IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

KENDRICK E. BRADLEY,	)	
	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. 17-3797-EAJA
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

THE SECRETARY'S RESPONSE TO APPELLANT'S SUPPLEMENTAL APPLICATION FOR ATTORNEY'S FEES AND EXPENSES

ISSUES PRESENTED

1) Whether Appellant successfully defended his initial application for attorneys fees and expenses?

2) Whether Appellant's request for supplemental attorney's fees and expenses is reasonable, given the circumstances surrounding Appellant's initial application for attorney's fees and expenses?

STATEMENT OF THE CASE

Appellant initiated this appeal on October 19, 2017. Appellant then filed his opening brief in this case on June 18, 2018, after which the parties were able to reach an agreement on a joint motion for partial remand of Appellant's claims. The Joint Motion was filed on October 1, 2018, and the Court granted the parties' motion on October 5, 2018. Following the issuance of the Court's mandate, Appellant submitted an application for attorney's fees and expenses on October 9, 2018. In this application Appellant requested that the Court award him $8,862.11 in compensation for 43.4 hours of work performed by his attorneys, plus expenses.

Included in these charges were charges for 2.1 hours of work performed by Ms. Barbara Cook. Appellant explained that he was requesting an hourly rate of $198.06 for Ms. Cook's work. (Application at 8.) He further explained that he arrived at this hourly rate by looking to "the Consumer Price Index-U for the Midwest" and applying the midpoint of June 2018, the month that his opening brief was filed. (Application at 8, n.4.)

The Secretary filed his response to this application on December 13, 2018. In his response, the Secretary stated that he did not challenge Appellant's assertion that he was the prevailing party, that the Secretary's position was not substantially justified, or any of the itemized charges provided in Appellant's initial application. (Secretary's Opposition at 1-2.) The Secretary only sought to challenge the hourly rate requested for Ms. Cook. (Secretary's Opposition at 2.) Specifically, the Secretary explained that while he did not challenge Appellant's selection of June 2018 as the midpoint of the case, or Appellant's selection of the Consumer Price Index (CPI-U) for the Midwest region, Appellant had miscalculated the hourly rate for Ms. Cook authorized by the CPI-U for June 2018, as provided by the Court in *Elcyzyn v. Brown*, 7 Vet.App. 170, 180-181. (Secretary's Opposition at 5-8.) The Secretary also provided calculations for Ms. Cook's hourly rate, using the CPI-U for the Midwest region as of June 2018, which yielded an hourly rate of $194.01. (Secretary's Opposition at 5-8.) Finally, the Secretary noted that while the difference in Ms. Cook's hourly rate did not equate to a substantial difference in this case, the error in Appellant's calculations could have

resulted in significant overpayment to appellants over time, when considered in the aggregate. (Secretary's Opposition at 4, 8.)

Appellant responded to the Secretary's opposition on March 1, 2019. In this response, Appellant argued, for the first time, that he was entitled to an hourly rate of $198.06 for Ms. Cook's work because Ms. Cook worked in Cincinnati, Ohio, and so the CPI-U applicable to the Cincinnati locality "should be used for determining her start date rate." (Appellant's Response at 1.) Appellant further explained, for the first time, that he arrived at the rate of $198.06 by multiplying the statutory rate of $125 per hour "by the increase in the cost of living rate determined by the U.S. Bureau of Labor Statistics' Consumer Price Index-U…for the Midwest, as of the midpoint of the case." (Appellant's Response at 3.) Appellant then took that product and divided it "by 148.6-*the local rate in Cincinnati* applicable on March 29, 1996, the start date for the EAJA rate." (Appellant's Response at 3.) However, Appellant noted that the CPI-U for the Cincinnati locality was discontinued after December 2017. (Appellant's Response at 4.)

On May 28, 2019, the Court ordered that the Secretary reply to Appellant's response within 14 days of the Court's Order, and that both parties were to file a statement setting forth their position on whether a precedential opinion was warranted on this matter. The Secretary's responses were provided on June 11, 2019. In his reply, the Secretary explained that while he did "not challenge the propriety of utilizing the most specific CPI-U regional information available when calculating the percentage increase in the cost of living for a given area",

Appellant's use of comingled data from two separate and distinct indexes in calculating the hourly rate for Ms. Cook was mathematically improper. (Secretary's Reply at 2.) The Secretary further explained that Appellant's use of two separate CPI-U regions/localities in a single calculation to determine Ms. Cook's hourly rate "conflates the economic activity captured by each index", which was inconsistent with the guidance provided by the Bureau of Labor Statistics and this Court's guidance in *Elcyzyn*. (Secretary's Reply at 4-5.) Additionally, in his statement, the Secretary stated that he believed a precedential decision may be warranted in this case. (Secretary's Statement at 1-2.) Appellant submitted his statement in response to the Court's order on June 17, 2019, in which he agreed that a precedential decision of the Court was warranted. (Appellant's Statement at 1.) Following the submission of the parties' statements, the Court submitted this case to a panel of Judges Allen, Meredith, and Falvey for decision on June 20, 2019. The Court then set oral argument on this issue for October 23, 2019.

However, on October 16, 2019, exactly seven days before the argument was to be held, Appellant's counsel reached out to the undersigned, proposing an alternative method to calculate Ms. Cook's hourly rate. Later that same day, Appellant filed a Notice of Alternative Remedy with the Court. In this notice, Appellant explained that "[i]n preparing for the upcoming oral argument, counsel for the Appellant became aware of a possible alternative means to calculate Ms. Cook's EAJA rate." (Appellant's Notice at 1.) Appellant then proposed that Ms. Cook's hourly rate be calculated using a formula suggested by the National

Veterans Legal Service Program, which calculates the hourly rate "using the calculation for Ms. Cook's hourly rate for the last month the Cincinnati CPI-U was available in the second half of 2017" and "multiplying that number using the Midwest CPI-U for June 2018…divided by the data from the Midwest CPI-U for December 2017…" (Appellant's Notice at 1.) Appellant then stated that he "believe[d] this formula is a fair alternative and compares apples to apples when calculating the appropriate hourly rate for Ms. Cook's geographical area." (Appellant's Notice at 2.) Using this method, Appellant reduced his requested total for fees and expenses to $8,861.90. (Appellant's Notice at 2.)

The Secretary filed a Response to Appellant's Notice later that same day, in which he informed the Court that he did not contest Appellant's new request for an award in the amount of $8,861.90. The Court then revoked its oral argument order on October 17, 2019, and on October 28, 2019, the Court granted Appellant's application "as that application was amended by the appellant's 'Notice of Alternative Remedy'…" Then, on November 8, 2019, Appellant filed a Supplemental Application for Attorney's Fees and Expenses.

In this application, Appellant argues that he is entitled to receive a supplemental award of fees and expenses in the amount of $8,872.06, in relation to work performed following the filing of his initial application. (Supplemental Application at 1.) In presenting this supplemental application, Appellant argues that he is entitled to such fees and expenses "because he successfully defended his position in his petition…" (Supplemental Application at 1, 4.) However,

Appellant defines "his position" as being "that Ms. Cook was entitled to use a localized (Cincinnati) rate for determining the starting point of her proper hourly EAJA rate." (Supplemental Application at 1.) To support this contention, Appellant argues that the fact that the hourly reduction in Ms. Cook's hourly rate was "a mere 10 cents per hour", instead of the $4.05 per hour reduction initially requested by the Secretary "establishes that Appellant's defense of the EAJA petition was successful." (Supplemental Application at 1-2.) Appellant also describes the result in the litigation of his initial application as "a compromise" between the parties. (Supplemental Application at 4.)

The Secretary, hereby, provides his response to Appellant's Supplemental Application.

SUMMARY OF ARGUMENT

This Court should exercise its authority to deny Appellant's Supplemental Application for Attorneys Fees and Expenses, as Appellant did not successfully defend his initial application. Rather, Appellant offered an entirely new argument for calculation of Ms. Cooks rate only days before the scheduled oral argument in this case. This alternative calculation is, by Appellant's own statements, a means of calculation which "compares apples to apples" and is, at most, described as a compromise between the parties. (Appellant's Notice at 2; Supplemental Application at 4.) The fact that the Secretary and the Court accepted this newly presented means of calculation does not indicate that Appellant "successfully defended" his initial application, and, in fact, suggests that he was unable to defend

such a position. As such, Appellant is not entitled to supplemental fees and expenses.

However, even if Appellant can be found to have successfully defended his initial application, his request for supplemental fees and expenses is not reasonable, as the extent of Appellant's success was very limited. Additionally, it is not reasonable for Appellant to be awarded supplemental fees and expenses in defense of his initial application, when his initial application contains none of the information regarding his calculations which came to light during further litigation of his initial application. Moreover, supplemental fees and expenses are not reasonable given that Appellant's initial application, when considered on its own terms, exclusively, does contain incorrect calculations. Appellant's supplemental application is also unreasonable given that Appellant presented his alterative means for calculation of Ms. Cooks hourly rate only days before the scheduled oral argument, despite his assertion that his attorneys spent 40.5 hours litigating the defense of his initial application, including up to 18.8 hours of legal research on the issue of the calculation of Ms. Cook's hourly rate.

ARGUMENT

This Court has held that it is "unquestioned that EAJA fees are available for litigation over the EAJA application itself and that an award of fees and expenses for that purpose would generally follow from success in the basic EAJA application itself." *Cook v. Brown*, 6 Vet.App. 226, 240 (1994) (citing *Comm'r v. Jean*, 496 U.S. 154, 162 (1990)). This principle is consistent with the Congressional intent

that compensation for fees and expenses under the EAJA statute are "to cover the cost of all phases of *successful* civil litigation…" *Id* (emphasis added). However, it is important to note that case law clearly requires that in order for an Appellant to recover supplemental fees and expenses, following litigation surrounding his or her initial application for fees and expenses, Appellant must have been successful in his or her defense of the initial application. *See Cook*, 6 Vet.App. at 240; *McNeely v. W.*, 12 Vet.App. 162, 164 (1999) (noting that supplemental fees were possible, given that "the appellant was ultimately successful on the fee application…"); *Wagner v. Shinseki*, 640 F.3d 1255, 1259 (Fed. Cir. 2011) (noting that "supplemental fees should be denied 'to the extent' that a claimant's defense of his original fee application proves unsuccessful." (citing *Jean*, 496 U.S. at 163 n.10).)

In this case, Appellant argues that he "successfully defended his position in his petition". (Supplemental Application at 1, 3, 4.) However, Appellant did not, in fact, "successfully defend" his initial application. Rather, Appellant presented new information regarding his calculations over the course of additional litigation triggered only by the Secretary's opposition to his initial application. Appellant then presented what he describes in his own words as a "compromise" or an "alternative remedy" in the form of "an alternative means of calculating Ms. Cook's hourly rate…" (Supplemental Application at 3, 4.)

The fact that the Secretary did not dispute Appellant's "new request for an award", does not suggest that Appellant successfully defended his application. In

reality, Appellant presented an entirely new means of calculating Ms. Cook's rate, which is entirely divorced, mathematically, from the means of calculation originally represented in Appellant's initial application and explained for the first time in Appellant's Response to the Secretary's Opposition. As such, it cannot be reasonably said that Appellant "successfully defended" his initial application, when he abandoned the calculations of that initial application for a "fair alternative [which] compares apples to apples…" (Appellant's Notice at 2.)

In an attempt to overcome this fundamental problem, Appellant attempts to distract the Court by turning to the overall amount of the reduction reached after the Secretary's opposition. In particular, he argues that the "reduction of a mere 10 cents per hour…establishes that Appellant's defense of the EAJA petition was successful." (Supplemental Application at 2, 3.) However, Appellant's argument is a red herring, as the basis for the Secretary's opposition to Appellant's initial application was not a challenge to the subjective reasonableness of Appellant's itemized charges, but was, instead, a challenge to the mathematical calculations completed in Appellant's initial application. The fact that the difference between Appellant's initial, and ultimately abandoned, calculations and his newly presented alternative calculations was slight is of no consequence when considering whether Appellant's successfully defended his initial application, and the Court should reject Appellant's attempt to wash over the substance of the litigation surrounding his EAJA application.

Moreover, the Secretary would note that Appellant cannot be said to have successfully defended his initial application when that application, on its very face, was mathematically incorrect. As discussed above, Appellant stated in his initial application that he had calculated Ms. Cook's rate based on the CPI-U for the Midwest region and the June 2018 midpoint of this case. Appellant presented no discussion or explanation of his use of the CPI-U for the Cincinnati locality in his initial application. That information was not revealed until the Secretary opposed his initial application on the basis that the calculations provided by the Court in *Elcyzyn*, using the midpoint and CPI-U regional information identified by Appellant, did not support the hourly rate he requested. The Secretary even performed these calculations in his opposition, to demonstrate the clearly incorrect result reached by Appellant in his initial application, based on the information provided in the initial application. (Secretary's Opposition at 7-8.) Given the clearly incorrect nature of his initial application, Appellant cannot be said to have successfully defended his application when he presented an alternative means of calculation.

That said, even if Appellant can be said to have successfully defended his initial application, the Court has been clear that an appellant may only receive reasonable supplemental fees, after a successful defense of an initial application. *See McNeely*, 12 Vet.App. at 164 (noting that the Supreme Court has held that "the threshold merits determinations" "need not again be established during the fees-for-fees litigation…", rather "[t]he sole consideration in determining a fees-for-fees supplemental application is one of reasonableness.") The Court of Appeals

for the Federal Circuit has also been clear that supplemental fees are only reasonable when they are "commensurate with the degree of success obtained on the original fee application." *Wagner*, 640 F.3d at 1260. Accordingly, Appellant is not entitled to supplemental fees, even if he can be said to have successfully defended his initial application, as supplemental fees are not reasonable in this case.

Even if Appellant could be said to have successfully defended his initial application, the degree of Appellant's success is extremely low in this case. *Id*. As was detailed above, Appellant did not defend the means of calculating Ms. Cook's hourly rate that he presented in his initial application, or in his subsequent pleadings. Appellant, instead, abandoned his original means of calculating Ms. Cook's rate, and presented an entirely new means of calculation which was unrelated to his original methodology. In an attempt to obfuscate this issue, Appellant argues that his defense was not of his original calculations, but instead on the principle that Ms. Cook should be compensated based on the most local CPI-U information available, which Appellant argues was accepted by the Court. (Supplemental Application at 1,3.) However, the Secretary never challenged the principle that Ms. Cook's rate should be calculated using the most local and available CPI-U data. In fact, the Secretary specifically disclaimed such an argument in his reply to Appellant's response. (Secretary's Reply at 2.) Rather, the Secretary disputed what Appellant considered to be the most local and

available CPI-U data, given the discontinuation of the CPI-U data for the Cincinnati locality after December 2017. (Secretary's Reply at 2.)

Looking at the litigation of Appellant's initial application in the context provided by the pleadings in this case, it is clear that Appellant's success was extremely limited, should he be found to have successfully defended his initial application at all. As such, Appellant's request for $8,872.06 in compensation, which is more than was even requested in his initial application, is not reasonable. The Court should, therefore, deny Appellant entitlement to supplemental fees, given the markedly limited degree of his success, should the Court find that Appellant was successful in his defense whatsoever.

Additionally, Appellant's application for supplemental fees is not reasonable because his fees reflect work performed only to rehabilitate a pleading which lacked critical information. As was discussed above, Appellant's initial application contained no reference to the CPI-U data for the Cincinnati locality. (Application at 1-17.) Instead, Appellant stated simply that the hourly rate for Ms. Cook's work was calculated using the June 2018 midpoint and the CPI-U for the Midwest region. (Application at 8, n. 4.) Appellant only explained, and subsequently defended, his use of the Cincinnati CPI-U data in his calculation after the Secretary opposed his initial application on the basis that using the data identified in the initial application, Appellant had not properly calculated Ms. Cook's hourly rate. As such, it is not reasonable for Appellant to be awarded supplemental fees for work which

was performed to explain, and then defend, a pleading which was entirely lacking in the relevant details of Appellant's asserted hourly rate.

Finally, Appellant's application for supplemental fees is not reasonable because Appellant only presented his alternative means of calculating Ms. Cook's rate days before oral argument was scheduled in this appeal. As was discussed above, Appellant asserts that he is entitled to 40.5 hours of attorney work time, plus other expenses. Of those hours, Appellant asserts that up to 18.8 hours were spent conducting legal research on the proper means of calculating Ms. Cook's hourly rate between the filing of the Secretary's opposition and Appellant's Notice informing the Court of an alternative means of calculation. (Supplemental Application at 8-9.) Nearly all of this research was performed well before Appellant presented his alternative means of calculation. (Supplemental Application at 8-9.)

As an initial matter, the Secretary would argue that time spent researching the proper means of calculating Ms. Cook's hourly rate should have been completed prior to Appellant's initial application, given that such information is critical to a proper application for fees and expenses in excess of the statutory rate of $125 per hour. 38 U.S.C. § 2412. As such, it is, again, not reasonable that Appellant should be awarded supplementary fees for work which was performed as a result of an insufficiently detailed initial application. However, even putting aside that issue, it is not reasonable that Appellant should be compensated for work which would not have been necessary, had he presented his alternative means of calculating Ms. Cook's rate earlier in the litigation of his initial application.

To allow an appellant to complete all pleadings in defense of his initial application, as well as nearly all work in preparation for oral argument, only to present a reasonable alternative to his initial application only days before argument, would be to allow appellants to increase the amount billed to the government, without any responsibility to reasonably mitigate that amount. *See Hensley v. Eckerhart,* 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) , 461 U.S. at 434 (quoting *Copeland v. Marshall*, 641 F.2d 880, 891, 205 U.S. App. D.C. 390 (D.C. Cir. 1980) (en banc)) ("'Hours that are not properly billed to one's client are not properly billed to one's adversary pursuant to statutory authority.'"). Such a result would not be reasonable, and so Appellant should not be entitled to receive supplemental fees in this case.

CONCLUSION

In summation, Appellant should not be awarded supplemental fees in relation to the litigation of his initial application for fees and expenses because Appellant did not successfully defend his initial application. Rather, Appellant entirely abandoned the methodology underlying his initial application, which was not found in the initial application itself, and presented an entirely new methodology which was completely divorced from his initial method of calculation. However, even were Appellant to be found to have successfully defended his initial application, the degree of that success was markedly low, given Appellant's abandonment of his initial methodology. The extremely limited nature of any

success further indicates that Appellant's application for supplemental fees is not reasonable under the case law.

Finally, even if Appellant did successfully defend his application, and even if the extent of that success were not so limited, Appellant's application for supplemental fees is not reasonable, as the work captured by his supplemental application was performed only to attempt to rehabilitate and make defensible an application which was entirely lacking in any of the relevant details regarding Appellant's asserted hourly rate for Ms. Cook. Moreover, much, if not all, of the work captured by Appellant's supplemental application would not have been necessary, had he presented his alternative means of calculating Ms. Cook's hourly rate earlier than seven days before the scheduled argument in this case. It is, therefore, not reasonable to provide Appellant with compensation for work which was only performed due to his delay in conducting his necessary research and presenting the Court with the alternative means of calculation he discovered.

Because Appellant did not successfully defend his initial application, and because his supplemental application is not reasonable, the Secretary respectfully requests that the Court deny Appellant's supplemental application for attorney's fees and expenses, consistent with 38 U.S.C. § 2412(d)(1)(A).

Respectfully submitted,

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