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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 17-2348(E)

FRANK J. KELLOGG, APPELLANT,

v.

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

Before TOTH, *Judge*.

MEMORANDUM DECISION

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

TOTH, *Judge*: Although oral argument in Frank J. Kellogg's appeal was heard before a panel of this Court, it was ultimately determined that the case was not appropriate for precedential resolution. The matter was returned to a single judge, and a February 2020 memorandum decision was issued that vacated the Board decision on appeal and remanded the claim for further proceedings. The present dispute is over a portion of the expenses claimed by Mr. Kellogg in his application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA).

Under EAJA, this Court has the authority to award the "reasonable fees and expenses of attorneys." 28 U.S.C. § 2412(b). To be eligible for such an award, an applicant must submit a timely application itemizing the fees and expenses sought and show that he is a prevailing party, that he is financially eligible to receive the award, and that the Secretary's position in the case was not "substantially justified." *Dixon v. O'Rourke*, 30 Vet.App. 113, 118 (2018). "It is well settled that only reasonable fees and expenses may be awarded under EAJA and that an applicant has the burden of demonstrating the reasonableness of his request for an EAJA award." *Vazquez-Flores v. Shinseki*, 26 Vet.App. 9, 15 (2012) (citation omitted). This furthers the twin purposes of EAJA: "to (1) ensure adequate representation for those needing to vindicate their rights against the

government and (2) minimize the cost of this redress to taxpayers." *Parrott v. Shulkin*, 851 F.3d 1242, 1249 (Fed. Cir. 2017).

Here, Mr. Kellogg filed a timely EAJA application seeking a total of \$24,072.45. Of this, \$21,884.39 is for his attorney's fees (her time) and \$2,188.06 is for his attorney's expenses (her costs). The Secretary does not dispute the veteran's entitlement to an EAJA award, nor does he object to the fee portion of the application. Instead, he challenges some of the expenses as unreasonable. Counsel traveled from New York City to Washington, D.C., to participate in oral argument held on September 25, 2019. She spent two nights at the Watergate Hotel; the per night price (a \$649 room rate plus \$97.03 in taxes) was \$746.03. Noting the Watergate's marketing as a "luxury" hotel, the Secretary asserts that Mr. Kellogg failed to demonstrate "how it was reasonable to charge taxpayers \$746.03 a night for luxury accommodations for his attorney's two nights in September 2019" or to indicate that he "applied any billing judgment in requesting reimbursement for said charge." Secretary's Response at 6. The Secretary thus asks the Court to disallow entirely the \$1,492.06 in lodging fees or, in the alternative, disallow any expenses above \$300 per night, which he suggests is a reasonable rate.¹ *Id.* at 8. So, at most, the Secretary is urging the Court to reduce the overall EAJA award sought by some 6%.²

Mr. Kellogg filed a reply. He first questions the Secretary's qualifications for challenging the reasonableness of the nightly hotel rate, using that most persuasive of rhetorical tools: sarcasm. Reply at 2 ("In so disputing, the Secretary, who has apparently accredited himself as a hotel rate expert, sets his own 'reasonable rate' for a Washington, D.C. hotel rental rate of \$300.00 per night."). More constructively, the veteran asserts that the Secretary's objection must fail for legal and factual reasons. Legally, Mr. Kellogg contends that, unlike EAJA *fees*, there is no burden on an applicant to prove the reasonableness of EAJA *expenses*; rather, it is the Secretary's burden to prove that they are unreasonable. Factually, the veteran argues that \$746.03 per night is not unreasonable when one considers that "oral argument was scheduled during the peak month of September (when Congress reopens, conventions resume and business travelers return after Labor Day)." *Id.* Finally, he points out that his attorney had already exercised billing judgment and reduced her fee request by almost \$4,000 (15% of the original fee award sought).

¹ This amount reflects a 20% increase over the \$250 nightly D.C. hotel rate incurred by the same counsel in a 2016 case. Reply at 8 n.3.

² Unchallenged by the Secretary are expenses of \$169 for dining and \$488 for roundtrip airfare.

As a legal matter, the Court cannot agree with Mr. Kellogg over which party must do the persuading. EAJA specifies that only the "reasonable fees *and* expenses of attorneys" should be awarded. 28 U.S.C. § 2412(b) (emphasis added). The reasonableness requirement applies to expenses. When a fee-shifting statute requires a court to make a finding of reasonableness, the award applicant "bears the burden of persuasion that the statutory requirement has been satisfied." *Gisbrecht v. Barnhart*, 535 U.S. 789, 807 n.17 (2002). Nor does the Court discern any basis for treating fees differently from expenses in this regard. Contrary to Mr. Kellogg's suggestion, this case is not about whether the expense of a hotel room, as a necessary part of facilitating oral argument, was a reasonable one for his attorney to have incurred. It was. Just as compensation for an attorney's time is a necessary and reasonable expense of litigating a case. Yet just because an attorney may be entitled to EAJA fees does not mean that the full extent of the fees sought in a particular case is inherently reasonable. The caselaw of this Court and the Federal courts of appeals attests to that. Likewise, the fact that it was reasonable for the veteran's counsel here to seek reimbursement for the cost of her lodgings does not mean that the full cost she seeks must be accepted as reasonable. And if, as Mr. Kellogg suggests, no reported case specifically addresses a reasonableness-of-expenses issue, perhaps that is because parties usually can resolve their disagreements (or because applicants usually refrain from submitting unreasonable expenses). In any event, it is his burden to show that a \$1,492.06 hotel bill is a reasonable expense.

The Court is not persuaded that it is. (The Secretary has not challenged counsel's decision to charge for two nights of lodging in D.C., so the Court passes on that issue.) Hotels in the nation's capital can be quite expensive, but like many things in life, they come in a variety of prices. Mr. Kellogg has not explained why it was necessary for his attorney to spend nearly \$750 per night on accommodations. Short notice cannot be the answer. The order scheduling oral argument was issued on June 11, 2019, more than three months before it was held. Nor has he alleged that the choice was based on logistical considerations; the Watergate Hotel is not particularly close to the Court.

Mr. Kellogg contends primarily that oral argument was scheduled during a "peak" month and that many other events occurring in the city at that time inflated hotel prices. In email exchanges with VA counsel, the veteran's attorney stresses this and avers that she could not find less expensive accommodations. *See* Reply, Exhibits B & D. This may be so, but the comparators used to support the point are telling. Appellant's counsel cites prices for the JW Marriott Hotel, the

Four Seasons Hotel, and the St. Regis Hotel.³ The Court is not an expert on the Greater Washington hospitality industry, but these hotels also market themselves as—and have a reputation for—providing luxury accommodations. They are a small (and costly) fraction of the area's hotelries. The Court does not doubt that the veteran's counsel acted in good faith and believed that the lodgings she procured came at an appropriate price. But "expenses the court finds to be unreasonable or unnecessary in the pending litigation[] cannot be awarded under the EAJA." *Oliveira v. United States*, 827 F.2d 735, 744 (Fed. Cir. 1987) (explaining, for example, that "expenses incurred in gaining admission to practice before the court with proper jurisdiction could not be awarded under the EAJA"). The Court must exercise its discretion in this area. *See id.*

Mindful that taxpayers are being asked to foot the bill, *cf. Parrott*, 851 F.3d at 1249, the Court concludes that Mr. Kellogg has not shown that a nightly hotel charge of \$746.03 was a reasonable EAJA expenditure by his attorney. Accordingly, the Court will deny recoupment for any outlay above \$300 per night. The Court summarily rejects the allegations of appellant's counsel that the Secretary's objection to the nightly hotel expense sought was motivated by bad faith, personal animus, or racial bigotry. These are serious charges, and her attempts to support them with anecdotal evidence and speculative inferences about the Secretary's purportedly disparate actions in other cases are wholly unpersuasive.

The veteran's April 28, 2020, EAJA application is GRANTED in the reduced amount of \$23,180.39, which reflects the disallowance as unreasonable of \$892.06 in hotel expenses.

DATED: November 25, 2020

Copies to:

Tara R. Goffney, Esq.

VA General Counsel (027)

³ The Court notes that these comparisons do not reflect the actual price of rooms in September 2019.