IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JUSTINIANO DELRIO,	)	
	)	
Petitioner,	)	
	)	
v.	)	Vet. App. No. 17-4220-EAJA
	)	
ROBERT L. WILKIE,	)	
Acting Secretary of Veterans Affairs,	)	
	)	
Respondent.	)	

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

ISSUE PRESENTED

Whether the $24,034.39 in attorneys' fees and expenses sought in Appellant's March 13, 2020, Equal Access to Justice Act (EAJA) application is reasonable?

ISSUES NOT CONTESTED

The Secretary concedes that this Court has jurisdiction over this matter pursuant to 38 U.S.C. § 7261(a)(1), and the Equal Access to Justice Act (EAJA). *See* 28 U.S.C. § 2412(d)(2)(F); 38 U.S.C. § 7261(a)(1). Moreover, Appellant's EAJA application satisfies the jurisdictional requirements of the statute as set out by this Court in *Bazalo v. Brown*, 9 Vet.App. 304, 306 (1996) (en banc), *rev'd on other grounds by*, 150 F.3d 1380 (Fed. Cir. 1998). The Secretary also does not contest the issues of whether Appellant was the prevailing party or whether the Secretary's position was substantially justified. Finally, the Secretary does not contest

Appellant's selected hourly rate. The Secretary only contests whether the fees and expenses sought by Appellant in his application are reasonable in this case.

STATEMENT OF THE CASE

On November 9, 2017, Appellant filed a Notice of Appeal, seeking to appeal a September 19, 2017, decision of the Board of Veterans' Appeals (Board), which denied him entitlement to a total disability rating based on individual unemployability (TDIU). [Record Before the Agency (R.) at 2-15.] (Notice of Appeal). In relation this appeal, Appellant filed his opening brief with the Court on June 11, 2018. In his brief, Appellant argued that the Board's decision was arbitrary and capricious, as it lacked "any standards for assessing characteristics of 'substantially gainful employment' and the Veteran's ability to secure and maintain this type of work." (Appellant's Brief at 7-10.) Appellant also argued that the Board had erred in its decision by failing to consider the effects of his fibromyalgia on his ability to engage in substantially gainful employment, prior to the effective date of service connection for fibromyalgia. (Appellant's Brief at 10-14.)

Upon reviewing Appellant's opening brief, the Secretary moved this Court on August 10, 2018, to stay the proceedings of this appeal, pending the Court's determination in *Ray v. Wilke*, U.S. Vet.App. No. 17-0781. In this motion, the Secretary argued that *Ray* was submitted to a panel of the Court on April 16, 2018, and that the Court had requested supplemental

briefing on several questions pertaining to the definition of "substantially gainful employment". (Secretary's Motion at 2.) As such, the Secretary argued that it was "highly likely that the Court will offer guidance on this issue in its decision in *Ray*…" (Secretary's Motion at 4.) Given this, the Secretary argued that a stay of proceedings in this case would be conservative of the Court's resources and would ensure a uniform development of the law. (Secretary's Motion at 4.) However, Appellant filed his opposition to this motion on August 24, 2018, arguing that a stay was not necessary because he had offered other bases for remand, separate from the basis which would be impacted by the Court's decision in *Ray*. (Appellant's Opposition at 1-4.)

The Court denied the Secretary's motion to stay these proceedings on September 6, 2018, and the Secretary filed his brief with the Court on September 24, 2018. In his brief, the Secretary argued that the term "substantially gainful employment" had been adequately defined, as he argued in *Ray*. (Appellee's Brief at 21-26.) The Secretary also argued that the Board was not required to consider the effects of Appellant's fibromyalgia prior to the effective date for service connection of that disability, when considering his request for TDIU. (Appellee's Brief at 11-14.) Specifically, the Secretary argued that Appellant's citation to this Court's decision in *Frost v. Shulkin* was misplaced, as *Frost* was a highly distinguishable case, which involved application of an entirely different regulation. (Appellee's Brief at 12.) The Secretary also argued that the

analysis required by 38 C.F.R. § 4.16 inherently required a temporal limitation, as the question presented by such a claim is "premised on a specific period of time". (Appellee's Brief at 12-14.)

Appellant then filed his Reply Brief with the Court on November 26, 2018, and the case was assigned to a judge on November 30, 2018. However, on March 14, 2019, this Court issued a precedential decision in *Ray v. Wilkie*. 31 Vet.App. 58 (2019). In this decision, the Court held that the failure to define the term "substantially gainful employment" frustrated judicial review. *Ray*, 31 Vet.App. at 76. As such, the Court held that the term required a discussion of whether the veteran was capable of performing the mental and physical acts required by employment. *Id*. at 72.

In reflection of this decision, Appellant filed a notice of supplemental authorities with the Court on March 20, 2019. On May 6, 2019, this case was submitted to a panel of this Court, and on May 14, 2019 the Court ordered the case set for oral argument. Oral argument was set for August 22, 2019.

On June 7, 2019, the undersigned counsel for the Secretary spoke to Appellant's counsel by phone. During this conversation, the undersigned proposed that the parties agree to a joint motion for remand, on the basis that the Board's statement of reasons or bases in the September 19, 2017, decision was inadequate, as the Board failed to consider Appellant's claim consistent with the Court's guidance in *Ray.* On June 19, 2019, counsel for

Appellant informed the undersigned that Appellant had rejected this proposal for remand of Appellant's claim.

In reflection of this change in the Secretary's position, given the Court's decision in *Ray*, and as a consequence of Appellant's rejection of the Secretary's proposed resolution, the Secretary filed a Notice to the Court on August 13, 2019. In this notice, the Secretary informed the Court that his position with respect to the disposition of this appeal had developed, in light of the Court's holding in *Ray*, and that he now conceded that vacatur of the Board's decision and remand of Appellant's claim was appropriate, in order for the Board to provide an adequate statement of reasons or bases, consistent with the Court's guidance in *Ray*. (Appellee's Notice at 1.)

On August 14, 2019, the Court ordered that Appellant respond within two days to inform the Court whether the Secretary's concession resolved the appeal and whether Appellant believed that oral argument was still necessary. (August 14, 2019, Court Order.) Appellant responded to the Court on August 15, 2019. In this response, Appellant argued that the Secretary's concession did not resolve the appeal because the Secretary's concession did not resolve the issue of whether the Board was required to consider the effects of Appellant's fibromyalgia on his ability to engage in substantially gainful employment, prior to the effective date of service connection for that disability. (Appellant's Response at 2.) Appellant also responded that oral argument was still necessary "because there is no

precedent on whether the Court's holding in *Frost* applies to TDIU adjudications." (Appellant's Response at 3.)

Oral argument was then held before the Court on August 22, 2019. During this argument, the only issue substantively discussed by the parties was Appellant's argument that *Frost v. Shulkin* applied to the Board's adjudication of claims for TDIU under 38 C.F.R. § 4.16. The Court then issued its decision on this case on December 19, 2019. In this decision, the Court agreed with the Secretary's concession that the Board's decision did not comport with the Court's holding in *Ray*. *Delrio v. Wilkie*, __ Vet.App. __, No. 17-4220, slip op. at 5 (December 19, 2019). The Court also found that the Board had committed other errors in its statement of reasons or bases. *Id*. at 7-11 (citing *Quirin v. Shinseki*, 22 Vet.App. 290, 296 (2009).

However, despite Appellant's extensive argument, the Court found that "the effective date of TDIU cannot be earlier than the effective date of the award of service connection for the disability or disabilities upon which the award of TDIU is based." *Id*. at 16. In reaching this decision, the Court noted that to hold otherwise would create an "absurd result", and that part 4 of title 38 of the Code of Federal Regulations contained a "base temporal requirement" that informed consideration of 38 C.F.R. § 4.16. *Id*. at 13, 16. The Court also explicitly and completely rejected Appellant's arguments that his claim was analogous to *Frost* or that the word "ratable" in 38 C.F.R. § 4.16(a) supported a finding that a disability need not be service-connected

for the entire period for which TDIU is sought. *Id*. at 13-16. With this, the Court remanded Appellant's claim for the Board to provide an adequate statement of reasons or bases, but it found that the Board "need not address the effects of the veteran's fibromyalgia on his ability to secure and follow a substantially gainful occupation prior to October 11, 2006." *Id*. at 16-17.

Following the Court's decision, the Court issued Judgment on January 10, 2020, and Mandate was issued on March 13, 2020. On that same day, the Court accepted Appellant's Application for an Award of Attorney's Fees and Expenses (Application), pursuant to 28 U.S.C. § 2412(d). In this application, Appellant seeks a total of $24,034.39 for 126.2 hours of work. Of that, nearly half of the time billed by Appellant's counsel, 60.4 hours, falls between June 19, 2019, the date on which Appellant rejected the Secretary's proposed joint motion for remand, and December 19, 2019, the date of the Court's decision.

Since receiving Appellant's application, the undersigned counsel has contacted Appellant's counsel in an attempt to negotiate in good faith the amount of Appellant's Application, in light of the concerns discussed herein. Counsel first reached out to Appellant's counsel on April 2, 2020. Unfortunately, the parties were unable to come to an agreement on this matter. The parties last spoke on this matter on April 7, 2020. In light of the fact that the parties were not able to reach an agreement, the Secretary hereby responds to Appellant's Application.

SUMMARY OF ARGUMENT

This Court should exercise its authority to reduce the amount sought in Appellant's Application, as a large portion of Appellant's application pertains to work performed in relation to an argument upon which Appellant had no success. The large majority of the hours charged by Appellant's counsel relate to work performed to develop, prepare, and present Appellant's argument that the Court's holding in *Frost* was applicable to adjudications under 38 C.F.R. § 4.16. However, the Court's decision makes clear that Appellant had no success in litigating this issue, whatsoever, and that the basis for the Court's decision to vacate and remand was wholly unrelated to this argument. As such, it would not be reasonable to grant Appellant's counsel compensation 73.9 hours of attorney time spent on the preparation and presentation of that argument, particularly when considered against the fact that Appellant's counsel bills only 52.3 hours for the preparation and presentation of all other arguments, as well as for all other work related to the litigation of this appeal. Accordingly, the Secretary asks that the Court reduce the amount sought in Appellant's application, consistent with the Court's judgement.

ARGUMENT

The Court has wide discretion in awarding attorney fees and expenses and is obligated to ensure that any request for fees made by an

appellant against the Government is reasonable. In determining the reasonableness of a fee request, the Court is required to consider whether the hours claimed are (1) unreasonable on their face; (2) contraindicated by the factors set forth in case law; or (3) otherwise persuasively opposed by the Secretary. *McCormick v. Principi*, 16 Vet.App. 407, 413 (2002). To that end, the courts have been clear that an appellant may recover fees for time spent developing arguments which were, ultimately, unsuccessful. *Swiney v. Gober*, 14 Vet.App. 65, 74 (2000).

However, the fees for such arguments must be "reasonable in relation to the success achieved." *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983). *See also Vazquez-Flores v. Shinseki*, 26 Vet.App. 9, 16-17 (2012) (holding that there must be some connection between the efforts for which hours are billed and the success obtained by the claimant.); *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (finding fees unreasonable when the prevailing party won only nominal damages). When the Court determines such fees not to be reasonable, given the degree of success obtained, reduction of the award is proper. *See e.g., Smith v. Brown*, 8 Vet.App. 327, 329 (1995) (noting that there is no precise rule or formula for the Court's exercise of discretion to reduce an application, but that the Court must try to make its judgment equitable); *Swiney*, 14 Vet.App. at 75; *Farrar*, 506 U.S. at 114 (directing the District Court to engage "in any measured exercise of discretion" to consider the degree of success obtained by the prevailing party.)

In this case, Appellant argued that the Court's holding in *Frost v. Shulkin* applied to his claim for TDIU under 38 C.F.R. § 4.16. This argument was first presented in Appellant's opening brief. (Appellant's Brief at 10-14.) For preparation of this argument in his opening brief, Appellant bills a total of 6.3 hours between June 4, 2018, and June 9, 2018. Appellant also itemizes 7.2 hours between November 5th and 6th, 2018, for preparation of this argument in Appellant's reply brief. (Appellant's Reply Brief 1-6.)

However, in addition to the charges related to Appellant's preparation of the *Frost* argument in briefing, Appellant also bills substantial time for preparation and presentation of the *Frost* argument at oral argument before the Court. Importantly, Appellant's August 15, 2019, response to the Court's order makes clear that the only issue for which Appellant sought oral argument was his argument that the holding of *Frost* applied to adjudications under 38 C.F.R. § 4.16. (Appellant's Response at 1-4.) Moreover, the only issue discussed by the parties at argument was Appellant's argument regarding the holding of *Frost*.

With that in mind, Appellant requests compensation for 60.4 hours of time spent preparing and presenting this argument to the Court at oral argument. These charges fall between July 9, 2019, and the Court's decision on December 19, 2019, and by Appellant's own Response, these charges relate entirely to work performed in relation to Appellant's argument that the holding of *Frost* applied to his appeal. (Appellant's Response at 1-

4.) With these charges, Appellant seeks compensation for a total of 73.9 hours of attorney time, totaling $15,042.44, for preparation and presentation of an argument which the Court rejected in its entirety. Additionally, Appellant seeks an additional $787.04 in compensation for expenses related to the oral argument on Appellant's assertion that the holding of *Frost* applied in this case. Together, Appellant seeks $15,829.48 as compensation for work and expenses related to his argument regarding *Frost*. By comparison, Appellant seeks compensation for only 52.3 hours of attorney time to prepare and present all other arguments and to perform all other work associated with the litigation of this appeal. As such, nearly 66% of Appellant's total fees and expenses requested in this case relate to an argument which the Court rejected in its entirety and which was entirely divorced from the basis of the Court's decision to vacate and remand.

Such a request from Appellant is not reasonable, given the degree of success Appellant obtained in this case. While there is no question that Appellant did prevail in this appeal by obtaining vacatur of the Board's decision and a remand of his claim, Appellant's argument that the holding of *Frost* applied to his claim was squarely, and completely, rejected by the Court. *See* slip op. at 13-17. Additionally, the basis for what success Appellant did achieve in this case is entirely unrelated to his *Frost* argument. *Id*. at 5-11. As such, Appellant had no success, whatsoever, on this matter, and so it is not reasonable for Appellant to seek $15,829.48 in compensation for an issue on

which Appellant had no success and which was wholly unrelated to the basis of the Court's decision to vacate and remand. The unreasonable nature of this request is further exemplified by the fact that this request makes up nearly 66% of all fees and expenses for which Appellant requests compensation, despite the fact that Appellant obtained no success on this portion of the appeal.

Given the unreasonable nature of Appellant's requested compensation, in light of Appellant's lack of success, substantial reduction of Appellant's requested fees and expenses is warranted in this case. *See e.g., Farrar*, 506 U.S. at 114 (finding that reduction of a claimant's requested fees and expenses is appropriate where the claimant achieved only partial or limited success). As such, the Secretary asks that the Court either eliminate Appellant's charges relating to work performed in relation to his *Frost* argument, or that the Court reduce Appellant's application, as it deems appropriate, in light of the extensive nature of Appellant's requested fees and expenses and Appellant's limited success on the arguments presented. *Smith*, 8 Vet.App. at 329 (noting that there is no precise rule for such judgments from the Court, but that the Court's decision in such matters should be guided by whether Appellant prevailed on matters unrelated to the matters on which he failed and whether Appellant achieved a level of success that makes the hours expended reasonable).

CONCLUSION

In summation, Appellant's Application seeks an unreasonable amount of fees and expenses when it seeks $15,829.48 in compensation for work and expenses related to an issue on which Appellant had no success before the Court. Wherefore, the Secretary respectfully requests that the Court exercise its discretion to either eliminate these charges or to reduce the overall amount of Appellant's Application, consistent with the Court's judgment and the degree of success Appellant obtained in this appeal.

Respectfully submitted,

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