

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

RAYMOND S. ZIRKELBACH,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 20-1558
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**APPELLANT’S APPLICATION FOR AN AWARD OF REASONABLE
ATTORNEY FEES AND EXPENSES UNDER 28 U.S.C. § 2412(d)**

Pursuant to the Equal Access to Justice Act (EAJA), Appellant Raymond Zirkelbach moves the Court for an award of reasonable attorney fees in the amount of \$12,715.98.

On November 19, 2019, the Board of Veterans’ Appeals determined that the 2013 decision that reduced Mr. Zirkelbach’s disability rating for his back condition from 40% to 20% did not contain clear and unmistakable error (CUE). Record Before the Agency (R.) 1-11. Appellant filed a timely Notice of Appeal with the Court on March 4, 2020.

On July 28, 2020, following the resolution of an RBA dispute, Appellant’s counsel submitted a Summary of Issues memorandum to the VA attorney and the Court’s Central Legal Staff in advance of the Rule 33 pre-briefing conference. The conference was held on August 12, 2020.

On September 11, 2020, Appellant filed a principal brief. The Secretary filed a responsive brief on December 27, 2020. On January 11, 2021, Appellant filed a reply brief.

On February 11, 2021, the Court ordered the parties to file supplemental memoranda of law. Both parties filed their responses on March 4, 2021. On March 17, 2021, the case was submitted for panel review. On March 19, 2021, the Court scheduled oral argument. On May 26, 2021, the parties agreed to a Joint Motion for Remand (JMR) for the Board to provide adequate reasons or bases for its determination the 2013 RO correctly applied the law – even though the 2013 decision did not mention 38 C.F.R. § 3.344. JMR at 2-3. The parties also agreed that remand was warranted for the Board to address Appellant’s fair process argument. JMR at 3. Finally, the JMR directed the Board to address Appellant’s argument regarding the finality of the 2013 decision – a question that was at the heart of the Court’s order for supplement memoranda of law. The Court issued an order granting the JMR on June 7, 2021.

In order to be eligible for an award of attorney’s fees under the EAJA, a claimant must demonstrate that (1) he is a prevailing party; (2) he is eligible to receive an award; and (3) the position of the United States was not substantially justified. *Bazalo v. Brown*, 9 Vet.App. 304, 308 (1996). The claimant must also provide an itemized statement from his attorney explaining the services provided. *Id.*

The appellant is a prevailing party. See May 26, 2021 JMR; June 7, 2021 Court Order. A prevailing party includes one who obtains relief in the form of a remand predicated on administrative error. *Zuberi v. Nicholson*, 19 Vet.App. 541, 546 (2006). To

obtain “prevailing party” status, “one must secure some relief on the merits. Securing a remand to an agency can constitute the requisite success on the merits.” *Kelly v. Nicholson*, 463 F.3d 1349, 1353 (Fed. Cir. 2006). This Court has set forth a three-part test to determine prevailing-party status under the EAJA: “(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.” *Blue v. Wilkie*, 30 Vet.App. 61, 67 (2018) (citing *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016)).

Appellant is a prevailing party because the parties agreed that the Board failed to provide adequate reasons or bases for its decision, which it is required to do by statute. 38 U.S.C. § 7104(d)(1). The Court did not retain jurisdiction over this appeal, and the JMR and Court order call “for further agency proceedings, which leaves the possibility of attaining a favorable merits determination.” *Blue, supra*; see JMR at 2-4. Specifically, the JMR calls for the Board to explain its determination that the 2013 RO correctly applied the law in light of its finding that “there was no specific finding in the August 2013 rating decision that the requirements of 38 C.F.R. § 3.344 had been met.” JMR at 2-3. The JMR also calls for the Board to consider and address Appellant’s argument that “it is fundamentally unfair for VA to reduce a veteran’s disability rating and not say so.” JMR at 3. The JMR further directs the Board to address Appellant’s argument regarding the finality of the 2013 decision, which appeared to be of concern to the Court with respect to its jurisdiction to address this appeal. JMR at 3-4.

The appellant is eligible to receive an EAJA award. A showing of eligibility may be made by stating in the application that the appellant's net worth at the time the appeal was filed did not exceed \$2 million. *Bazalo*, 9 Vet.App. at 309. Undersigned counsel hereby states that Appellant's net worth did not exceed \$2 million at the time this action was filed. Appellant is not a business entity.

The government's position in this case was not substantially justified. In order for the government's position to be deemed substantially justified, so as to defeat an EAJA application, it must have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In its decision, the Board failed to adequately explain its determination that the 2013 RO complied with the law when it reduced the veteran's disability rating without discussing 38 C.F.R. § 3.344. R. 5-11; JMR at 2-3. At the time of the 2013 decision, Appellant's 40% disability rating had been in effect for more than five years, thus implicating 38 C.F.R. § 3.344(a). This regulation requires VA to make explicit factual findings before reducing a rating that has been in effect for more than five years. 38 C.F.R. § 3.344(a). Because the Board is required by law to provide adequate reasons or bases for its decision, its failure to do so renders the government's position in this case substantially unjustified.

Attached is the affidavit of Appellant's counsel and billing statement describing the request for \$12,715.98 in attorney fees. This rate was calculated by subtracting the CPI-U for the Midwest region from September 2020 (241.848), the date chosen as the midpoint of the litigation, from that of March 1996 (151.7), and dividing the result (90.18) by the CPI-U for March 1996. The result (.5944), representing the increase

between March 1996 and September 2020, was then multiplied by the statutory rate (\$125.00), demonstrating an increase of \$74.31, which was added to the \$125.00 statutory rate to arrive at the inflation-adjusted rate of \$199.31 per hour. In consideration of billing judgment, avoidance of redundant time, and reasonableness, Appellant's counsel is not requesting compensation for 18.2 hours, totaling \$3,627.44 of billable attorney time. There are no additional expenses associated with this appeal. A total award of fees in the amount of \$12,715.98 is reasonable and appropriate.

Respectfully submitted,

Dated: July 7, 2021

/s/ Amy B. Kretkowski

AMY B. KRETKOWSKI

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LEAD COUNSEL FOR THE APPELLANT

EXHIBIT A**Billing Statement for Raymond Zirkelbach**

Docket No. 20-1558

Total Hours:	82
Fees:	\$16,343.42
Total Unbilled Hours:	18.2
Total Unbilled Fees:	\$3,627.44
<i>(Unbilled - reduction based on counsel's express consideration of billing judgment, avoidance of redundant time, and reasonableness, totaling 18.2 hours)</i>	
Total Billed Fees:	\$12,715.98
(Based on 82 hours of work minus 18.2 hours of unbilled work at a rate of \$199.31 per hour)	

I, Amy B. Kretkowski, under penalty of perjury, affirm that this billing statement is a true and accurate accounting of the time I spent on the case of *Zirkelbach v. McDonough*, Docket No. 20-1558. In the exercise of billing judgment, I omitted and/or reduced time spent on administrative tasks, and time that appeared duplicative.

DATE	BILLED	UNBILLED	DESCRIPTION OF SERVICES
11/20/19	0.5		Review BVA decision.
12/3/19		0.1	Leave message for client re: BVA decision.
1/6/20		0.2	Email correspondence with client re: BVA decision.
1/9/20	0.1		Generate CAVC appeal and representation paperwork, send to client.
3/4/20	0.1		E-file Notice of Appeal, representation paperwork.
		0.1	Draft letter to client with signed paperwork, explain next steps.
		0.1	Review CAVC notice of docketing.
3/24/20	0.1		Email correspondence with OGC re: VA consent letter.
3/30/20		0.1	Review CAVC docket entry re: BVA decision.
3/31/20		0.2	Draft, efile motion to file Supplemental Notice of Appeal.
		0.1	Review Clerk's stamp order granting motion.
4/23/20		0.1	Review CAVC docket entry re: appearance of OGC attorney.
5/4/20	0.1		Review docket entry re: RBA notice. Calendar Rule 10 deadline.

5/13/20	0.1	Email OGC attorney re: RBA (not received).
5/14/20	0.1	Email with OGC attorney re: RBA.
5/15/20	0.1	Receive, scan, upload RBA.
5/17/20	2.5	Review, log, take notes on RBA pages 1-1,578, including careful reading of Board decision, prior submissions with arguments, prior RO decisions, prior Board decision, VA correspondence to client, motion to revise 2013 decision based on CUE, C&P reports, prior employer information (requests and responses), TDIU application, private medical opinion, VA development letters.
	2.7	Review, log, take notes on RBA pages 1,579-3,798, including careful reading of VA medical records, prior rating decisions, development letters, client appeal submissions, service medical records, claim for benefits, vocational rehabilitation application, C&P reports, service personnel records.
5/19/20	0.1	Email OGC attorney re: other veteran's records in file.
5/20/20	1.5	Review, log, take notes on RBA pages 3,799-4,754, including careful reading of C&P reports, prior rating decisions, VA medical records, client submissions, service medical records, service personnel records, VA development letters, original application.
	0.7	Compare current RBA to RBA from prior appeal for completeness.
5/21/20	0.2	Email OGC attorney re: RBA dispute.
5/22/20	0.1	Draft, efile RBA dispute.
6/3/20	0.1	Review Court order for Secretary to respond.
	0.1	Review docket entry re: OGC co-counsel notice of appearance; appellee's response (dispute resolved).
	0.1	Review docket entry lifting stay; notice to file brief; calendar deadline.
	0.2	Email with OGC attorney re: RBA; receive blank pages to replace records; dispute resolved.
7/16/20	0.1	Review Court order scheduling R. 33 conference; calendar date and deadline for R. 33 memo.
7/23/20	1	Review Board decision and RBA notes; outline arguments.

	2	Research rating reduction and CUE cases.
	2	Start drafting fact section of memo.
7/24/20	1	Finish drafting fact section.
	2.6	Draft argument (failure to apply § 3.344)
7/25/20	1	Revise argument.
7/26/20	1.7	Edit, proofread entire memo.
7/28/20	1	Prepare/redact RBA pages.
	0.1	Email R. 33 memo to OGC & CLS attorneys.
	0.1	Prepare, efile R. 33 certificate of service.
	0.2	Draft letter to client re: next steps, send with copy of memo.
8/11/20	0.3	Email with OGC and CLS attorneys re: possible need to reschedule conference.
8/12/20	0.4	Review R. 33 memo in advance of conference.
	0.2	Rule 33 conference.
	0.2	TC client re: conference, next steps.
9/5/20	0.2	Import sections of Rule 33 memo to brief.
	0.4	Revise, edit fact section.
	2.1	Draft Argument I (§ 3.344).
	1.1	Draft Argument II (§ 3.105).
9/6/20	2	Draft Arguments III and IV (due process, fair process, prejudice).
	1.9	Revise Arguments I and II.
	1	Revise Arguments III and IV.
	0.8	Draft Statement of the Issues, Summary of the Argument.
9/10/20	1.5	Proofread entire brief.
	1.8	Prepare table of authorities, RBA citations.
9/11/20	0.1	E-file brief.
	0.2	Draft letter to client, send with copy of brief .
11/5/20	0.1	Review & respond to OGC email re: extension of time.
	0.1	Review docket entry re: OGC extension of time.
11/6/20	0.1	Review docket entry granting motion; calendar deadline.
12/27/20	0.1	Review docket entry re: appellee's brief.

1/5/21	1.3		Review, take notes on appellee's brief.
	0.3		Review principal brief.
	1		Outline reply arguments.
1/6/21	2		Draft reply argument I (§ 3.344, CUE).
	1.5		Draft reply argument II (§ 3.105).
1/7/21	1.6		Revise reply arguments I and II.
1/8/21	1		Draft reply argument III (remedy).
1/9/21	0.4		Revise reply argument III.
1/10/21	0.5		Format table of authorities, record citations.
	1		Edit, proofread entire reply brief.
1/11/21	0.1		Efile reply brief.
		0.2	Draft letter to client to send with copy of reply brief, outline next steps.
1/19/21	0.1		Review docket entry re: ROP; calendar deadline for dispute.
	0.4		Review ROP.
1/20/21		0.1	Draft, efile statement accepting ROP.
1/22/21		0.1	Review docket entry re: Judge assignment.
2/11/21	0.3		Review Court order for supplemental memoranda of law.
2/14/21	1.7	1	Research caselaw on finality.
	1.5	1	Research caselaw and nonprecedent decisions re: CUE and § 3.344.
2/15/21	1		Outline Supplemental Memorandum of Law.
	2		Start drafting Supplemental Memorandum, Issue 1.
2/17/21	1.3		Finish drafting Issue 1.
	2.6		Draft Issue 2a.
	0.7		Draft Issue 2b.
2/19/21	1.5		Draft Issue 2c.
2/20/21	0.9		Revise, edit Issue 1.
	0.4		Revise, edit Issue 2a.
	0.2		Revise, edit Issues 2b and c.

2/22/21	0.1	Email OGC attorney re: joint motion to exceed page limit.
	0.3	Draft joint motion to exceed page limit.
	0.1	Email draft to OGC attorney.
	0.1	Efile joint motion to exceed page limit.
2/23/21	0.1	Review Clerk's stamp order granting joint motion.
2/27/21	0.8	Revise, edit entire memo.
3/4/21	0.4	Final review, proofread memo.
	0.1	Efile memo.
	0.4	Review Secretary's memo.
3/15/21	0.1	Review Court order submitting case to panel.
3/17/21	0.1	Review Court order re: oral argument.
3/19/21	0.6	Draft, efile <i>Solze</i> notice.
	0.1	Review Court order scheduling oral argument.
3/31/21	2	Prepare for oral argument.
4/20/21	2	Prepare for oral argument.
4/27/21	0.8	Draft, efile Rule 30(b) notice (<i>Stern</i>).
5/14/21	2	Moot oral argument with outside counsel.
5/21/21	0.1	Email with Court re: pre-OA conference.
5/24/21	0.3	Pre-OA conference.
5/25/21	1.5	Moot oral argument with outside counsel.
	0.2	Email OGC attorney re: finality issue and JMR.
	1	Draft, efile notice of clarification of position.
	0.2	Email with OGC attorney re: JMR.
5/26/21	0.1	Email with OGC attorney re: JMR.
	0.3	Review proposed JMR; email proposed revisions to OGC attorney.
	0.1	Email signature page to OGC attorney.
	0.1	Review docket entry re: JMR.
5/27/21	0.1	Review Court order revoking order for oral argument.

6/7/21	0.1	Review Court order granting JMR; judgment; calendar EAJA deadline.
7/7/21	1	Review time entries for billing statement.
	1	Draft EAJA application.
	0.2	Proofread, efile EAJA application.