

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ERMA ROLLINS,)	
Appellant,)	
)	
v.)	
)	Vet.App. No. 20-4179
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
Appellee.)	

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APPLICATION FOR AWARD OF REASONABLE
ATTORNEYS’ FEES AND EXPENSES PURSUANT TO 28
U.S.C. § 2412(d)**

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**APPELLANT'S APPLICATION FOR AWARD OF
REASONABLE ATTORNEY 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 U.S. Vet. App. R. 39, Appellant, Erma Rollins, applies for an award of reasonable attorney fees and expenses in the amount of **\$5,444.92**.

**I. APPELLANT IS A PREVAILING PARTY AND ELIGIBLE TO
RECEIVE AN AWARD.**

Under 28 U.S.C. § 2412(d), a court shall award to a prevailing party fees and other expenses incurred by that party in any civil action, including proceedings for judicial review of agency action. To obtain “prevailing party” status, a party need only to have obtained success “on any significant issue in litigation which achieve[d] some of the benefit ... sought in bringing the suit.” *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993).

In this case, Appellant is a prevailing party entitled to an award of fees and costs because the Court vacated the Board’s decision based on administrative error and remanded the case for further adjudication in accordance with the JMR. *See Zuberi v. Nicholson*, 19 Vet. App. 541 (2006); *Sumner v. Principi*, 15 Vet. App. 256 (2001) (*en banc*). This Court-

ordered relief creates the “material alteration of the legal relationship of the parties necessary to permit an award of attorney’s fees.”” *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep’t of Health and Human Res.*, 121 S. Ct. 1835, 1840 (2001) (*quoting Garland Indep. School Dist.*, 489 U.S. at 792.).

II. APPELLANT MEETS THE NET WORTH REQUIREMENTS

Ms. Rollins is a party eligible to receive an award of reasonable fees and expenses because she and her late husband, her predecessor in this litigation, did not have a net worth in excess of \$2 million at the time this civil action was filed.

As an officer of the Court, the undersigned counsel hereby states that neither Ms. Rollins nor her late husband’s net worth exceed \$2 million at the time this civil action was filed and neither owned any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7 million and which had more than 500 employees. *See Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996). *See, also*, Retainer Agreements on file with court certifying net worth.

III. THE POSITION OF THE SECRETARY OF VETERANS AFFAIRS WAS NOT SUBSTANTIALLY JUSTIFIED.

The Secretary can defeat Ms. Rollins application for fees and costs only by demonstrating that the government’s position was substantially justified. *See Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The U.S. Supreme Court has held that for the position of the government to be substantially justified, it must have a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *accord, Beta Sys. v. United States*,

866 F.2d 1404, 1406 (Fed. Cir. 1989).

In this case, the Secretary's administrative position was not substantially justified as evidenced by the JMR which the Court granted thereby vacating and remanding the Board's decision based on administrative error.

This element requires only a mere allegation that the Secretary's position at the administrative or litigation stage was not substantially justified, at which point the burden shifts to the Secretary to prove his position was substantially justified. *Swiney v. Gober*, 14 Vet. App. 65, 70 (2000).

IV. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES.

An itemized statement of the services rendered is attached to this application as Exhibit A, and the reasonable fees and expenses for which Ms. Rollins seeks compensation are listed below in this section. Included in Exhibit A is a certification that the counsel has "(1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed...and (2) considered and eliminated all time that is excessive or redundant." *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005). In exercising billing judgment, Ms. Rollins eliminated 3.8 hours of attorney time from the itemized statement and this fee petition out of 29.8 hours spent litigating this case before this Court.

Ms. Rollins is entitled to recover the EAJA base hourly rate of \$125 per hour for the work of her attorney, Scott Martin, adjusted to compensate for cost-of-living changes since that base rate was established. To calculate the hourly rate in this case, Ms. Rollins chose the

month in which the parties filed the joint motion to remand, i.e. March 2021, as the litigation mid-point upon which to base this adjustment. *Elczyn v. Brown*, 7 Vet. App. 170 (179-181) (1994).

Ms. Rollins, therefore, seeks a \$125 hourly rate for Attorney Scott Martin, increased to adjust for the cost of living in the Southern Region, because her attorney performed all work in this case while located in the Austin, TX metropolitan area. Applying the cost-of-living adjustment for the stated region at the aforementioned midpoint yields an hourly rate of \$209.42.

<u>Name</u>	<u>Rate</u>	<u>Hours</u>	<u>Fee Amount</u>
Scott Martin	\$209.42	26.0	\$ 5,444.92

WHEREFORE, Ms. Rollins respectfully requests that the Court award attorneys' fees and expenses in the total amount of **\$5,444.92**.

Respectfully submitted,

/s/ Scott A. Martin
Counsel for Ms. Rollins

EXHIBIT A

ATTORNEY HOURS

Please see the below table copied from an excel workbook, which was updated contemporaneously with work performed to track billing. All work was performed by undersigned counsel. I have reviewed the billing statement and I am satisfied that it accurately reflects the work performed. I have considered and eliminated some time in the exercise of billing discretion, noting in the description of “General Task(s)” when an activity was eliminated in the exercise of billing discretion.

Date	Time	General Task(s)
July 3, 2020	0.2	Respond to TVC email regarding case placement (eliminated in billing discretion)
July 6, 2020	0.2	Read and respond to email from TVC mentor (eliminated in billing discretion)
July 10, 2020	0.2	Prepare and file notice of appearance
July 13, 2020	0.1	Attempt to contact client, left introductory message
July 29, 2020	0.7	Introductory call with client. Discuss scope of appeal, potential issues, process and timeline, and possible outcomes.
August 6, 2020	0.1	Receive and review notice of appearance of VA counsel
August 14, 2020	0.1	Receive and review service of RBA
August 27, 2020	0.1	Email VA counsel re: extension of time to dispute RBA
August 28, 2020	0.1	Receive and review VA counsel’s response (eliminated in billing discretion)
August 28, 2020	0.2	Draft and file motion for extension of time to dispute the RBA
August 31, 2020	0.1	Receive and review court order granting extension, update calendar deadlines
September 8, 2020	2.8	Review RBA (1-681) for legibility and completeness as well as noting information potentially relevant to the appeal
September 10, 2020	3.7	Review RBA (682-1496) for legibility and completeness as well as noting information potentially relevant to the appeal
October 14, 2020	0.1	Receive and review notice to file appellant’s brief, update calendar deadline
November 3, 2020	0.1	Receive and review notice setting Rule 33 conference, updated calendar deadlines
November 9, 2020	2.2	Performed legal research necessary to draft Rule 33 memo, reviewed those portions of RBA relevant to appeal
November 10, 2020	2.1	Began drafting Rule 33 memo
November 12, 2020	1.6	Completed drafting Rule 33 memo, prepared attachments
November 17, 2020	0.2	Emailed Rule 33 memo to CLS and OGC; prepared and filed certificate of service
November 18, 2020	0.2	Receive and respond to TVC email re: Rule 33 conference (eliminated in billing discretion)

December 2, 2020	0.9	Review Board decision and Rule 33 memo, participate in Rule 33 conference.
December 2, 2020	0.1	Attempt to contact client to update on Rule 33 conference
December 3, 2020	0.1	Attempt to contact client to update on Rule 33 conference (eliminated in billing discretion)
December 5, 2020	0.1	Attempt to contact client to update on Rule 33 conference (eliminated in billing discretion)
December 7, 2020	0.1	Attempt to contact client to update on Rule 33 conference (eliminated in billing discretion)
December 7, 2020	0.2	Email to client updating him on Rule 33 conference, JMR offer
December 8, 2020	0.1	Attempt to contact client to update on Rule 33 conference (eliminated in billing discretion)
December 9, 2020	2.2	Drove to client's home to attempt to make contact, learned of client's death from family member (eliminated in billing discretion)
December 9, 2020	0.9	Research law and court rules regarding client's death
December 10, 2020	0.1	Send and receive email from VA counsel re: motion to stay
December 10, 2020	0.8	Draft and file Notice of Death and Motion to Stay
December 11, 2020	0.3	Discuss death of client and way forward with TVC mentor (eliminated in billing discretion)
December 14, 2020	0.1	Receive and review court filings
December 15, 2020	0.3	Call with late client's wife, explain situation, assess interest in substitution
December 15, 2020	0.5	Draft letter to client discussing path forward: VA Form 21P-0847, need for death certificate and new retainer agreement. Mailed letter
December 22, 2020	0.1	Call client to check on status of death certificate
January 10, 2021	0.1	Call client to check on status of death certificate, again
January 13, 2021	0.5	Call with client re: motion to substitute, case status, JMR, way forward
January 14, 2021	0.1	Email to VA counsel re: position on substitution and who should draft JMR
January 17, 2021	0.8	Draft motion to substitute
January 19, 2021	0.1	Email to VA counsel re: position on substitution given substitution still had not been granted at the agency level
January 21, 2021	0.1	Review VA counsel's response expressing preference for further stay
January 24, 2021	0.2	Draft and file motion to extend stay
February 8, 2021	0.2	Call with client re: VA letter denying substitution before the agency
February 9, 2021	0.2	Receive and review VA letter denying substitution
February 9, 2021	0.1	Email to VA counsel to correct erroneous denial
February 10, 2021	0.2	Emails with VA counsel re: correcting substitution, correct RO
February 11, 2021	0.1	Read VA email stating denial has been corrected
February 14, 2021	0.4	Revise motion to substitute to reflect substitution at agency and file motion
February 24, 2021	0.1	Review court ruling on motion to substitute
March 4, 2021	0.1	Email VA counsel re: status of JMR
March 16, 2021	0.2	Review draft JMR
March 17, 2021	1.3	Legal research re: JMR/post-AMA language
March 18, 2021	0.3	Email to VA counsel proposing changes to JMR
March 22, 2021	0.2	Read and respond to VA counsel's response to proposal
March 23, 2021	0.3	Discuss JMR with client
March 23, 2021	0.1	Email VA counsel agreeing to JMR

March 24, 2021	0.1	Review filed JMR
March 25, 2021	0.1	Review court order
March 29, 2021	0.2	Reply to TVC re: case close out (eliminated in billing discretion)
March 29, 2021	0.3	Prepare and send closeout letter to client outlining outcome and next steps to take
April 22, 2021	1.4	Prepare and file application for EAJA fees
TOTAL HOURS:	29.8	
TOTAL HOURS ADJUSTED FOR BILLING DISCRETION:	26.0	

CERTIFICATION

I have reviewed the billing statement and I am satisfied that it accurately reflects the work performed by counsel. I have considered and eliminated all time that is excessive or redundant.

Date: April 22, 2021

/s/ Scott A. Martin