filing of the EAJA application in December 2016. At \$193.66 per hour for 754.8 hours, Arnold & Porter attorneys' work during the appeal corresponds to \$146,174.56 in fees. At \$116.20 per hour for 120.2 hours, Arnold & Porter paralegals' work corresponds to \$13,967.24 in fees.

The Court also concludes that the \$22,393.58 in claimed costs and expenses are reasonable. *Uttieri*, 7 Vet.App. at 418. The research, travel, document retrieval, shipping, telephone, and duplication expenses incurred by Arnold & Porter all related to the provision of competent representation for the appellant. *See* EAJA Application, Exhibit 1 Appendix B. Despite the Secretary's contentions, the Court does not find that Arnold & Porter's computer research charges between September 2012 and January 2016 were duplicative. *See* Secretary's Opposition at 19. Nor will the Court agree with the Secretary that some of the claimed travel expenses were unnecessary to the prosecution of the appellant's claim. *Id.* Because the Court finds all of the claimed expenses and costs reasonable, it will grant the full \$22,393.58 requested.

Based on the foregoing analysis and the parties' submissions, it is

ORDERED that the appellant's EAJA application is GRANTED, IN PART, and fees, costs, and expenses are awarded to the appellant in the amount of \$182,535.38. It is also

ORDERED that the Secretary respond, within 20 days of the date of this order, to the October 11, 2018, Supplemental Fee Request.

⁴ As just one of many examples of block billing, on September 18, 2012, attorney LeBoeuf billed 5.8 hours to "[r]eview pleadings; draft timeline of key dates in case; begin reviewing caselaw regarding equitable tolling; begin drafting motion for reconsideration." This description is more similar in its specificity to the billed hours in *Scarborough* than to those in *Baldrige*. *Compare* 19 Vet.App. at 266, *with* 19 Vet.App. at 235.

DATED: October 23, 2018

BY THE COURT:

A handwritten signature in black ink, appearing to read "William S. Greenberg", with a long horizontal stroke extending to the right.

WILLIAM S. GREENBERG
Judge

Copies to:

Thomas W. Stoeve, Jr., Esq.

VA General Counsel (027)