IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

KENNETH R. DODD, Appellant,	)	
v.	)	Vet. App. No. 17-1350
ROBERT L. WILKIE, 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, Kenneth R. Dodd, moves this Court for an award of reasonable attorney fees and expenses. Appellant seeks an award in the amount of $11,057.75 for litigating the merits of this appeal and drafting this petition. In support of this motion, Appellant submits that: (1) he is entitled to an award of attorney fees and expenses under EAJA, 28 U.S.C. § 2412(d); and, (2) an award of $11,057.75 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 January 26, 2017, to the extent it denied entitlement to an initial disability rating greater than 10 percent for sinusitis.

In February 2019, the Court issued a memorandum 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 favorable lay evidence; and to discuss relevant and exceptional aspects of Appellant's condition, such as treatment and symptomatology, in its analysis of whether extraschedular consideration was warranted. In addition, the Board erred when it did not address whether there had been substantial compliance with its prior remand order.

ARGUMENT

I. APPELLANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND EXPENSES UNDER EAJA, 28 U.S.C. § 2412(D).

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

Generally, to be a prevailing party, a party must receive "at least some relief on the merits" and the relief must materially alter the legal relationship of the parties. *Higher Taste v. City of Tacoma*, 717 F.3d 712 (Fed. Cir. 2013) citing *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Res.*, 532 U.S. 598 (2001). More specifically, 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); *Kelly v. Nicholson*, 463 F.3d 1349 (Fed. Cir. 2006).

Most recently, the Federal Circuit in *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016), set out a three-part test "to determine a prevailing party status under the EAJA on administrative agency remands." Under this three-part test, a party is a prevailing party if (1) the remand was granted based upon or triggered by administrative error, (2) the remanding court did not retain jurisdiction, and (3) the remand clearly orders further agency proceedings, which allows the party "the possibility of attaining a favorable merits determination." *Blue v. Wilkie*, 30 Vet. App.

61 (2018), *citing Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016). Therefore, by applying the three-part test from *Dover*, the court here should find that Appellant is a prevailing party.

In this case, unlike the facts in either *Vaughn* or *Akers, supra*, the Court of Appeals for Veterans Claims issued a memorandum decision that set aside 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 favorable lay evidence; and to discuss relevant and exceptional aspects of Appellant's condition, such as treatment and symptomatology, in its analysis of whether extraschedular consideration was warranted. In addition, the Board erred when it did not address whether there had been substantial compliance with its prior remand order.

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 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 favorable lay evidence; and to discuss relevant and exceptional aspects of Appellant's condition, such as treatment and symptomatology, in its analysis of whether extraschedular consideration was

warranted. In addition, the Board erred when it did not address whether there had been substantial compliance with its prior remand order.

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.

II. THE COURT SHOULD AWARD APPELLANT REASONABLE FEES AND EXPENSES OF $11,057.75.

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 ***6.3 hours*** – ***totaling $1,289.92 --*** 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. <u>The EAJA Statutory Cap of $125.00 Should be Adjusted Upward to Reflect the Increase in the Cost of Living.</u>

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 *Elcyzyn 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 memorandum decision in February 2019. Appellant selects June 2018, as the date for calculating the CPI increase. *See Elcyzyn 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 63.80% between March 1996, and June 2018. Applying the increase in the CPI to the statutory rate, Appellant's counsel should be compensated at the rate of $204.75 per hour. This rate was calculated by subtracting the CPI-U for June 2018 (248.166) from that of March 1996 (151.5), and dividing the result (96.66) by the CPI-U for March 1996. The result (.6380), representing the increase between March 1996 and June 2018 was then multiplied by the statutory rate ($125.00), demonstrating an increase of

[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.

$79.75, which was added to the $125.00 statutory rate to arrive at the inflation-adjusted rate of $204.75 per hour.

Considering the foregoing, Appellant's counsel request a fee of $11,036.02 based upon 53.9 hours of work and $21.73 in expenses (See exhibit B) for a total of $11,057.75.

Respectfully submitted,

/s/ Glenn R. Bergmann
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Counsel for Appellant

Exhibit A

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, Kenneth R. Dodd, have a net worth of, or in excess of, $2,000,000.00.

/s/ Glenn R. Bergmann
Glenn R. Bergmann

Exhibit B

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 am admitted to practice before the United States Court of Appeals for Veterans Claims.
2. I have represented Kenneth R. Dodd in the case of Dodd v. Wilkie, Vet. App. No. 17-1350 without charge.
3. In May 2019 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 79.75 between March 1996, when the EAJA was amended, and June 2018.

The following is a statement of the exact service rendered and expenses incurred in the representation of the Appellant in this appeal by Bergmann & Moore. In addition to Glenn R. Bergmann, Esq., (GB) attorneys who may have worked on this appeal include: Joseph Moore (JM); Kim Sheffield (KS); Tom Polseno (TP); Daniel Wedemeyer (DW); Bryan Anderson (BA); Christopher Toms (CT); Joseph Murphy (JLM); Elizabeth Pesin (EP); Corey Creek (CC); Tiffany Guglielmetti (TG); Sun H. Choi (SC); Livhu Ndou, (LN); Nicole Steers (NS); Steven Spitzer (SS); David Litvak (DL); Jenny Tang (JT); Laura Jackson (LJ); Rosalee Hoffman, (RH); Ryan Pau (RP); Michael Garza (MG); Ziadanne Lewis (ZL); Mary Brown-Edokpayi (ME); Ken Ciardiello (KC); Melissa Hendricks (MH); James Ridgway (JR); Alex Tway (AT); John Juergensen (JJ); Lila Kanovsky (LK); H. Ritter Haaga (HRH); Sharon Kim (SK); Jonathan Brenner (JB); David Ames (DA); Hannah Youh (HY); Rachel Jiang (RJ); Jonathan Murphy (JCM); Kristen Parker-Fahey (KP); Andrew Cho (AC); and Kelsey Binder (KB). All are members of the Court's bar.

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Timesheet: Kenneth R. Dodd (17-1350) **June 4, 2019**

Legal Services Rendered:

Date	Description of Services	Hours	Misc. expense
3/23/17	BVA decision case screen (KS/GB)	.6	
5/9	T/c from client, signed up (KS)	.1	
	Correspondence to veteran w/ att's	.1	Via Email
5/10	T/c to client re: receipt of POA (NS)	.1	
5/12	Reviewed documents from veteran including POA docs	.2	
	Prepared/filed appeal/appearance	.1	
5/15	Reviewed notice docketing	.1	
5/17	Reviewed copy of BVA Decision	.1	
	Received BVA Decision transmittal	(.1)n/c	
5/24	Correspondence to court w/filing fee check	.1	Pstg. 0.49
5/26	Reviewed CAVC Fee	.1	
6/19	Prepare new client correspondence outlining appellate process (NS/GB)	.3	Pstg. 0.49
	Prepare co-counsel notice of appearance (SC)	.1	
6/26	Review VA notice of appearance (SC)	.1	
7/11	Review RBA filing notice (SC)	.1	
7/24	e-corres to OGC re: no RBA cd receipt (SC)	.1	
7/25	e-corres from OGC re: new RBA cd sent; cert of service will file new (SC)	.1	
	Review new certificate of service (SC)	.1	
	Received RBA CD (1051pgs.)	(.2)n/c	
8/1	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. 1-1051 (NS)	3.3	
8/2	Prepare report re: RBA completeness/legibility; e-correspondence re: RBA review (NS)	.7	
	Review NS R10 memo; e-corres to OGC re: RBA issue (SC)	.1	

	e-corres from OGC re: issue /records team (SC)	.1
8/11	e-corres from OGC records team re: status (SC)	.1
8/14	Prepare and file RBA dispute (SC)	.1
8/23	Review abeyance order (SC)	.1
9/7	Review VA notice of appearance from records team; Sec. response [1] for RBA dispute (SC)	.1
9/21	Review Sec. response [2] for RBA dispute (SC)	.1
10/6	Review Sec. response [3] for RBA dispute (SC)	.1
10/23	Review Sec. response [4] for RBA dispute (SC)	.1
11/3	e-corres from OGC re: dispute and outstanding fax; e-corres to OGC re clarification; e-corres from OGC (SC)	.2
	T/c msg to client (SC)	.1
11/6	T/c msg to client (SC)	.1
	Review Sec. resp [5] for RBA dispute (SC)	.1
	T/c from client, explain outstanding fax, send again for VA forwarding (SC)	.1
	e-corres to OGC re: will send over docs once rec'd; e-corres from OGC (SC)	.1
11/13	Review e-corres from client w/ fax resent (SC)	.1
	e-corres to OGC w/ resent fax/docs (SC)	.1
11/16	e-corres to OGC re: RBA dispute (SC)	.1
11/27	Review Sec. response [6] to dispute (SC)	.1
12/5	e-corres from OGC re: RBA dispute/cannot accept fax documents (SC)	.1
	e-corres to OGC re: RBA dispute, vendor clarification vs claims intake center (SC)	.1
	e-corres from OGC re: will contact vendor (SC)	.1
12/6	Review Sec. response [7] to dispute (SC)	.1
12/20	Review Sec. response [8] to dispute (SC)	.1
1/2/18	e-corres to OGC re: dispute status; e-corres from OGC re will confirm with VA intake center (SC)	.1
1/4	Review Sec. response [9] to dispute (SC)	.1
1/8	Review RBA dispute issue/assess Sec. responses and proposal for resolution; draft and e-corres to OGC on records team with two alternative resolutions of issue (SC)	.6
1/17	e-corres from OGC on records team re: VA confirmation of receipt of 30 pages of fax (SC)	.1
	e-corres to OGC re: will raise as merits issue (SC)	.1
2/16	Review BC order (SC)	.1
3/2	Review lit file, outlining potential issues for alternative resolution (SC)	.4
	Begin RBA merits review (ignoring illegible / incomplete documents previously deemed not relevant at R. 10), pp. 582-945, in preparation for	3.2

	drafting Rule 33 memo identifying potential bases for alternative resolution, taking notes as necessary (SC)	
3/4	Continue RBA merits review (ignoring illegible / incomplete documents previously deemed not relevant at R. 10), pp. 9-581, AND Virtual VA, pp. 946-1051, in preparation for drafting Rule 33 memo identifying potential bases for alternative resolution, taking notes as necessary (SC)	2.6
3/5	Draft Rule 33 memo, with *Lexis* research on EXS issues for sinusitis, including sleep disturbance; *Stegall*/DTA arg – PTRs and indication of outstanding records; R/B corollary; R/B arg – DC 6522 and evidence of polyps/rhinitis, § 4.2 medical clarification necessary, Appellant's argument on issue; R/B arg – EXS referral, inability to undergo surgery, sleep impairment, nausea, fatigue and marked interference; prepare RBA extracts (SC)	3.0
	Draft case assessment (SC)	.3
	e-corres to OGC / CLS w/ attached R33 memo and RBA extracts (SC)	.1
	Prepare certificate of service (SC)	.1
3/22	T/c from CLS re: OGC contact (SC)	.1
	e-corres from CLS re: BC/alternate numbers; e-corres to second CLS (SC)	.1
	T/c from CLS re: left msg w/ OGC, later time; e-corres from CLS re: time (SC)	.1
	Review lit file, incl. R33 in preparation for BC (SC)	.2
	Participate in BC, note partial offer, defense (SC)	.3
	Draft post-BC update (SC)	.2
	Review CLS briefing order (SC)	.1
4/4	e-corres to OGC re: JMR basis (SC)	.1
	e-corres from OGC (SC)	.1
4/5	e-corres to OGC, draft recommendation (SC)	.2
4/12	T/c to client, explain JMR offer, merits of arguments/issues, recommendation (SC)	.4
4/30	T/c from client, desire to brief issue, reject JMR (SC)	.1
5/30	Review lit file, incl. R33 memo and post-BC update; begin drafting statement of facts (SC)	1.5
5/31	Continue drafting principal brief, statement of facts, (SC)	3.0
	Continue brief draft; complete statement of facts/procedural history	1.5

	Draft principal brief, Arg. I, DTA/*Stegall* outstanding PTRs, and Arg. II.A, schedular rating/polyps (SC)	2.2	
6/1	Draft principal brief, finish Arg. II.A, draft Arg. II.B., with *Lexis* research on *Vogan*, DCs; revise entire principal brief, adding citations and authorities (SC)	1.8	
6/5	Review and supervisory revision of SC principal brief, adding material & comments re § 3.159(c)(1), *Doucette* & *King*, sleep impairment, structure of DC 7522 argument (applying *Clemons*) (TP)	2.3	
	Revise principal brief per TP comments, including *Lexis* research on *King*, *Doucette*, language and authority, mem decs and EXS argument (2.4 hrs)(SC)	1.9 (.5)n/c	
	Revise principal brief, DC 7522 argument into *Clemons* issue; revision of entire brief with addition of authorities and citations (2.0 hrs) (SC)	1.0 (1.0)n/c	
6/6	Prepared table of authorities and table of contents for brief (EG)	(1.2)n/c	
6/7	Reviewed table of authorities and table of contents for brief (EG)	(.6)n/c	
	Revise principal brief additionally, including statement of facts/EXS argument, *Clemons* (1.4 hrs)(SC)	.9 (.5)n/c	
6/8	Correspondence to client with attach brief	.1	Pstg. 6.70
9/19	Review litigation file inc. briefs; begin drafting reply brief re: *Stegall* basis/concession, R/B statement, favorable evidence rebuttal (3.5 hrs)(SC)	3.0 (.5)n/c	
	Draft reply brief, EXS referral, symptoms, with *Lexis* research, *Kuppamala*, *Thun*, *Yancy* (SC)	1.3	
9/20	Draft reply brief, complete EXS argument, with additional *Lexis* research on *Doucette*, post-hoc rationalization; draft R/B rebuttal – *Clemons*, with review of *Boggs*, *Ephraim*, distinguishing facts/circumstances (SC)	3.3	
	Review entire reply brief, in particular schedular rating argument, staged ratings, 38 CFR § 4.7 (SC)	1.2	
9/27	Review and supervisory revision of SC reply brief, adding material & comments re *Stegall* RvB remand vs. reversal, *Spellers*, § 4.97, intent to claim rhinitis (TP)	1.3	
10/2	Revise reply brief per TP comments (SC)	.6	

10/3	Prepared table of authorities and table of contents for reply brief (EG)	(.6)n/c	
10/5	Correspondence to client with attach reply brief	.1	Pstg. 6.70
10/15	Review ROP filing notice (SC)	.1	
	Reviewed ROP for compliance with Rule 28.1 and noted findings (JB)	1.5	
10/25	Review ROP memo (SC)	(.1)n/c	
	Prepare statement accept ROP (SC)	.1	
10/30	Review judge assignment (SC)	.1	
3/7	Review CAVC mem dec and draft assessment/summary (SC)	.1	
3/8	T/c to client; left msg (SC)	.1	
3/19	Commence client correspondence re: case disposition and next steps (HRH)	2.1	
	T/c to client; left voicemail (HRH)	.1	
3/20	T/c from client (HRH)	.3	
	Complete client correspondence re: case disposition and next steps (HRH)	.2	Pstg. 7.35
	Review judgment (GB)	.1	
5/21	Review mandate (GB)	.1	
5/28	Compiled time sheet (EG)	(.5)n/c	
	Prepared EAJA application (EG)	(.5)n/c	
6/4	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 (6.3 hours)	**(1,289.92)**	
Total Current Services Rendered		**53.9 hrs**	**11,036.02**

Expenses

Research (lexis/nexis)	(0.00) n/c	
Copies (x .10)	(0.00) n/c	
Postage	21.73	
Total expenses	21.73	21.73
Total current services rendered plus expenses		**$ 11,057.75**

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

/s/Glenn R. Bergmann June 4, 2019
Glenn R. Bergmann **Date**