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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-3797(E)

KENDRICK E. BRADLEY, APPELLANT,

v.

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

Before ALLEN, *Judge*.

ORDER

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

On October 9, 2018, appellant filed an Equal Access to Justice Act ("EAJA") Application for an Award of Attorneys' Fees and Expenses, seeking a total award of \$8,862.11.¹ The Secretary contested the propriety of the hourly rate appellant initially claimed for one attorney. On October 16, 2019, appellant filed a Notice of Alternative Remedy, advising the Court that he decreased the total award sought to \$8,861.90. The Secretary notified the Court that he "d[id] not contest [a]ppellant's new request for an award in the amount of \$8,861.90 under the [EAJA]." ² Although the Secretary agreed to the revised award, he also stated that his "concession . . . in no way denotes [his] position as to any issue or matter presented herein which may potentially affect the litigation or settlement of future applications for attorney[s'] fees filed with this Court pursuant to 28 U.S.C. § 2412." ³

On October 28, 2019, the Court granted appellant's Application for an Award of Attorneys' Fees and Expenses Pursuant to 28 U.S.C. § 2412(d), as that application was amended by appellant's Notice of Alternative Remedy. On November 8, 2019, appellant submitted a Supplemental Application for an Award of Attorneys' Fees and Expenses, which the Secretary does, in fact, contest. We will now consider whether appellant is entitled to supplemental fees or expenses.

¹ Appellant's Application for an Award of Attorneys' Fees and Expenses, at 1.

² Secretary's Response to Appellant's Notice of Alternative Remedy, at 1.

³ *Id.*, at 2.

This Court has jurisdiction to award attorneys' fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F), and enjoys wide discretion in making an award under the EAJA.⁴ We have held that "[i]t 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."⁵

Here, appellant did not successfully defend the entirety of his initial EAJA application. Instead, appellant changed his theory as to the portion of the EAJA application that was contested. Thus, appellant abandoned his initial, disputed, theory, and the Court never ruled on that theory. Appellant now asks us to find that he successfully defended that very theory. Considering appellant's abandonment of that theory, however, and the theory never having reached adjudication, it simply could not have been successful. Thus, appellant has failed to show his claimed success in the initial application.

We recognize that the Secretary only challenged a portion of appellant's initial EAJA application. Appellant does not, however, seek entitlement to fees stemming from preparation of the uncontested portion of the initial EAJA application and, therefore, we need not consider whether a partial award of fees or expenses would be appropriate.⁶

Upon the consideration of the foregoing, it is

ORDERED that the appellant's Supplemental Application for an Award of Attorneys' Fees and Expenses, is DENIED.

DATED: February 7, 2020

BY THE COURT:



MICHAEL P. ALLEN
Judge

Copies to:

Zachary M. Stolz, Esq.

VA General Counsel (027)

⁴ *Chesser v. West*, 11 Vet.App. 497, 499, 501 (1998).

⁵ *Cook v. Brown*, 6 Vet.App 226, 240 (1994)

⁶ This Court has held that for EAJA fees to be awarded, an applicant must submit evidence of hours worked in the form of a billing statement that is specific and detailed. *See Andrews v. Principi*, 17 Vet.App. 319, 322-23 (2003). From the documentation provided, we are unable to discern which fees were incurred for the uncontested portion of the initial EAJA application, and which fees were incurred in defending the unsuccessful portion of the initial EAJA application. *See Exhibit A to Appellant's Supplemental Application for Award of Attorneys' Fees and Expenses*. Therefore, even if appellant had requested partial fees, the documentation provided would not be specific enough to support an award for fees incurred in connection with the uncontested portion of the initial EAJA application.