UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JUSTINIANO DELRIO Appellant,	)	
v.	)	CAVC No. 17-4220 EAJA
ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS, Appellee	)	

APPELLANT'S RESPONSE TO APPELLEE'S RESPONSE TO APPLICATION FOR AN AWARD OF ATTORNEYS FEES AND EXPENSES

On March 12, 2020, the undersigned filed a timely EAJA application in the amount of $24,034.39. This application included time spent preparing for and participating in an oral argument in which several of Appellant's arguments were found persuasive. In response, the Secretary requests that the Court reduce Appellant's requested award by $15,829.48 because that amount was for "preparation and presentation of an argument which the Court rejected in its entirety." Sec. Resp. at 10 (referencing Appellant's argument as to *Frost v. Shulkin*, 29 Vet.App. 1313 (2017)). But the Secretary overlooks the fact that meaningful preparation time and time at oral argument was spent on more than the *Frost* argument. Appellant is entitled to fees and expenses for this work. The Court's decision, furthermore, was not limited to the parties' agreement regarding *Ray v. Wilkie,* 31 Vet.App. 58 (2019).

The Court should reject the Secretary's opposition and award the amount requested.

ARGUMENT

In his response to the EAJA application, the Secretary argues that Appellant is not entitled to an EAJA fee for an argument upon which Appellant had no success. Sec. Resp. at 8. The Secretary concludes, at page 11 of his response, that "the basis for what success Appellant did achieve in this case is entirely unrelated to his *Frost* argument." While the Court did reject Appellant's *Frost* argument, it agreed with Appellant on other issues and arguments. The Secretary selectively reads the Court's decision as based entirely on *Ray*.

To demonstrate the flaw in the Secretary's challenge, one need only read the Court's decision. It is true the Court found *Frost* "inapposite." *Delrio v. Wilkie*, 32 Vet.App. 232, 248 (2019). But before the Court discussed its rejection of Appellant's *Frost* arguments, it wrote an entire section called "Other Reasons or Bases Errors." *Id.* at 240-44. At the end of that section, after listing a litany of Board mistakes, the Court remanded the case for consideration of Mr. Delrio's "assertions that PTSD rendered him unable to secure and follow a substantially gainful occupation prior to October 11, 2006. . . ." *Id.* at 244. Importantly, the Court held that a TDIU determination "is not medical in nature, and it is not the province of medical examiners to opine on whether a veteran's service-connected disabilities preclude substantially gainful employment." *Delrio*, 32 Vet.App. at 242.

The Secretary entirely ignores this important part of the Court's decision, this key holding, and Appellant's arguments advancing this conclusion. In his opening brief, Appellant argued that the Board provided inadequate reasons or bases for its finding that Appellant was not unemployable prior to October 2006 (Appellant's Brief at 14); that the Board incorrectly relied on the inadequate March 2003 and November 2005 examinations (*Id.* at 19-21); and that the Board did not address relevant evidence potentially favorable to Appellant's entitlement to TDIU (*Id.* at 15-16). Counsel had to be prepared to discuss these issues at oral argument and, as noted above, they are a part of the Court's favorable decision.

The Secretary seems to believe that *Frost* was the only issue discussed during oral argument and he also seems to believe that in preparing for an oral argument, counsel needed to only prepare to discuss *Frost*. *See* Sec. Response at 6. Both suppositions are false. Preparation was needed on the other issues and legal questions presented in the case. Counsel's time preparing for and participating in those arguments led to successes that are reasonably billed under the EAJA.

The Secretary also appears to believe that the only reason Appellant succeeded is because of the parties' agreement as to *Ray v. Wilkie,* 31 Vet.App. 58 (2019). He therefore asks for a reduction of $15,829.48, including all costs associated with the oral argument. Sec. Response at 11. But this reduction presupposes that Mr. Delrio prevailed based upon *Ray* and nothing else—a presupposition that is demonstrably

false. His request for a reduction should be rejected.

Appellant agrees with the Secretary that he is not entitled to an EAJA fee for an argument upon which Appellant had no success, which is why he reduced 12 hours for the time spent preparing for the *Frost* argument. EAJA Application at 9. But given that the *Frost* argument was only a part of Appellant's overall successful pursuit of remand in this case, the Court should reject the Secretary's proposed further reduction.

CONCLUSION

Appellant is entitled to be paid for work where there is some connection between the efforts billed and the ultimate success of the claimant. *Vazquez-Flores v. Shinseki*, 26 Vet.App. 9, 16-17 (2012). Because his counsel billed for efforts directly leading to the claimant's success here, he respectfully requests the Court grant Appellant $24,034.39 in EAJA fees for work done in successfully obtaining a Court remand for that portion of the Board's September 19, 2017 decision denying entitlement to TDIU prior to October 11, 2006.

Respectfully submitted,

Justiniano Delrio
By His Attorneys,
CHISHOLM CHISHOLM & KILPATRICK
/s/ Zachary M. Stolz
321 S Main St #200
Providence, Rhode Island 02903
(401) 331-6300