

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

RICHARD A. HARRINGTON	)	
Appellant,	)	
	)	
v.	)	CAVC No. 19-581
	)	EAJA
	)	
ROBERT L. WILKIE,	)	
SECRETARY OF	)	
VETERANS AFFAIRS,	)	
Appellee	)	

APPELLANT'S APPLICATION FOR AN  
AWARD OF ATTORNEYS FEES AND EXPENSES  
PURSUANT TO 28 U.S.C. § 2412(d)

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and the Court's Rule 39, Appellant, through counsel, seeks a total fee in the amount of **\$18,197.30**.

The basis for the application is as follows:

**Grounds for an Award**

This Court has identified four elements as being necessary to warrant an award by the Court of attorneys' fees and expenses to an eligible party pursuant to the EAJA. These are: (1) a showing that the appellant is a prevailing party; (2) a showing that the appellant is eligible for an award; (3) an allegation that the government's position is not substantially justified; and (4) an itemized statement

of the fees sought. *Owens v. Brown*, 10 Vet. App. 65, 66 (1997) (quoting *Bazalo*, 9 Vet. App. at 308). See also 28 U.S.C. §§ 2412(d)(1)(A),(B).

As will be demonstrated below, Appellant satisfies each of the above-enumerated requirements for EAJA.

1. THE APPELLANT SATISFIES EACH OF THE REQUIREMENTS FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES

A. *The Appellant Is a Prevailing Party*

In *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S.Ct 1835 (2001), the Supreme Court explained that in order to be a prevailing party the applicant must receive "at least some relief on the merits" and the relief must materially alter the legal relationship of the parties. 532 U.S. at 603-605. The Federal Circuit adopted the *Buckhannon* test in *Brickwood Contractors, Inc. v. United States*, 288 F.3d 1371 (Fed. Cir. 2002) and applied it to an EAJA applicant. The Federal Circuit explained in *Rice Services, LTD. v. United States*, that "in order to demonstrate that it is a prevailing party, an EAJA applicant must show that it obtained an enforceable judgment on the merits or a court ordered consent decree that materially altered the legal relationship between the parties, or the equivalent of either of those." 405 F.3d 1017, 1025 (Fed. Cir. 2005).

In *Zuberi v. Nicholson*, 19 Vet. App. 541 (2006), this Court explained that the Federal Circuit case of *Akers v. Nicholson*, 409 F.3d 1356 (Fed. Cir. 2005) "did not change the focus for determining prevailing party status from a standard that looks to the basis for the remand to one that looks to the outcome of the remand. *Akers* simply did not involve a remand that was predicated on an administrative error." 19 Vet. App. at 547. (internal quotations omitted). The Court held in *Zuberi* that *Motorola* provided the proper test for prevailing party. *Id.* Next in *Kelly v. Nicholson*, 463 F.3d 1349 (Fed. Cir. 2006), the Federal Circuit held that:

To be considered a prevailing party entitled to fees under EAJA, one must secure some relief on the merits. Securing a remand to an agency can constitute the requisite success on the merits. [W]here the 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 1353 (internal citations and quotations omitted).

Most recently, this Court in *Blue v. Wilkie*, 30 Vet.App. 61 (2018), laid out the following three-part test relating to when an appellant is considered a prevailing party under the EAJA:

An appellant who secures a remand to an administrative agency is a prevailing party under the EAJA if (1) the remand was necessitated by or predicated upon administrative error, (2) the remanding court did not retain jurisdiction, and (3) the language in the remand order clearly called for further agency proceedings, which leaves the possibility of attaining a favorable merits determination.

*Id.* at 67, citing *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016).

The Court set aside and remanded the Board's December 6, 2018 decision based upon the Board's failure to provide an adequate statement of reasons or bases. See pages 1-9 of the Memorandum Decision. It has been sixty days since Entry of Judgment issued on June 3, 2020. Based upon the foregoing, and because the three-part test promulgated in *Blue* is satisfied, Appellant is a prevailing party.

*B. Appellant Is Eligible For An EAJA Award*

Appellant also satisfies the EAJA requirement that his net worth at the time his appeal was filed did not exceed \$2,000,000. 28 U.S.C. § 2412(d)(2)(B). Mr. Harrington had a net worth under \$2,000,000 on the date this action was commenced. See Paragraph 3 of the fee agreement filed with the Court. Therefore, Mr. Harrington is a person eligible to receive an award under the EAJA.

*C. The Position of the Secretary Was Not Substantially Justified*

In *White v. Nicholson*, 412 F.3d 1314 (Fed. Cir. 2004) the Federal Circuit applied the totality of the circumstances test and noted that "EAJA requires that the record must supply the evidence of the Government's substantial justification." 412 F.3d at 1316. The Secretary's position during proceedings before the Agency or the Court was not reasonable, either in law or in fact, and accordingly the Secretary's position was not substantially justified at either the administrative or

litigation stage. There thus is nothing substantially justified in the Board's failure to provide an adequate statement of reasons or bases. Moreover, there is no evidence that special circumstances exist in Appellant's case that would make an award of reasonable fees and expenses unjust. 28 U.S.C. § 2412(d)(1)(A).

## 2. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES

Appellant has claimed a reasonable amount of attorneys' fees, predicated upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Ussery v. Brown*, 10 Vet. App. 51, 53 (1997) (*quoting Elczyn, 7 Vet. App. at 176-177*).

Seven attorneys from the law firm of Chisholm Chisholm & Kilpatrick worked on this case: Stephen Capracotta, Nicholas Phinney, Jordyn Coad, Kevin Medeiros, Samuel Agostini, Danielle M. Gorini, and Zachary Stolz.<sup>1</sup> Attorney

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<sup>1</sup>"There is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer." *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988); *see also Baldridge v. Nicholson*, 19 Vet.App. 227, 237-38 (2005) ("the fees sought must be 'based on the distinct contribution of each individual counsel.'"). "The use in involved litigation of a team of attorneys who divide up the work is common today for both plaintiff and defense work." *Johnson v. Univ. Coll. of Univ. of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) *holding modified by Gaines v. Dougherty Cty. Bd. of Educ.*, 775 F.2d 1565 (11th

Stephen Capracotta graduated from University of Connecticut School of Law in 2016 and the *Laffey* Matrix establishes that \$365.00 is the prevailing market rate for an attorney with his experience.<sup>2</sup> Nicholas Phinney graduated from Roger Williams University Law School in 2007 and the *Laffey* Matrix establishes that \$510.00 is the prevailing market rate for an attorney with his experience. Jordyn Coad graduated from American University Law School in 2016 and the *Laffey* Matrix establishes that \$365.00 is the prevailing market rate for an attorney with

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Cir. 1985). “Careful preparation often requires collaboration and rehearsal[.]” *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 860 (1st Cir. 1998). As demonstrated in Exhibit A, each attorney involved in the present case provided a distinct, and non-duplicative contribution to the success of the appeal. *See Baldridge*, 19 Vet.App. at 237 (“An application for fees under EAJA where multiple attorneys are involved must also explain the role of each lawyer in the litigation and the tasks assigned to each, thereby describing the distinct contribution of each counsel.”).

<sup>2</sup>The U.S. Attorney’s Office maintains a matrix, known as the Laffey Matrix, of prevailing market rates for attorneys by years of practice, taking into account annual price increases, pursuant to *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff’d in part by* 746 F.2d.4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021, 105 S. Ct. 3488 (1985). This Court has approved the use of the Laffey Matrix for determining the prevailing market rate for EAJA fees. *See, e.g., Wilson v. Principi*, 16 Vet. App. 509, 213 (2002) (finding the Laffey Matrix a “reliable indicator of fees...particularly as to cases involving fees to be paid by government entities or determined under fee-shifting statutes”), *vacated on other grounds by* 391 F.3d 1203 (Fed. Cir. 2004); *see also Sandoval*, 9 Vet. App. at 181 (using the Laffey Matrix as an indicator of prevailing market rate and holding that once a prevailing market rate is established, the government has the burden of producing evidence to show that the rate is erroneous.) *See* Exhibit B (Laffey Matrix).

her experience. Kevin Medeiros graduated from Suffolk University Law School in 2015 and the *Laffey* Matrix establishes that \$365.00 is the prevailing market rate for an attorney with his experience. Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that \$510.00 is the prevailing market rate for an attorney with her experience. Zachary Stolz graduated from the University of Kansas School of Law in 2005 and the *Laffey* Matrix establishes that \$510.00 is the prevailing market rate for an attorney with his experience.

Samuel Agostini is a 2019 graduate of Boston College Law School, and at the time some of his work was performed, he was admitted to practice as a non-attorney practitioner. Mr. Agostini has entered his appearance in multiple cases before the Court of Appeals for Veterans Claims. The Court has found that “[I]n formulating an EAJA award to a non-attorney practitioner, once a prevailing market rate is determined for the non-attorney practitioner based on a certain skill level, reputation, and geographic area, that prevailing market rate can be adjusted over time by application of the appropriate percentage increase of the change in the appropriate consumer price index.” See *Apodackis v. Nicholson*, 19 Vet. App. 91 (2005). Therefore, based on Mr. Agostini’s court experience, Appellant seeks attorney’s fees at the rate of \$173.00 per hour for representation services before the

Court for his time before he was admitted to practice law on November 18, 2019.

After that admittance date, Mr. Agostini's billing rate as an attorney is \$319.00.

Elizabeth Rowland is a 2014 graduate from Vassar College and began working as a paralegal for Chisholm Chisholm & Kilpatrick in November 2016. Ms. Rowland was admitted to practice as a non attorney practitioner on January 16, 2018. In *McDonald v. Nicholson*, 21 Vet.App. 257 (2007), this Court indicated that non attorney practitioners are entitled to an EAJA award at a lesser rate than the \$125.00 per hour statutory rate for attorneys, plus the cost of living adjustment. Therefore, Ms. Rowland's rate as a non attorney practitioner is \$175.13 per hour.<sup>3</sup>

Attached as Exhibit A to this fee petition are the hours worked for all attorneys. Appellant seeks attorneys' fees at the rate of \$207.64 per hour for Mr. Capracotta, Mr. Phinney, Ms. Coad, Mr. Medeiros, Mr. Agostini after his admittance date, Ms. Gorini, and Mr. Stolz for representation services before the Court.<sup>4</sup> This rate per hour, multiplied by the number of hours billed for these seven

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<sup>3</sup> Elizabeth Rowland's resume is attached showing her educational background as well as her experience, including multiple cases she has worked on before the Court of Appeal for Veterans Claims as co-counsel. Her experience level accurately reflects the hourly rate using the formula set forth in *McDonald v. Nicholson*, 21 Vet.App. 257 (2007).

<sup>4</sup> This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. See *Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase



attorneys (54.90) results in a total attorney's fee amount of \$11,399.44.

In addition, Appellant seeks attorney's fees at the rate of \$173.00 per hour for representation services before the Court for Mr. Agostini's time prior to his November 18, 2019 admittance date. This rate per hour, multiplied by the number of hours billed (63.40) results in a total attorney's fee amount of \$10,968.20.

Appellant seeks attorney's fees at the rate of \$175.13 per hour for Ms. Rowland's representation services before the Court as a non attorney practitioner. This rate per hour, multiplied by the number of hours billed for Ms. Rowland (0.80) results in a total attorney's fee amount of \$140.10.

Based upon the foregoing, the total fee amount is **\$22,507.74**. However, in the exercise of billing judgment, Appellant will voluntarily reduce the total fee amount by 21 hours and seek a reduced fee of **\$18,147.30**.

In addition, Appellant seeks reimbursement for the following expense:

Filing Fee: \$50.00

Based upon all of the foregoing, the total fee and expense sought is **\$18,197.30**.

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was calculated for the period from March 29, 1996 (the start date for the EAJA rate), to December 2019 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994).

I, Zachary M. Stolz, am the lead counsel in this case. I certify that I have reviewed the combined billing statement and am satisfied that it accurately reflects the work performed by all representatives. I have considered and eliminated all time that I believe, based upon my over ten years of practicing before this Court, is either excessive or redundant.

Respectfully submitted,  
Richard A. Harrington  
By His Attorneys,  
CHISHOLM CHISHOLM & KILPATRICK  
/s/Zachary M. Stolz  
321 S Main St #200  
Providence, Rhode Island 02903  
(401) 331-6300  
Fax: (401) 421-3185

# Exhibit A

Time from 10/1/2018 to 8/3/2020

Case No. 265551

Client: Harrington, Mr. Richard A.

			<u>Hours</u>
12/19/2018	STEPHEN	Reviewed Board decision and conducted legal research. Recommended case for appeal to CAVC and suggested legal arguments.	0.60
1/28/2019	NICK	Reviewed file & appeal documents. Filed Notice of Appeal, Notice of Appearance for Z. Stolz as lead counsel, & Fee Agreement with the Court. Received, reviewed, & saved Court confirmation email to the file. Updated case file.	0.10
1/29/2019	NICK	Reviewed docket and confirmed Court's proper docketing of appeal documents; updated client file	0.10
2/7/2019	JCOAD	Prepared notice of appearance and filed the same with the Court. Reviewed docket entries for procedural status and reviewed case notes. Updated client file.	0.10
3/1/2019	JCOAD	Received and reviewed BVA decision transmittal for accuracy, saved, and updated client file.	0.10
3/7/2019	JCOAD	Received and reviewed notice of appearance of OGC, saved, and updated client file.	0.10
3/25/2019	JCOAD	Received and reviewed notice of appearance of OGC, saved, and updated client file.	0.10
4/1/2019	JCOAD	Received and reviewed RBA notice for accuracy, saved, and updated client file.	0.10
4/3/2019	NICK	Reviewed RBA to determine need for dispute	0.70
4/15/2019	JCOAD	Spoke with veteran about recent VA treatment and status of his case. Drafted memo to file summarizing same.	0.30
4/16/2019	STEPHEN	Discussed RBA dispute with Nick and Jordyn. Reviewed notes in case file and relevant parts of RBA re: missing records in RBA. Emailed VA attorney re: missing records.	0.20
5/2/2019	STEPHEN	Emailed VA attorney re: RBA dispute. Received and reviewed email from VA attorney replying to same.	0.10
5/2/2019	STEPHEN	Prepared and e-filed notice of appearance. Reviewed notes in case file re: missing records in the RBA. Drafted and e-filed motion to dispute the RBA. Updated client file.	0.20
5/15/2019	STEPHEN	Received and reviewed email from the Court with order staying case pending RBA dispute. Ensured document was correct and updated client file.	0.10
5/30/2019	STEPHEN	Received and reviewed email from the Court with Appellee's response to RBA dispute. Ensured document was correct and updated client file.	0.10
6/12/2019	EROWLAND	Received and reviewed VA's response to RBA dispute. Updated client file. Prepared and e-filed notice of appearance.	0.10
6/27/2019	EROWLAND	Received and reviewed VA's response to RBA dispute. Updated client file.	0.10
7/15/2019	EROWLAND	Received and reviewed VA's response to RBA dispute. Updated client file.	0.10
7/24/2019	EROWLAND	Reviewed amended RBA to determine if the dispute was resolved. Emailed VA counsel indicating RBA dispute was resolved. Updated client file.	0.20
7/25/2019	EROWLAND	Received and reviewed email from VA counsel. Updated client file.	0.10
7/25/2019	EROWLAND	Received and reviewed VA's final response to RBA dispute. Updated client file.	0.10
7/26/2019	JCOAD	Prepared status letter for client regarding acceptance of RBA and explaining next steps of appeal. Updated client file. Received and reviewed email from Court with notice to file brief. Reviewed document for accuracy. Calculated deadline to file brief. Updated client file and calendar.	0.20
7/29/2019	EROWLAND	Received and reviewed VA's final response to RBA dispute. Updated client file.	0.10
8/20/2019	SAGOSTIN	Reviewed record pages 1 - 204 for briefing purposes.	1.30
8/20/2019	SAGOSTIN	Received and reviewed PBC date, calculated memo due date, and updated the file and calendar.	0.20
8/21/2019	KEVIN	Prepared and e-filed notice of appearance, received and reviewed confirmation e-mail for accuracy, and updated file.	0.10
8/21/2019	SAGOSTIN	Researched PTSD and TDIU issues and began drafting an outline for a PBC memorandum.	3.00
8/21/2019	SAGOSTIN	Researched PTSD and TDIU for briefing and PBC memorandum purposes.	1.20

# Exhibit A

Time from 10/1/2018 to 8/3/2020

**Case No. 265551**

**Client: Harrington, Mr. Richard A.**

			<u>Hours</u>
8/21/2019	SAGOSTIN	Reviewed record pages 205 - 878 for briefing purposes.	3.00
8/21/2019	SAGOSTIN	Reviewed record pages 879 - 1851 for briefing purposes.	2.20
8/21/2019	SAGOSTIN	Finished drafting the PBC outline.	0.60
8/22/2019	KEVIN	Reviewed Sam's PBC memo outline against decision and relevant evidence; made necessary revisions and drafted memo to file re: additions/suggestions for memo.	1.50
8/22/2019	SAGOSTIN	Researched TDIU cases and continued drafting the PBC memorandum.	3.00
8/22/2019	SAGOSTIN	Began researching for and drafting PBC memorandum.	3.00
8/23/2019	SAGOSTIN	Finished drafting the PBC memorandum draft	0.60
8/23/2019	SAGOSTIN	Continued researching for and drafting the PBC memorandum.	2.00
8/28/2019	KEVIN	Substantive review of Sam's draft PBC memo for accuracy of legal arguments, organization, and flow; made necessary edits and revisions; memo to file re: edits/suggestions.	2.90
8/28/2019	SAGOSTIN	Revised the PBC memorandum	1.30
8/29/2019	SAGOSTIN	Made additional revisions to the draft of the PBC memorandum.	0.60
8/30/2019	KEVIN	Made final edits to PBC memo; served to VA and CLS counsels; prepared and e-filed Rule 33 certificate; received and reviewed confirmation e-mail for accuracy; updated file.	0.20
9/16/2019	SAGOSTIN	Continued drafting the misinterpretation and misapplication of law argument.	0.70
9/16/2019	SAGOSTIN	Finished drafting the opening brief's statement of the case. Drafted the statement of issues and standard of review sections. Began drafting the argument section's first argument regarding misinterpretation and misapplication of the law.	3.00
9/16/2019	SAGOSTIN	Spoke with Mr. Harrington over the phone. I explained the outcome of the PBC and answered questions he had about the briefing process. I inquired into his employment status and updated the file.	0.30
9/16/2019	SAGOSTIN	Began drafting the statement of the case for the opening brief.	3.00
9/16/2019	SAGOSTIN	Prepared for and participated in PBC with VA and CLS counsels; drafted memo to file summarizing outcome; updated file.	1.60
9/17/2019	SAGOSTIN	Continued drafting the TDIU section of the opening brief. Researched relevant case law including Withers v. Wilkie.	0.60
9/17/2019	SAGOSTIN	Continued drafting the TDIU section of the opening brief. Researched Ray v. Wilkie and Cantrell v. Shulkin.	3.00
9/17/2019	SAGOSTIN	Began drafting the TDIU argument for the opening brief.	3.00
9/17/2019	SAGOSTIN	Began drafting the R&B section of the opening brief; conducted research including Mittleider v. West.	1.30
9/18/2019	SAGOSTIN	Researched the substantially gainful employment analysis and added to the brief	0.40
9/18/2019	SAGOSTIN	Continued drafting the substantially gainful employment section of the TDIU argument. Incorporated revisions into the statement of the case section.	1.60
9/24/2019	SAGOSTIN	Began drafting the duty to assist argument of the opening brief	3.00
9/24/2019	SAGOSTIN	Reviewed the PBC memorandum, the draft of the opening brief, and the case notes in anticipation of discussing case strategy with Kevin Medeiros.	0.40
9/24/2019	SAGOSTIN	Continued drafting the opening brief's increased rating for PTSD argument. Focused on the specific incorrect conclusions the Board made in regards to each of the symptoms listed in the diagnostic code.	2.40
9/25/2019	KEVIN	Reviewed brief and suggested revisions to organization of arguments.	0.80
9/25/2019	SAGOSTIN	Continued drafting the opening brief. Focused on the TDIU argument's substantially gainful employment subsection. Researched Beaty v. Brown and Friscia v. Brown.	0.90

# Exhibit A

Time from 10/1/2018 to 8/3/2020

Case No. 265551

Client: Harrington, Mr. Richard A.

			<u>Hours</u>
9/25/2019	SAGOSTIN	Discussed the case with Mr. Harrington when he called. Spoke with him about the briefing process and some of the deadlines. Memorialized the conversation in a note.	0.20
9/25/2019	SAGOSTIN	Continued drafting the opening brief. Focused on the summary of the argument section and the argument section's failure to articulate standards subsection. Conducted research on relevant cases including Dennis, Jenkins, Cantrell, Matthews, and Gray.	3.00
9/25/2019	SAGOSTIN	Continued drafting the opening brief. Focused on the misinterpretation and misapplication of law and reasons or bases arguments.	3.00
9/26/2019	SAGOSTIN	Revised the substantially gainful employment section of the opening brief	0.40
9/26/2019	SAGOSTIN	Drafted the conclusion of the opening brief.	2.00
10/8/2019	KEVIN	Began review of Sam's draft opening brief.	3.00
10/14/2019	KEVIN	Continued review of Sam's draft opening brief.	2.50
10/16/2019	KEVIN	Completed review of Sam's draft opening brief; memo to file re: necessary revisions and additions	0.90
10/16/2019	SAGOSTIN	Made additional revisions to the the opening brief Focused on the statement of the case, summary of the argument, and standard of review sections.	2.00
10/18/2019	SAGOSTIN	Continued revising the opening brief Focused on the argument section, specifically the increased rating for PTSD, standardless, and inadequate reasons or bases for TDIU subarguments.	3.00
10/18/2019	SAGOSTIN	Contonued revising the opening brief. Focused on the argument section's TDIU subargument, the statements of the issues and the case, and the conclusion.	2.30
11/17/2019	SAGOSTIN	Reviewed the RBA citations in the statement of the case's first two pages for accuracy. Made all necessary revisions.	0.30
11/19/2019	SAGOSTIN	Reviewed the RBA citations in the statement of the case's third and fourth pages for accuracy. Made all necessary revisions.	0.30
11/24/2019	SAGOSTIN	Reviewed the RBA citations in the statement of the case's fifth and sixth pages for accuracy. Made all necessary revisions.	0.30
11/25/2019	SAGOSTIN	Finished reviewing the RBA and legal citations in the opening brief for accuracy. Made all necessary revisions.	2.60
12/1/2019	SAGOSTIN	Researched Morgan v. Wilkie and drafted an argument related to staged ratings.	2.60
12/2/2019	SAGOSTIN	Made final edits to the opening brief. E-filed the opening brief. Received and reviewed an email from the Court regarding the filing for accuracy. Reviewed the docket for accuracy. Updated file.	0.80
12/11/2019	SAGOSTIN	Prepared and e-filed attorney notice of appearance following admission to the CAVC as an attorney, received and reviewed confirmation e-mail for accuracy, and updated file.	0.10
1/10/2020	SAGOSTIN	Received and reviewed email with OGC's brief. Reviewed the brief and outlined the Secretary's arguments. Drafted a memo to file containing that outline. Updated file.	1.30
1/15/2020	SAGOSTIN	Spoke with Mr. Harrington about the Secretary's brief and our reply brief. Summarized the conversation in a memo to file.	0.30
2/13/2020	SAGOSTIN	Began drafting the reply brief. Focused on responding to the Secretary's response to our Vazquez-Claudio argument.	0.80
2/13/2020	SAGOSTIN	Began outlining the reply brief, focusing on responding to the Secretary's PTSD arguments.	0.50
2/14/2020	SAGOSTIN	Continued to draft the reply brief, focusing on the Secretary's response to our standardless argument.	1.20
2/14/2020	SAGOSTIN	Continued drafting the reply brief, focusing on responding to the Secretary's staged rating counter argument.	0.60
2/14/2020	SAGOSTIN	Continued to draft the reply brief, focused on responding to the Secretary's arguments concerning the Veteran's thought deficiency and his hobbies.	2.90
2/15/2020	SAGOSTIN	Continued drafting the reply brief, focusing on the TDIU argument.	0.40
2/18/2020	SAGOSTIN	Continued to draft the reply brief, focused on the TDIU section.	0.30

# Exhibit A

Time from 10/1/2018 to 8/3/2020

**Case No. 265551**

**Client: Harrington, Mr. Richard A.**

			<u>Hours</u>
2/18/2020	SAGOSTIN	Continued to draft the reply brief's TDIU section. Focused on the Secretary's response to our Ray arguments.	0.80
2/19/2020	SAGOSTIN	Continued drafting the reply brief's arguments relating to the increased rating claim.	0.50
2/19/2020	SAGOSTIN	Continued to draft the reply brief, focusing on responding to the Secretary's arguments regarding Ray v. Wilkie.	1.10
2/21/2020	SAGOSTIN	Finished the draft of the reply brief, ensuring responses to the Secretary's arguments. Drafted the conclusion section.	2.00
2/26/2020	KEVIN	Reviewed and outline pleadings and began first substantive review of SA's draft reply brief.	3.00
2/27/2020	KEVIN	Continued substantive review of SA's draft reply brief.	3.00
2/28/2020	KEVIN	Continued and completed substantive review of SA's draft reply brief; memo to file for SA review re revisions and additions for second draft.	1.60
2/28/2020	SAGOSTIN	Continued revising the draft of the reply brief, focusing on the fifth argument.	0.40
2/28/2020	SAGOSTIN	Continued to revise the draft of the reply brief. Updated file.	0.90
2/28/2020	SAGOSTIN	Began revising thereply brief. Focused on the first four arguments.	3.00
3/4/2020	SAGOSTIN	Reviewed the reply brief for accuracy of all legal and RBA citations. Made all necessary revisions.	1.40
3/9/2020	SAGOSTIN	Received OGC's ROP and reviewed the Court's confirmation email for accuracy. Updated file.	0.10
3/9/2020	SAGOSTIN	Finalized the edits to the reply brief. E-filed the reply brief. Received and reviewed for accuracy the Court's confirmation email. Updated file.	1.80
3/10/2020	SAGOSTIN	Reviewed the Secretary's ROP to ensure that all cited pages are included in the ROP. Prepared and e-filed our response to the ROP. Received and reviewed the Court's confirmation email for accuracy. Updated file.	0.70
3/11/2020	SAGOSTIN	Received and reviewed for accuracy the Court's email that the case has been assigned to Judge Falvey. Updated file.	0.10
5/12/2020	SAGOSTIN	Reviewed the memorandum decision, summarizing the decision in a memo to file. Updated file.	0.40
5/15/2020	ZACH	Reviewed Court decision, pleadings, and notes in case. Prepared letter to client concerning Court's decision. Ensured case file was updated with necessary letters, pleadings, and correspondence so that client could be properly informed of case progress, disposition, and next steps.	0.70
5/20/2020	SAGOSTIN	Spoke with Mr. Harrington about the Court's memorandum decision. Summarized the conversation in a memo to file. Updated file.	0.40
6/3/2020	SAGOSTIN	Received and reviewed for accuracy the Court's order entering judgment. Updated file.	0.10
6/4/2020	SAGOSTIN	Spoke with Mr. Harrington about judgment entering and answered questions he had about the transition from the Court to the Board. Summarized the conversation in a memo to file. Updated file.	0.70
6/11/2020	ZACH	Prepared letter to client concerning entry of Court's judgment.	0.30
7/27/2020	SAGOSTIN	Discussed mandate entering soon with Mr. Harrington. Summarized the conversation in a memo to file. Updated file.	0.30
8/3/2020	DANIELLE	Prepared and e filed Notice of Appearance. Received, reviewed, and saved Court confirmation email. Checked docket sheet to ensure proper filing. Updated case file.	0.20
8/3/2020	DANIELLE	Reviewed file. Prepared EAJA Petition and Exhibit A. Submitted completed EAJA Application for proofreading and billing accuracy review.	1.00
8/3/2020	ZACH	Reviewed EAJA Application for proofreading purposes and to ensure billing accuracy.	0.30

## Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
DANIELLE	1.2	\$ 207.64	\$ 249.17
EROWLAND	0.8	\$ 175.13	\$ 140.10
JCOAD	1.0	\$ 207.64	\$ 207.64
KEVIN	19.5	\$ 207.64	\$ 4,048.98
NICK	0.9	\$ 207.64	\$ 186.88
SAGOSTIN	29.7	\$ 207.64	\$ 6,166.91
STEPHEN	1.3	\$ 207.64	\$ 269.93
ZACH	1.3	\$ 207.64	\$ 269.93
SAGOSTIN	63.4	\$173.00	\$10,968.20
Expense: Filing Fee: \$50.00		Total:	\$22,557.74

**Elizabeth Rowland**

1 Turks Head Place, Suite 1100, Providence, RI, 02903

(401) 331-6300 [erowland@cck-law.com](mailto:erowland@cck-law.com)

**Education and Qualifications**

Vassar College, Poughkeepsie, NY

Bachelor of Arts in English, May 2014

Accredited Claims Agent: January 2018

Non-attorney Practitioner, Court of Appeals for Veterans Claims: January 2018

**Experience**

Employed at Chisholm, Chisholm & Kilpatrick Ltd. November 2016-present

**Non-attorney Practitioner**, January 2018-present

Drafted summary of issues for pre-briefing conferences, represented clients at telephonic briefing conferences with VA counsel, drafted briefs, reviewed client Records Before the Agency (RBA) in order to determine need for RBA disputes, prepared EAJA applications.

**Cases Resulting in a JMR or JMPR:**

Norman W. Wheeler, 18-18

Ronald P. Rosa, 18-1789

Wallace Simmons, 18-1816

Michael Burns, 18-2253

Harvey Reed, Jr., 18-2223

Andrea Bounds, 18-3503

Limas Sheppard, Jr., 18-3755

Albert Mack, 18-4097

James Robinson, Jr., 18-4027

Marvin Lunsford, 18-4184



Russell Haston, 18-4594

Ronald Smith, 18-5927

Manuel Cruz, 18-5718

Eligio Perez, 18-7084

Mark D. Phillip-Appellant Brief filed, 18-4057

Christopher Goodenough-Appellant Brief filed, 17-4910

Thaddeus Stewart-Appellant Brief filed, 18-3283

Phillip M. Moses, 18-7123

Tabatha Isom, 19-247

Billy J. Lawson, 18-5155

**Editorial Specialist**, September 2017-January 2018

Reviewed opening and reply briefs to ensure accuracy and readability prior to submission to Court

**Paralegal**, November 2016-September 2017

Performed legal research, reviewed veterans' claim files for appeal development, communicated with clients over the phone and in writing, drafted arguments and appeals for submission to various VA regional offices, acquired evidence in support of pending appeals

## USAO ATTORNEY'S FEES MATRIX — 2015-2020

*Revised Methodology starting with 2015-2016 Year*

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17	2017-18	2018-19	2019-20
31+ years	568	581	602	613	637
21-30 years	530	543	563	572	595
16-20 years	504	516	536	544	566
11-15 years	455	465	483	491	510
8-10 years	386	395	410	417	433
6-7 years	332	339	352	358	372
4-5 years	325	332	346	351	365
2-3 years	315	322	334	340	353
Less than 2 years	284	291	302	307	319
Paralegals & Law Clerks	154	157	164	166	173

### *Explanatory Notes*

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-

Legal Services index measures. Although it is a national index, and not a local one, *cf. Eley v. District of Columbia*, 793 F.3d 97, 102 (D.C. Cir. 2015) (noting criticism of national inflation index), the PPI-OL index has historically been generous relative to other possibly applicable inflation indexes, and so its use should minimize disputes about whether the inflator is sufficient.

4. The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc.* 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore (DC-MD-VA-WV) area. The USAO rates for years prior to and including 2014-15 remains the same as previously published on the USAO's public website.
5. The various "brackets" in the column headed "Experience" refer to the attorney's years of experience practicing law. Normally, an attorney's experience will be calculated starting from the attorney's graduation from law school. Thus, the "Less than 2 years" bracket is generally applicable to attorneys in their first and second years after graduation from law school, and the "2-3 years" bracket generally becomes applicable on the second anniversary of the attorney's graduation (*i.e.*, at the beginning of the third year following law school). See *Laffey*, 572 F. Supp. at 371. An adjustment may be necessary, however, if the attorney's admission to the bar was significantly delayed or the attorney did not otherwise follow a typical career progression. See, *e.g.*, *EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate); *EPIC v. Dep't of Homeland Sec.*, 982 F. Supp. 2d 56, 60-61 (D.D.C. 2013) (same). The various experience levels were selected by relying on the levels in the ALM Legal Intelligence 2011 survey data. Although finer gradations in experience level might yield different estimates of market rates, it is important to have statistically sufficient sample sizes for each experience level. The experience categories in the current USAO Matrix are based on statistically significant sample sizes for each experience level.
6. ALM Legal Intelligence's 2011 survey data does not include rates for paralegals and law clerks. Unless and until reliable survey data about actual paralegal/law clerk rates in the D.C. metropolitan area become available, the USAO will compute the hourly rate for Paralegals & Law Clerks using the most recent historical rate from the USAO's former *Laffey* Matrix (*i.e.*, \$150 for 2014-15) updated with the PPI-OL index. The formula is \$150 multiplied by the PPI-OL index for May in the year of the update, divided by 194.3 (the PPI-OL index for May 2014), and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
7. The attorney's fees matrices issued by the United States Attorney's Office are intended to facilitate the settlement of attorney's fees claims in actions in which the United States may be liable to pay attorney's fees to the prevailing party and the United States Attorney's Office is handling the matter. The United States Attorney's Office is presently working with other parties to develop a revised rate schedule, based upon current, realized rates paid to attorneys handling complex federal litigation in the District of Columbia federal courts. This effort is motivated in part by the D.C. Circuit's urging that "both the plaintiff and defense sides of the bar" should "work together and think creatively about how to produce a reliable assessment of fees charged for complex federal litigation in the District." *D.L. v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019). This new matrix should address the issues identified by the majority in *D.L.*, but it is expected that it will be some time before a new matrix can be prepared. In the interim, for matters in which a prevailing party agrees to payment pursuant to the matrices issued by the United States Attorney's Office, the United States Attorney's Office will not demand that a prevailing party offer the additional evidence that the law otherwise requires. See *Eley*, 793 F.3d at 104 (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995)) (requiring "evidence that [the] 'requested rates are in line with those prevailing in the community for similar services'").