

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

ROBERT M. EUZEBIO)	
Appellant,)	
)	
v.)	CAVC No. 17-2879
)	EAJA
)	
DENIS MCDONOUGH,)	
SECRETARY OF)	
VETERANS AFFAIRS,)	
Appellee)	

APPELLANT’S SUPPLEMENTAL APPLICATION FOR AWARD OF ATTORNEY’S FEES & EXPENSES

Appellant, Mr. Euzebio, hereby applies to this Court for a supplemental award of his attorney’s fees and expenses in the amount of **\$4,586.21**. This application is made pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(d), and this Court’s Rule 39.

I. Procedural History

The Board of Veterans’ Appeals issued a July 2017 decision that denied Mr. Euzebio’s claim for service connection for a thyroid condition including as due to Agent Orange and / or contaminated drinking water at Camp Lejeune. In October 2019, counsel for Mr. Euzebio appealed the Court’s decision to the Federal Circuit and in May 2021 the Court set aside and remanded the Board’s decision.

Appellant's counsel then filed a timely Application for Attorney's Fees and Expenses ("EAJA") on June 22, 2021, seeking a total fee amount of \$78,333.00.

The Secretary filed an opposed response to the EAJA on November 1, 2021 contesting Appellant's EAJA. Appellant's counsel then filed a response to the Secretary's opposition on November 30, 2021. On January 4, 2022, the Court awarded Appellant the full amount requested in the EAJA.

Mr. Euzebio submits below an itemized statement of the fees for which he applies. Accordingly, Mr. Euzebio contends that he is entitled to a supplemental award of attorney's fees in this matter in the total amount of **\$4,586.21**.

II. Argument

A. Mr. Euzebio is Entitled to Supplemental Fees because he Successfully Defended his Original Application

"It is unquestioned that EAJA fees are available for litigation over the EAJA application itself and that an award of fees and expenses for that purpose would generally follow from success in the basic EAJA application." *Cook v. Brown*, 6 Vet. App. 226, 240 (1994), *aff'd on other grounds*, 68 F.3d 447 (Fed. Cir. 1995); *accord I.N.S v. Jean*, 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990); *Fritz v. West*, 264 F.3d 1372 (Fed.Cir. 2001); *Swiney v. Gober*, 14 Vet. App. 65, 75 (2000); *Sandoval v. Brown*, 9 Vet. App. 177, 181-182 (1996), (92-168); *Camphor*

v. Brown, 8 Vet. App. 272, 277 (1995); *Curtis v. Brown*, 8 Vet. App. 104, 108 (1995).

Supplemental fees should be “granted to the extent that a claimant successfully defends his original fee application.” *Wagner v. Shinseki*, 640 F.3d 1255, 1260 (Fed. Cir. 2011) citing *Fritz v. Principi*, 264 F.3d 1372, 1377 (Fed. Cir. 2001). Mr. Euzebio successfully defended his application and the Court agreed when it awarded the full requested amount of \$78,333.00. He is now entitled to supplemental fees.

B. Itemized Statement of Fees and Expenses

“The sole consideration in determining a fees-for-fees supplemental application is one of reasonableness.” *McNeely v. West*, 12 Vet. App. 162, 164 (1999); see *Swiney v. Gober*, 14 Vet. App. at 75; *Cook v. Brown*, 6 Vet. App. at 240.

The itemization, prepared by Danielle Gorini, as Exhibit A, refers to Ms. Gorini, Mr. Stolz, Ms. Donahower’s, Ms. Degnan’s, and Ms. Cook’s work.¹

¹“There is nothing inherently unreasonable about a client having multiple attorneys, and they may all be compensated if they are not unreasonably doing the same work and are being compensated for the distinct contribution of each lawyer.” *Norman v. Hous. Auth. of City of Montgomery*, 836 F.2d 1292, 1301 (11th Cir. 1988); see also *Baldrige v. Nicholson*, 19 Vet.App. 227, 237-38 (2005)(“the fees sought must be ‘based on the distinct contribution of each individual counsel.’”). “The use in involved litigation of a team of attorneys who divide up

Danielle Gorini graduated from Roger Williams University Law School in 2005 and the *Laffey* Matrix establishes that \$591.00 is the prevailing market rate for an attorney with her experience. Zachary Stolz graduated from the University of Kansas School of Law in 2005 and the *Laffey* Matrix establishes that \$591.00 is the prevailing market rate for an attorney with his experience. April Donahower graduated from Temple University School of Law in 2013 and the *Laffey* Matrix establishes that \$452.00 is the prevailing market rate for an attorney with her experience. Kaitlyn Degnan graduated from Syracuse University School of Law in 2017 and the *Laffey* Matrix establishes that \$380.00 is the prevailing market rate for an attorney with her experience. Barbara Cook graduated from University of Michigan Law School in 1977 and the *Laffey* Matrix establishes that \$665.00 is the prevailing market rate for an attorney with her experience.

the work is common today for both plaintiff and defense work.” *Johnson v. Univ. Coll. of Univ. of Alabama in Birmingham*, 706 F.2d 1205, 1208 (11th Cir. 1983) holding modified by *Gaines v. Dougherty Cty. Bd. of Educ.*, 775 F.2d 1565 (11th Cir. 1985). “Careful preparation often requires collaboration and rehearsal[.]” *Rodriguez-Hernandez v. Miranda-Velez*, 132 F.3d 848, 860 (1st Cir. 1998). As demonstrated in Exhibit A, each attorney involved in the present case provided a distinct, and non- duplicative contribution to the success of the appeal. See *Baldrige*, 19 Vet.App at 237 (“An application for fees under EAJA where multiple attorneys are involved must also explain the role of each lawyer in the litigation and the tasks assigned to each, thereby describing the distinct contribution of each counsel.”).

Appellant seeks attorneys' fees at the rate of \$203.22 per hour for Ms. Gorini's, Ms. Donahower's, Ms. Degnan's, and Mr. Stolz's services before the Court.² This rate per hour, multiplied by the number of hours billed for these attorneys (21.60) results in a total attorneys' fee amount of \$4,389.55.

Appellant also seeks attorney's fees at the rate of \$196.66 per hour for Ms. Cook's representation services before the Court.³ This rate per hour, multiplied by the number of hours billed for Ms. Cook (1.00) results in a total attorney's fee amount of \$196.66.

Based upon all of the foregoing, the total supplemental EAJA fee sought is **\$4,586.21.**

² This rate was determined by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living as determined by the Consumer Price Index-U for Northeast. *See Mannino v. West*, 12 Vet. App. 242, 243 (1999). The increase was calculated for the period from March 29, 1996 (the start date of the EAJA rate), to April 2018 the chosen mid-point date for the litigation in this case, using the method described in *Elczyn v. Brown*, 7 Vet. App. 170, 181.

³ Per the agreement in *Bradley v. Wilkie*, 17-3797, this rate was determined using the formula proposed by the National Veterans Legal Services Program, Veterans Benefit Manual, [1683] (Barton Stichman et al. eds. 2017-18 ed.). Specifically, the hourly rate is determined using the \$193.83 hourly rate from the last month the Cincinnati Consumer Price Index-U was available in the second half of 2017, multiplying that number using the Midwest Consumer Price Index-U for the midpoint in the case, April 2018, divided by the data from the Midwest Consumer Price Index-U for December 2017 or 230.548.

I, Zachary M. Stolz, am the lead counsel in this case. I certify that I have reviewed the combined billing statement and am satisfied that it accurately reflects the work performed by all representatives. I have considered and eliminated all time that I believe, based upon my over ten years of practicing before this Court, is either excessive or redundant.

Respectfully submitted,
Robert M. Euzebio
By His Attorneys,
CHISHOLM CHISHOLM & KILPATRICK
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1/10/2022

Exhibit A

Time from 8/17/2021 to 1/10/2022

Case No. 252921

Client: Euzebio, Mr. Robert M.

			<u>Hours</u>
8/17/2021	APRIL	Called client to provide status update; left voice mail requesting call back; noted call in client's file	0.10
8/18/2021	APRIL	Received email from Court with order entering mandate; reviewed order for accuracy and saved to client's file; updated client calendar	0.10
8/26/2021	APRIL	Called client to provide status update; left voice mail requesting call back; noted call in client's file	0.10
8/31/2021	APRIL	Called client to provide status update; left voice mail requesting call back; noted call in client's file	0.10
8/31/2021	APRIL	Received phone call from client; provided status update; noted call in client's file	0.10
9/9/2021	DANIELLE	Received and reviewed email from OGC re: motion for extension of time to file EAJA response. Responded, saved email, updated file.	0.10
9/10/2021	DANIELLE	Received and reviewed email from the Court with OGC motion for extension of time to file EAJA response. Saved email, updated file.	0.10
11/2/2021	BARBARA	Reviewed OGC EAJA response, review decision to see what it relied on, review Bell and case it relied on to confirm not judicially created rule; memo to the file.	0.40
11/2/2021	DANIELLE	Received and reviewed email from Court with Aee EAJA response. Reviewed response. Note to the file re: OGC's opposition. Updated the file.	0.30
11/2/2021	ZACH	Reviewed Secretary's opposition to EAJA application. Drafted a note to the file re: strategy for response.	1.10
11/17/2021	APRIL	Performed research regarding "prevailing party" and "substantially justified"	3.00
11/17/2021	APRIL	Drafted prevailing party argument for EAJA reply	1.30
11/18/2021	APRIL	Conducted additional research re: prevailing party and change in the law; revised and added to prevailing party argument	2.80
11/19/2021	APRIL	Performed additional research and began drafting substantial justification argument	2.00
11/19/2021	APRIL	Completed substantial justification argument	2.50
11/22/2021	BARBARA	Review and edit draft EAJA reply, suggest moving arguments out of footnotes, adding a sentence as to absurdity of BVA view, and adding to conclusion	0.60
11/29/2021	APRIL	Implemented suggested edits to EAJA reply	1.30
11/29/2021	ZACH	Reviewed Court decisions, relevant portions of record, Secretary's EAJA challenge, and notes on case. Reviewed EAJA response and read relevant caselaw. Note to the file for April's reference.	3.00
11/30/2021	APRIL	Efiled reply to Secretary's response to EAJA application	0.10
11/30/2021	APRIL	Implemented proofreader's edits and saved EAJA reply	0.30
11/30/2021	APRIL	Made final revisions and substantive edits to EAJA reply	0.70
11/30/2021	KDEGNAN	Proofread EAJA Response.	0.40
12/3/2021	APRIL	Received and reviewed email from Court with EAJA judge assignment; saved to client's file; updated file.	0.10
12/20/2021	APRIL	Called client to provide status update; left voice mail requesting call back; noted call in client's file; sent follow-up email	0.20
12/20/2021	APRIL	Called client to provide status update on EAJA litigation; noted call in client's file	0.20
1/5/2022	ZACH	Reviewed Court's decision granting EAJA in full. Discussed via email with co counsel. Note to the file.	0.80
1/10/2022	DANIELLE	Reviewed file. Prepared Supplemental EAJA Petition and related Exhibit. Submitted completed Supplemental EAJA for proofreading and billing accuracy review.	0.50
1/10/2022	ZACH	Reviewed Supplemental EAJA Application for proofreading purposes and to ensure billing accuracy.	0.30

Timekeeper Summary

<u>Staff</u>	<u>Hours</u>	<u>Rate</u>	<u>Amount</u>
APRIL	15.0	\$ 203.22	\$ 3,048.30
BARBARA	1.0	\$ 196.66	\$ 196.66
DANIELLE	1.0	\$ 203.22	\$ 203.22
KDEGNAN	0.4	\$ 203.22	\$ 81.29
ZACH	5.2	\$ 203.22	\$ 1,056.74
	22.6		\$ 4,586.21

USAO ATTORNEY'S FEES MATRIX — 2015-2021*Revised Methodology starting with 2015-2016 Year*

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
31+ years	568	581	602	613	637	665
21-30 years	530	543	563	572	595	621
16-20 years	504	516	536	544	566	591
11-15 years	455	465	483	491	510	532
8-10 years	386	395	410	417	433	452
6-7 years	332	339	352	358	372	388
4-5 years	325	332	346	351	365	380
2-3 years	315	322	334	340	353	369
Less than 2 years	284	291	302	307	319	333
Paralegals & Law Clerks	154	157	164	166	173	180

Explanatory Notes

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-

Legal Services index measures. Although it is a national index, and not a local one, *cf. Eley v. District of Columbia*, 793 F.3d 97, 102 (D.C. Cir. 2015) (noting criticism of national inflation index), the PPI-OL index has historically been generous relative to other possibly applicable inflation indexes, and so its use should minimize disputes about whether the inflator is sufficient.

4. The methodology used to compute the rates in this matrix replaces that used prior to 2015, which started with the matrix of hourly rates developed in *Laffey v. Northwest Airlines, Inc.* 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985), and then adjusted those rates based on the Consumer Price Index for All Urban Consumers (CPI-U) for the Washington-Baltimore (DC-MD-VA-WV) area. The USAO rates for years prior to and including 2014-15 remains the same as previously published on the USAO's public website.
5. The various "brackets" in the column headed "Experience" refer to the attorney's years of experience practicing law. Normally, an attorney's experience will be calculated starting from the attorney's graduation from law school. Thus, the "Less than 2 years" bracket is generally applicable to attorneys in their first and second years after graduation from law school, and the "2-3 years" bracket generally becomes applicable on the second anniversary of the attorney's graduation (*i.e.*, at the beginning of the third year following law school). *See Laffey*, 572 F. Supp. at 371. An adjustment may be necessary, however, if the attorney's admission to the bar was significantly delayed or the attorney did not otherwise follow a typical career progression. *See, e.g., EPIC v. Dep't of Homeland Sec.*, 999 F. Supp. 2d 61, 70-71 (D.D.C. 2013) (attorney not admitted to bar compensated at "Paralegals & Law Clerks" rate); *EPIC v. Dep't of Homeland Sec.*, 982 F. Supp. 2d 56, 60-61 (D.D.C. 2013) (same). The various experience levels were selected by relying on the levels in the ALM Legal Intelligence 2011 survey data. Although finer gradations in experience level might yield different estimates of market rates, it is important to have statistically sufficient sample sizes for each experience level. The experience categories in the current USAO Matrix are based on statistically significant sample sizes for each experience level.
6. ALM Legal Intelligence's 2011 survey data does not include rates for paralegals and law clerks. Unless and until reliable survey data about actual paralegal/law clerk rates in the D.C. metropolitan area become available, the USAO will compute the hourly rate for Paralegals & Law Clerks using the most recent historical rate from the USAO's former *Laffey* Matrix (*i.e.*, \$150 for 2014-15) updated with the PPI-OL index. The formula is \$150 multiplied by the PPI-OL index for May in the year of the update, divided by 194.3 (the PPI-OL index for May 2014), and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
7. The attorney's fees matrices issued by the United States Attorney's Office are intended to facilitate the settlement of attorney's fees claims in actions in which the United States may be liable to pay attorney's fees to the prevailing party and the United States Attorney's Office is handling the matter. The United States Attorney's Office is presently working to develop a revised rate schedule, based upon current, realized rates paid to attorneys handling complex federal litigation in the District of Columbia federal courts. This effort is motivated in part by the D.C. Circuit's urging the development of "a reliable assessment of fees charged for complex federal litigation in the District." *D.L. v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019). This new matrix should address the issues identified by the majority in *D.L.*, but it is expected that it will be some time before a new matrix can be prepared. In the interim, for matters in which a prevailing party agrees to payment pursuant to the matrices issued by the United States Attorney's Office, the United States Attorney's Office will not demand that a prevailing party offer the additional evidence that the law otherwise requires. *See Eley*, 793 F.3d at 104 (quoting *Covington v. District of Columbia*, 57 F.3d 1101, 1109 (D.C. Cir. 1995)) (requiring "evidence that [the] 'requested rates are in line with those prevailing in the community for similar services'").