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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 15-0715 (E)

LEROY S. ROBINSON, JR., APPELLANT,

V.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before SCHOELEN, *Judge*.

MEMORANDUM DECISION

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

SCHOELEN, *Judge*: Before the Court is the appellant's April 4, 2018, application for an award of attorney fees of $209,984.75 and $2,874 in expenses pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). Single-judge disposition is appropriate. For the reasons set forth below, the Court will award the appellant's EAJA application, but will reduce the award to $79,670.08 in fees and $2,874 in expenses.

I. BACKGROUND

On February 20, 2015, the appellant, through counsel, appealed a December 3, 2014, decision of the Board of Veterans' Appeals (Board) denying an effective date earlier than December 3, 2004, for the grant of service connection for post-traumatic stress disorder (PTSD). Between May 2015 and August 2017, the parties disputed the content of the record before the agency (RBA). In June 2015, the appellant filed a motion, pursuant to Rule 10(b) of this Court's Rules of Practice and Procedure, disputing the content of the RBA. The appellant noted that several documents he had obtained were missing from the RBA, including medical records from 1992 and 2008. Additionally, he stated that he had requested that he be allowed to examine documents in the original paper claims file.

In response, the Secretary stated that in assembling the RBA that was served on the appellant, the Secretary did not use or refer to the original paper records. He argued that because the original paper documents had been converted into electronic records, the appellant's official claims file was now composed of documents that had been "scanned and uploaded" from the Veterans Benefits Management System (VBMS) and Virtual VA (VVA) electronic databases. The Secretary maintained that, "[w]hile some paper source materials may still exist, they do not constitute the claims file and are now considered duplicates or non-records." Secretary's Jan. 6, 2016, Response at 7. In making this argument, the Secretary conceded that the official electronic file was missing pages, including certain medical records described by the appellant. Finally, the Secretary argued that the original paper claims file was not available for review by the appellant. The appellant replied that he had a right under Rule 10(d) to inspect the paper originals that were scanned into the VBMS and VVA, notwithstanding the Secretary's position that those databases now constituted the official claims file.

In July 2016, after the parties and amicus curiae appeared before this Court for oral argument, the Court held in a nondispositive precedential opinion that the Secretary's refusal to allow the appellant's representative access to the paper source documents was contrary to the requirements of Rule 10(d), which provides that the appellant would have access to the "original material." *Robinson v. McDonald*, 28 Vet.App. 178, 184 (2016). The Court found that the plain meaning of this phrase encompassed the original paper records and that the Secretary's digitization of paper documents did not transform the original paper records into copies for purposes of Rule 10(d). *Id*. at 186. The Court held that "pursuant to 38 U.S.C. § 7252(b) and Rule 10 the appellant has a right to inspect paper source documents in the Secretary's possession that were part of the record of proceedings before the Board or Secretary and connected with the adjudication of his claim pending before the Court." *Id*. at 192. Further, the Court ordered the Secretary to assemble all the appellant's paper source documents, and provide them to the appellant's representative for review and copying. *Id*.

On August 17, 2016, the Secretary averred that the Office of General Counsel (OGC) had obtained the appellant's paper source documents and mailed them to the Philadelphia regional office (RO), for the appellant to review the documents. The appellant informed the Court that the parties had arranged for the appellant's counsel to visit the RO on August 30, 2016, to review the original paper claims file; however, when she appeared for the appointment, RO personnel advised

her that the claims file was unavailable because 11 days earlier it had been sent to a vendor for scanning.

On September 12, 2016, the appellant filed a motion to hold the Secretary in contempt of the Court's July 2016 order. The appellant argued that the Secretary had failed to comply with the Court's July 14, 2016, order by failing to provide the paper source documents or to explain to the Court why it had not done so. On this same date, the appellant concurrently filed a motion for an order imposing sanctions on the Secretary. The appellant argued that the Court should order the Secretary to pay attorney's fees to the appellant's counsel and pay a Court fine for "flagrant disobedience of a Court [o]rder in an amount to be determined by this Court." Appellant's Opposed Motion for an Order Imposing Sanctions for Contempt of Court at 7-10.

Also on September 12, 2016, the Secretary appealed the Court's July 2016 decision to the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). On September 16, 2016, this Court held the appellant's motions in abeyance, pending the outcome of the Secretary's appeal.

In November 2017, the appellant filed a motion to dismiss the Secretary's appeal, arguing that the Federal Circuit did not have jurisdiction over a nonfinal order from this Court. Additionally, he argued that the Secretary's appeal was frivolous. In response, the Secretary informed the Federal Circuit that it no longer intended to pursue the appeal, and requested that the appeal be dismissed.

On this same date, the appellant moved the Federal Circuit to impose sanctions because the Secretary knew or should have known that he did not have viable grounds to appeal an interlocutory order from this Court. Further, the appellant asserted that the Secretary should be sanctioned for delaying to respond to the appellant's motion to dismiss.

In January 2017, the Federal Circuit granted the Secretary's motion to withdraw his appeal and denied the appellant's motion to dismiss as moot. *Robinson v. Snyder*, No. 2016-2653, 2017 WL 4277641 (Fed. Cir. Jan. 27, 2017) (order). The Federal Circuit also denied the appellant's sanctions motion. *Id*. In doing so, the Federal Circuit recognized that Rule 38 of the Federal Rules of Appellate Procedure provides that sanctions may be appropriate "'when an appellant has raised issues that are beyond the reasonable contemplation of fair-minded people'" or when "'an appellant has not dealt fairly with the court, has significantly misrepresented the law or facts, or has abused the judicial process by repeatedly litigating the same issue in the same court.'" 2017 WL 4277641, at * 1 (quoting *Sparks v. Eastman Kodak Co*., 230 F.3d 1344, 1345 (Fed. Cir. 2000)). The Federal

Circuit determined that under either standard, the appellant had not demonstrated that sanctions were appropriate. *Id*. The case was then returned to this Court.

On April 28, 2017, the Court ordered the appellant to provide the Court with copies of any documents he had in his possession that he believed were missing from the RBA. In May 2017, the Court ordered the appellant to inform the Court whether he agreed to have the outstanding documents copied at a local VA facility at the Secretary's expense. On June 20, 2017, the Court held oral argument on the remaining issues pertaining to the RBA dispute, and on the same date, ordered the Secretary to retrieve and associate certain records with the RBA and to review the VA's internal records system to search for additional medical records from 2009 to 2014 that were not included in the RBA. In August 2017, the appellant notified the Court that she had reviewed a disc from the Secretary containing the outstanding documents and she considered the RBA dispute resolved.

On March 5, 2018, the Court granted the appellant's motions for contempt and sanctions. *Robinson v. Shulkin*, U.S. Vet. App. No. 15-0715 (unpublished order Mar. 5, 2018). The Court noted that bad faith or willfulness was not required to hold a party in civil contempt; rather, a party may be held in civil contempt where his failure to fully comply with a Court rule or order is the result of "'gross negligence and a gross lack of diligence.'" *Id*. at 3 (quoting *Pousson v. Shinseki*, 22 Vet.App. 432, 437 (2009)).

The Court found the Secretary in civil contempt because he did not comply with the July 2016 court order, which required him to assemble the appellant's paper source documents and provide them to the appellant's representative for review pursuant to Rule 10(d) of the Court's Rules of Practice and Procedure. *Id*. The Court found that the RO's scheduling an appointment for document review with the appellant's counsel and then sending the documents off-site prior to the appointment constituted "gross negligence and a gross lack of diligence." *Id*. at 3. Additionally, the Court held that the Secretary was not "reasonably diligent and energetic in attempting to accomplish his duty under the Court's July 14, 2016, order and his actions further delayed the resolution of this case." *Id*. To sanction the Secretary, the Court ordered the Secretary to pay the appellant's counsel $1,411.83 for the time she spent attempting to inspect the appellant's paper source documents. *Id*. at 4. The Court did not make a finding that the Secretary was willful or acted in bad faith. On the same date that the Court issued its order on sanctions, the Court granted the

parties' joint motion to vacate the December 2014 Board decision and remanded the matter to the Board for further proceedings. The Court's mandate was also issued on this date.

II. ANALYSIS

This Court has jurisdiction to award attorney fees pursuant to 28 U.S.C. § 2412(d)(2)(F). The EAJA application was filed within the 30-day EAJA application period set forth in 28 U.S.C. § 2412(d)(1)(B), and the application meets the statutory content requirements because it contains (1) a showing that the appellant is a prevailing party; (2) a showing that he is a party eligible for an award because his net worth does not exceed $2,000,000; (3) an allegation that the Secretary's position was not substantially justified; and (4) an itemized statement of the attorney fees and expenses sought. *See* 28 U.S.C. § 2412(d)(1)(A), (1)(B), (2)(B); *Scarborough v. Principi*, 541 U.S. 401, 408 (2004).

The Secretary does not dispute, and the Court finds, that the appellant is a prevailing party. *See Sumner v. Principi*, 15 Vet.App. 256, 264-65 (2001) (en banc), *aff'd sub nom. Vaughn v. Principi*, 336 F.3d 1351 (Fed. Cir. 2003). The Secretary also does not dispute the issue of substantial justification, so the Court need not further address it. *See Cullens v. Gober*, 14 Vet.App. 234, 237 (2001) (en banc) (noting that, once an appellant alleges no substantial justification, the burden shifts to the Secretary to prove that VA was substantially justified in administrative and litigation positions). Accordingly, the Court concludes that the appellant is entitled to an EAJA award, and, therefore, the Court need only determine what amount in this case constitutes reasonable attorney fees. *See* 28 U.S.C. § 2412(d)(2)(A).

A. Hourly Rate

The appellant argues that he spent 452.60 hours[1] on this appeal and that he should receive $203.24 per hour[2] for certain hours expended by his attorney. But he argues that he is entitled to an additional "special factor" upward adjustment in his hourly rate of $203.24 to $296.72 for 388.2 hours his counsel performed between February 2016 to June 2017, on the RBA dispute. The Secretary does not dispute the requested hourly rate of $203.24, but he argues that this rate should

[1] The 452.6 hours the appellant seeks reflects the appellant's exercise of billing judgment. The appellant initially billed 514.2 hours and then reduced his total billing hours by 12%.

[2] The appellant argues that the statutory $125 hourly rate under the EAJA should be increased, for an attorney in the New York City area, to $203.24 because of the increase in the cost of living demonstrated by the Consumer Price Index of urban consumers in the New York-Northern New Jersey and Long Island area.

apply to all the hours the appellant's counsel reasonably spent throughout the litigation. Specifically, he disputes that in this case, the EAJA "special factor" allows an upward adjustment of the hourly rate. The appellant did not reply to the Secretary's response addressing the merits of the Secretary's arguments on the hourly rate. The Court agrees with the Secretary that $203.24 is a reasonable rate and that a "special factor" adjustment of that rate is not warranted.

Under 28 U.S.C. § 2412(d)(2)(A), if a Court finds that a "special factor" exists, an upward adjustment in the statutorily set hourly attorney fee rate ($125) is authorized in cases brought by or against the Government. In *Starry Associates, Inc. v. United States* (*Starry I*), 131 Fed. Cl. 208 (2017), the U.S. Court of Federal Claims (Claims Court) held that "egregious" agency misconduct was a "special factor" under section 2412(d)(2)(A), allowing for an upper adjustment of the hourly rate under EAJA. The appellant contends that the Secretary's "delay" and "intransigence" throughout the RBA dispute were like the Government's "egregious intransigence" that in *Starry I* warranted a special factor adjustment. EAJA Petition at 10-15.

In response, the Secretary asserts that the appellant's reliance on the *Starry I* is misplaced because in *Starry Associates, Inc. v. United States* (*Starry II*), 892 F.3d 1372 (Fed. Cir. 2018) the Federal Circuit vacated *Starry I* and remanded the case. The Secretary points out that the Federal Circuit held that the Claims Court had erred as a matter of law in holding that "an agency's improper or dilatory conduct during the administrative process" can constitute a "special factor" under section 2412(d)(2)(A). *Id*. at 1374. The Court agrees with the Secretary's argument. *Starry II* clearly found that the plain meaning of the statutory language, "special factor, such as the limited availability of qualified attorneys for the proceedings involved," does not include "egregious . . . government misconduct." *Id.* at 1380. The Federal Circuit reasoned that "[a]gency misconduct, even if egregious, does not bear any nexus to the reasonable hourly rate an attorney might charge in litigation, and, thus, cannot 'justify' awarding fees at a rate above $125 per hour."[3] *Id*. at 1381. The Federal Circuit noted that the additional effort "necessitated" by a private party's attorney because of the Government misconduct "would be reflected in an increase in the reasonable

[3] The Federal Circuit noted that its decision was consistent with other courts' decisions on this issue. *Id*. at 1384-85 (discussing *Kervin v. U.S. Postal Service*, 218 F.2d 185 (2d Cir. 2000) (holding that the special factor under section 2412(d) does not allow an upward adjustment of statutory fees because of bad faith on the part of the Government); *Estate of Cervin v. Commissioner*, 200 F.3d 351 (5th Cir. 2000) (discussing language in 26 U.S.C. § 7430, which is identical to that of section 2412(d), to conclude that improper behavior and an untenable Government litigating position cannot be a "special factor" warranting an increase above the statutorily allowed hourly fee)).

numbers of hours for the purposes of a lodestar calculation."[4] *Id*. at 1382. Applying *Starry II*, the Court concludes that under EAJA's section 2412(d), egregious Government misconduct does not serve as a vehicle to allow for an upward adjustment in the appellant's counsel statutory hourly rate.

B. Reasonableness of Fee

The appellant bears the burden of demonstrating the reasonableness of the fee request. *See Blum v. Stenson*, 465 U.S. 886, 897 (1984). "The Court has wide discretion in the award of attorney fees under the EAJA." *Chesser v. West*, 11 Vet.App. 497, 501 (1998). "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended . . . multiplied by a reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); *see Blum*, 465 U.S. at 897 (explaining that this calculation "normally provides a 'reasonable' attorney's fee"); *Elcyzyn v. Brown*, 7 Vet.App. 170, 177 (1994). "The [Court] must determine not just the actual hours expended by counsel, but which of those hours were reasonably expended in the litigation." *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983). "'Hours that are not properly billed to one's client are not properly billed to one's adversary pursuant to statutory authority.'" *Hensley*, 461 U.S. at 434 (quoting *Copeland v. Marshall*, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)). Many factors are considered when determining reasonableness of fees, including whether the hours claimed are unreasonable on their face; the difficulty of the issue presented; the skill required to perform the legal service; the results obtained; and whether the fee sought is persuasively opposed by the Secretary. *See McCormick v. Principi*, 16 Vet.App. 407, 413 (2002); *Ussery v. Brown*, 10 Vet.App. 51, 53 (1997); *Chesser*, 11 Vet.App. at 502; *see also Hensley*, 462 U.S. at 430 n.3.

[4] The Federal Circuit noted that a prevailing party may seek fees under EAJA's section 2412(b) when the Government litigates in "bad faith" or exhibits other egregious misconduct. *Starry II*, 892 F.3d at 1382. That provision states that "[t]he United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law." However, the Federal Circuit noted that under common law, attorney's fees are only assessed against a party that has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Id*. at 1382 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (quoting *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975))). Although here this Court found that the Secretary was not reasonably diligent and energetic in attempting to accomplish his duty under the Court's July 2016 order and that the Secretary's handling of the appointment for the appellant's attorney to review the claims file constituted "gross negligence and a gross lack of diligence," the Court does not find that in this litigation the Secretary has ever acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

The Court may reduce the number of hours claimed if the appellant's attorney spends time in "duplicative, unorganized, or otherwise unproductive efforts." *Vidal v. Brown*, 8 Vet.App. 488, 493 (1996) (citing *Jordan v. U.S. Dep't of Justice*, 691 F.2d 514, 518 (D.C. Cir. 1982)). The Court must also bear in mind that, in awarding EAJA fees, courts "'have a special responsibility to ensure that taxpayers are required to reimburse prevailing parties for only those fees and expenses actually needed to achieve the favorable result.'" *Baldridge v. Nicholson*, 19 Vet.App. 227, 233 (2005) (quoting *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 975 (D.C. Cir. 2004); *see Copeland v. Marshall*, 641 F.2d 880, 888 (D.C. Cir. 1980) (noting that, pursuant to fee-shifting statutes, "[w]here a fee is sought from the United States, which has infinite ability to pay, the Court must scrutinize the claim with particular care"). The Secretary's unsupported allegations that time expended was excessive are not by themselves sufficient to justify a reduction. *Sandoval v. Brown*, 9 Vet.App. 177, 181 (1996). Additionally, the Court's determination of a fee award "does not necessarily entail combing through each billing statement and tallying up tenths of hours as a green-eye-shaded auditor would do." *See Baldridge*,19 Vet.App. at 242; *see also Fox v. Vice*, 563 U.S. 826, 837 (2011) (stating that courts "need not, and indeed should not, become green eye-shade accountants" because "the essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection").

Here, the Secretary challenges certain hours that the appellant's attorney spent on the RBA issues as facially "unreasonable." Secretary's EAJA Response at 8-11. However, besides mounting a conclusory argument, the Secretary does not persuasively provide reasons to oppose these hours or in many instances identify specific dates or entries for the challenged hours. The Court surmises that the Secretary's challenge is based on a belief that the appellant's attorney spent excessive time on the itemized work. As in *Ussery*, "the Secretary has offered no evidence or standard for the Court to apply, other than his own apparent conclusion that, perhaps, a more efficient attorney might have been able to accomplish these tasks in less time." *Ussery*, 10 Vet.App. at 54. However, the Secretary's argument is "of no practical assistance to the Court" because he does not provide "contextual" references for his assertions. *Id*. The Court finds the appellant's requested fees are reasonable given the complexity of the legal issues raised in the RBA stage of the litigation, which required two oral arguments, numerous orders, and two decisions from this Court.

The Secretary also challenges hours expended by the appellant's attorney at the Federal Circuit because they were unsuccessful and unproductive. Specifically, the Secretary opposes 32.5

hours for researching and drafting a motion for sanctions against the Secretary in the Federal Circuit and 28.1 hours for research and drafting a reply to the Secretary's response to that motion. Secretary's EAJA Response at 10-11.[5] The Federal Circuit denied the appellant's motion for sanctions after concluding that he had not met the standard for imposing such sanctions. Although Courts may award fees for time reasonably spent on an unsuccessful argument in support of a successful claim, the touchstone in determining whether fees ought to be awarded in such a case is whether the argument was reasonable. *Hensley v. Principi*, 16 Vet.App. 491, 501 (2002). Although the appellant succeeded in his efforts to have the Secretary's appeal dismissed in the Federal Circuit, the Court finds that the time he spent on his motion for sanctions and his reply to the Secretary's opposition to that motion, totaling 60.6 hours, was unreasonably spent because the appellant's arguments in pursuit of his motion were not reasonable. *See Robinson*, 2017 WL 4227641. Accordingly, the Court will strike 60.6 hours as time spent on unproductive efforts.

C. Reasonableness of Expenses

Pursuant to 28 U.S.C. § 2412(d)(2)(A), reasonable expenses are those "found by the Court to be necessary for the preparation of the party's case." The Court may, at its discretion, award "expenses 'customarily charged to the client where the case is tried.'" *March v. Brown*, 7 Vet.App. 163, 170 (1994) (quoting *Oliveira v. United States*, 827 F.2d 735, 744 (Fed. Cir. 1987)). The appellant seeks $2,874 for expenses associated with hotel, travel, and postage fees. Appellant's Fee Application at 17. Given that the litigation in this case involved two oral arguments, which required the appellant's counsel to travel to Washington, D.C., numerous pleadings, and a voluminous claims file, the Court finds that the appellant's request for expenses is reasonable.

II. CONCLUSION

The Court finds that 60.6 hours of the 452.6 hours requested by the appellant shall be reduced from the EAJA award. Accordingly, the Court will award the appellant EAJA fees of

[5] The appellant did not file a reply addressing the merits of the Secretary's argument on the reasonableness of the requested fees.

$79,670.08 (based on the hourly rate of $203.24) and $2,874 in expenses. Therefore, the Court will grant attorney fees and expenses in the total amount of $82,544.08.

DATED: August 21, 2019

Copies to:

Tara R. Goffney, Esq.

VA General Counsel (027)