

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

RICHARD ANTHONY REITTINGER,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 20-3418
)	
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 Richard Reittinger moves the Court for an award of reasonable attorney fees in the amount of \$13,574.68.

On March 19, 2020, the Board of Veterans’ Appeals declined to reopen and readjudicate Mr. Reittinger’s claims for service connection for bilateral upper and lower peripheral neuropathy. Record Before the Agency (R.) 1-9. Appellant filed a timely Notice of Appeal with the Court on May 18, 2020.

On November 2, 2020, Appellant’s counsel submitted a Summary of Issues memorandum to VA’s Office of General Counsel’s attorney and the Court’s Central Legal Staff attorney in advance of the Rule 33 pre-briefing conference. The conference was held on November 24, 2020.

On February 11, 2021, Appellant filed a principal brief. The Secretary filed a responsive brief on May 12, 2021. On July 12, 2021, Appellant filed a reply brief.

On October 8, 2021, the case was submitted for panel review. On October 13, 2021, the Court scheduled oral argument for December 8, 2021. On November 23, 2021, the parties agreed to a Joint Motion for Remand (JMR) for the Board to address whether the deck logs that were submitted after Mr. Reitinger had selected the “direct review” docket on his appeal were part of the evidentiary record before the Board. JMR at 2-3. The parties specifically noted the language of 38 C.F.R. §§ 3.103(c)(2) and 3.156(c) – and agreed that, on remand, the Board must consider the service department records as part of the evidentiary record before it. JMR at 3. The Court issued an order granting the JMR on December 8, 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 November 23, 2021 JMR; December 8, 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 the is 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 “consider the service department records as part of the evidentiary record,” in light of 38 C.F.R. §§ 3.103(c)(2) and 3.156(c). JMR at 2-3.

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 address whether the deck logs Mr. Reitinger submitted after his selection of the “direct” review appeal option were part of the evidentiary record in light of 38 C.F.R. §§

3.103(c)(2) and 3.156(c). JMR at 2-3. Section 3.156(c) requires VA to reconsider a previously denied claim whenever “VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim.” And 38 C.F.R. § 3.103(c)(2) expressly carves out an exception for 3.156(c) under the AMA. The Board is required by law to provide adequate reasons or bases for its decisions and to base its decisions on all applicable provisions of law and regulation. 38 U.S.C. § 7104(a). Its failure to do so here 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 \$13,574.68 in attorney fees. This rate was calculated by subtracting the CPI-U for the Midwest region from March 2021 (246.246), the date chosen as the midpoint of the litigation, from that of March 1996 (151.7), and dividing the result (94.55) by the CPI-U for March 1996. The result (.6232), representing the increase between March 1996 and March 2021, was then multiplied by the statutory rate (\$125.00), demonstrating an increase of \$77.91, which was added to the \$125.00 statutory rate to arrive at the inflation-adjusted rate of \$202.91 per hour. In consideration of billing judgment, avoidance of redundant time, and reasonableness, Appellant’s counsel is not requesting compensation for 15.5 hours, totaling \$3,145.11 of billable attorney time. There are no additional expenses associated with this appeal. A total award of fees in the amount of \$13,574.68 is reasonable and appropriate.

Respectfully submitted,

Dated: December 28, 2021

/s/ Amy B. Kretkowski

AMY B. KRETKOWSKI

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LEAD COUNSEL FOR THE APPELLANT

EXHIBIT A**Billing Statement for Richard A. Reitinger**

Docket No. 20-3418

Total Hours:	82.4
Fees:	\$16,719.78
Total Unbilled Hours:	15.5
Total Unbilled Fees:	\$3,145.11
<i>(Unbilled - reduction based on counsel's express consideration of billing judgment, avoidance of redundant time, and reasonableness, totaling 15.5 hours)</i>	
Total Billed Fees:	\$13,574.68
(Based on 82.4 hours of work minus 15.5 hours of unbilled work at a rate of \$202.91 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 *Reitinger v. McDonough*, Docket No. 20-3418. 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
5/5/20	0.8		Review BVA decision.
5/6/20			1.4 TC with client re: BVA decision, representation.
5/7/20	0.1		Generate CAVC appeal and representation paperwork, send to client.
5/18/20	0.1		E-file Notice of Appeal, representation paperwork. 0.1 Draft letter to client with signed paperwork, explain next steps.
5/19/20			0.1 Review CAVC notice of docketing.
6/18/20			0.1 Review CAVC docket entry re: BVA decision.
7/14/20			0.1 Review CAVC docket entry re: appearance of OGC attorney.
7/20/20	0.1		Review docket entry re: RBA notice. Calendar Rule 10 deadline.
7/29/20	0.1		Receive, upload RBA (3,820 pages).
8/6/20			0.1 Email OGC attorney re: position on extension of time to review RBA. 0.1 Draft, efile motion for extension of time to review RBA.

8/7/20		0.1 Review clerk's stamp order granting motion; calendar deadline.
9/8/20	3.1	Review, log, take notes on RBA pages 1-1,887, including careful reading of Board decision, client submissions, prior RO decisions, congressional correspondence, VA medical records, C&P examination reports, American Legion submissions, prior Board decision, Board correspondence to client, private medical records, applications for compensation, service records.
	3	Review, log, take notes on RBA pages 1,889-3,820, including careful reading of prior rating decisions, VA medical records, client appeal paperwork, internal VA memos, applications for benefits, C&P reports, development letters, client statements, private medical records, letters from private doctors, service personnel and medical records.
9/9/20	1.3	Compare current RBA to RBA from prior appeal to ensure completeness.
9/25/20		0.1 Review notice to file brief; calendar deadline.
10/20/20	0.1	Review Court order scheduling R. 33 conference; calendar date and deadline for R. 33 memo.
10/29/20	1	Review Board decision and RBA notes; outline arguments.
	2	Start drafting fact section of memo.
10/30/20	1	Finish drafting fact section.
	3.4	Draft argument section.
11/1/20	1.5	Revise argument.
	1.4	Edit, proofread entire memo.
11/2/20	0.5	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.
11/12/20		0.2 Review, respond to OGC email re: rescheduling R33 conference.
		0.1 Review docket entry, motion to reschedule conference.
11/17/20		0.1 Review clerk's stamp order granting motion; calendar new conference date, time.
11/24/20	0.5	Review R. 33 memo in advance of conference.

	0.4	Rule 33 conference.
	0.2	TC client re: conference, next steps.
12/21/20		0.1 Email OGC attorney re: position on extension of time to submit brief.
		0.1 Draft, efile motion for extension of time.
		0.1 Review stamp order granting motion; calendar deadline.
1/26/21	0.2	Import sections of Rule 33 memo to brief.
	1.7	Revise, edit fact section.
1/28/21	2.5	Draft Argument I (failure to apply 38 C.F.R. § 3.156(c)).
1/30/21	2	Draft Argument II (due process violation).
	1	Draft Argument III (prejudicial error).
2/7/21	2.7	Revise, edit Arguments I and II.
	0.5	Revise, edit Argument III.
	1	Draft Statement of the Issues, Summary of the Argument.
2/9/21	1.5	Proofread entire brief.
	1.8	Prepare table of authorities, RBA citations.
2/10/21	1.2	Draft Solze notice; redact appendix.
2/11/21	0.1	E-file brief and Solze notice.
	0.2	Draft letter to client, send with copy of brief and Solze notice.
4/12/21		0.1 Review & respond to OGC email re: extension of time.
		0.1 Review docket entry re: OGC motion for extension of time.
		0.1 Review docket entry granting motion; calendar deadline.
5/12/21		0.1 Review docket entry re: appellee's brief.
5/19/21		0.1 Email OGC re: position on extension of time for reply brief.
5/24/21		0.1 Draft, efile motion for extension of time to file reply brief.
5/25/21		0.1 Review docket entry granting motion; calendar deadline.
6/11/21	2	Review, take notes on appellee's brief.
	0.5	Review principal brief.
	1.2	Outline reply arguments.
6/18/21	2	Draft reply argument I.

6/19/21	1	Revise reply argument I.
6/23/21	2.5	Draft reply argument II.
6/28/21	1.9	Draft reply argument III.
7/3/21	1.7	Revise reply arguments II and III.
7/10/21	0.5	Format table of authorities, record citations.
7/11/21	1.6	Edit, proofread entire reply brief.
7/12/21	0.1	Efile reply brief.
		0.2 Draft letter to client to send with copy of reply brief, outline next steps.
7/19/21	0.1	Review docket entry re: ROP; calendar deadline for dispute.
	0.4	Review ROP.
7/20/21		0.1 Draft, efile statement accepting ROP.
7/21/21		0.1 Review docket entry re: Judge assignment.
10/8/21		0.1 Review Court order submitting case to panel.
10/13/21		0.1 Review Court order scheduling oral argument.
		0.3 TC client re: oral argument.
10/23/21	2	2 Preparation for oral argument.
10/30/21	2	2 Preparation for oral argument.
11/6/21	3	3 Preparation for oral argument.
11/14/21	3	3 Preparation for oral argument (pre-moot).
11/17/21	0.1	Review OGC email re: JMR offer.
11/18/21	0.3	Respond to OGC's JMR offer; counter-offer.
11/19/21		0.1 Review, respond to Court's email re: pre oral argument Zoom conference.
11/22/21	0.6	Correspond via email with OGC attorney re: JMR terms; review draft of JMR; email proposed revisions.

11/23/21	0.1	Email OGC attorney re: accepting final draft of JMR. <i>0.1</i> Review docket entry re: JMR.
11/24/21		<i>0.1</i> Review Court order revoking order for oral argument.
12/8/21		<i>0.1</i> Review Court order granting JMR; judgment; calendar EAJA deadline.
12/28/21	1.5	Review time entries for billing statement.
	1.8	Draft EAJA application.
	0.2	Proofread, efile EAJA application.