

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

HAROLD L. ROBY, JR,

Appellant,

v.

No. 17-0528

DENIS McDONOUGH,
Secretary of Veterans Affairs,

Appellee.

**APPELLANT’S APPLICATION FOR AN AWARD
OF REASONABLE ATTORNEY FEES AND EXPENSES**

Appellant, through counsel, hereby makes application to the Court for an award of reasonable attorney fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). The reasonable fee for this litigation is \$85,576.00. Additionally, expenses total \$550.00. The total amount of fees and expenses requested is **\$86,126.00**.

I. SUMMARY OF THE CASE

Mr. Harold L. Roby, Jr., (Veteran or Appellant), appealed a November 17, 2016, decision of the Board of Veterans’ Appeals. The decision denied Mr. Roby a 50% disability rating for his achalasia disability. This Court affirmed the Board’s decision on March 19, 2019. Mr. Roby filed a motion for reconsideration on May

24, 2019, which was denied by the Court on July 22, 2019. Mr. Roby appealed this Court's decision to the United States Court of Appeals for the Federal Circuit (the "Federal Circuit"). Before the Federal Circuit, Mr. Roby argued that he was entitled to a 50% disability rating for his achalasia disability under the rating schedule, and that this Court incorrectly denied his rating request, improperly interpreting and applying DC 7203. The Federal Circuit agreed, vacating and remanding the Court's decision. *Roby v. McDonough*, No. 2020-1088, 2021 WL 3378834 (Fed. Cir. Aug. 4, 2021).

II. ARGUMENT

The Equal Access to Justice Act ("EAJA") provides:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

...

(2) For the purposes of this subsection--

(A) "fees and other expenses" includes ... reasonable attorney fees

...

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except

that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

...

(F) “court” includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims.

28 U.S.C. § 2412. An award of fees requires that: (1) the claimant be a “prevailing party;” (2) the Government's position was not “substantially justified;” (3) no “special circumstances make an award unjust;” and, (4) any fee application be submitted to the court within thirty days of final judgment in the action and be supported by an itemized statement. *Commissioner, INS v. Jean*, 496 U.S. 154, 158 (1990). An award warranted in this case.

Mr. Roby prevailed in his appeal. He sought to overturn the Board’s decision denying a 50% disability rating for his achalasia disability on the basis that the Court improperly interpreted and applied DC 7203. Indeed, the Federal Circuit vacated and remanded this Court’s decision, which affirmed the Board’s decision, on the legal issue Mr. Roby raised. Consistent with the Federal Circuit’s decision, this Court set aside the Board decision and remanded the matter for readjudication. Mr. Roby is thus a prevailing party under the EAJA, having established “entitlement to some relief on the merits of his claims, either in the trial court or on appeal.” *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980). An appellant to this Court obtains prevailing party status when the appeal achieves “some form of ‘judicially

sanctioned change in the legal relationship of the parties.’” *Cycholl v. Principi*, 15 Vet. App. 355, 357 (2001) (quoting *Sumner v. Principi*, 15 Vet. App. 256, 260-61 (2001)). Appellant is a prevailing party because “where the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party (1) without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court.” *Halpern v. Principi*, 384 F.3d 1297, 1306(Fed. Cir. 2004) (quoting *Former Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360, 1366 (Fed. Cir. 2003)). This Court did not retain jurisdiction over the appeal on remand. Thus, the Veteran qualifies as a prevailing party for EAJA purposes regardless of the outcome of subsequent agency proceedings.

The position of the United States was not substantially justified in this case. “Substantially justified,” as used in the EAJA, means justified in substance, in the main, or to a degree that could satisfy a reasonable person. *See Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988). In determining whether the Government's position was substantially justified, the Court must consider the underlying agency action.

“[P]osition of the United States” means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

28 U.S.C.A. § 2412(d)(2)(D); *Felton v. Brown*, 7 Vet. App. 276, 289 (1994). Once an appellant claiming fees and expenses alleges the absence of a substantial justification, the burden shifts to the Secretary to establish that his position was substantially justified at both the administrative and judicial stages. *Cullens v. Gober*, 14 Vet. App. 234, 237 (2001) (en banc); see *Locher v. Brown*, 9 Vet. App. 535, 537 (1996). The Government must show “that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts.” *Gavette*, 808 F.2d at 1467 (emphasis in original). Government action should never be held substantially justified where, as here, it is contrary to statute, regulation or judicial precedent. See, e.g., *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-57 (1990).

Mr. Roby is unaware of any special circumstances which make an award of attorney fees unjust in this case.

The Court entered judgment in this case on May 23, 2022. An appeal to the United States Court of Appeals for the Federal Circuit would therefore have been timely if filed on or before July 22, 2022, within sixty days of the judgment. 38 U.S.C. §§ 7291(a), 7292(a). No appeal having been filed, this application is timely

if filed on or before August 22, 2022,¹ within thirty days of the final judgment of this Court. 28 U.S.C. § 2412(d)(1)(B).

Mr. Roby brought the captioned appeal in his individual capacity. Therefore, in order to qualify as a “party” under the EAJA it must be shown that his “net worth did not exceed \$2,000,000 at the time the civil action was filed.” 28 U.S.C. § 2412(d)(2)(B). The requirement is satisfied in this case because Appellant filed a declaration of financial hardship with the Court on February 22, 2017. *See Bazalo v. Brown*, 9 Vet. App. 304, 309 (1996), *rev’d sub nom. on other grounds Bazalo v. West*, 150 F.3d 1380 (Fed. Cir. 1998).

This application is accompanied by an affidavit from the Veteran’s representative. The affidavit includes the number of hours expended on this litigation and establish that, based upon the specific services performed, \$85,576.00 is a reasonable fee. An application for fees is allowable where it is based on records that are substantially reconstructed and reasonably accurate. *P.P.G. Indus. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1570 (Fed. Cir. 1988). In this case, the application is based upon contemporaneous time records.

¹ Thirty days following the July 22, 2022, final judgment is Sunday August 21, 2022. The next business day is Monday August 22, 2022. *Luyster v. Principi*, 167 Vet. App. 96, 99 (2002).

In addition to attorney fees, Appellant is entitled to recover expenses. 28 U.S.C. § 2412(d)(1)(A); *Cook v. Brown*, 6 Vet. App. 226, 237-40 (1994). Expenses properly include the filing fees paid to this Court and the Federal Circuit which total \$550.00. *Id.*

III. CONCLUSION

For the foregoing reasons, Mr. Roby respectfully requests that this Court order the Secretary to pay reasonable attorney fees and expenses in **the total amount of \$86,126.00 jointly to Harold L. Roby, Jr., and Finnegan, Henderson, Farabow, Garrett & Dunner, LLP.** The name of the undersigned representative, Thomas E. Sullivan, who is not entitled to payment of fees in his individual capacity, should not appear on the check. The Court should order that a check be delivered to counsel within thirty days following the date of the Court's order awarding fees and expenses.

Date: 08/17/2022

Respectfully submitted,

/s/ Thomas E. Sullivan

Thomas E. Sullivan

Charles T. Collins-Chase

FINNEGAN, HENDERSON, FARABOW,

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Attorneys for Claimant-Appellant

Harold L. Roby Jr.

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AFFIDAVIT OF THOMAS E. SULLIVAN, ESQ.

Now comes the undersigned, Thomas E. Sullivan, and certifies the following to be true and correct.

1. I, Thomas E. Sullivan, am lead counsel for Mr. Roby in the above captioned case. This affidavit is made to provide the Court with information in support of a claim for reasonable attorney fees under 28 U.S.C. § 2412(d).

2. I now have primary responsibility for this appeal. Charles T. Collins-Chase oversaw this appeal before the Federal Circuit; along with Kenneth S. Guerra, and Jennifer M. Vein, he conducted research, and drafted and reviewed papers filed in this appeal. Other contributors to the appeal were Ronald L. Smith, Amanda E. Stephenson, Kathleen A. Daley, Cora R. Holt, and Amy L. Fulton.

3. In the exercise of billing judgment, Appellant is not claiming fees for: tasks performed by support personnel or time expended on routine administrative tasks or work performed by non-attorney practitioners during the course of the appeal. Kenneth S. Guerra was admitted to the Virginia bar on November 25, 2019, during the course of this appeal. Accordingly, any billing entries for Mr. Guerra prior to November 25, 2019, will not be billed.

The consolidated billing statement is based on contemporaneous time records maintained during this appeal. AES = Amanda E. Stephenson; ALF = Amy L. Fulton; CRH = Cora R. Holt; CTC = Charles T. Collins-Chase; JMV = Jennifer M. Vein; KAD = Kathleen A. Daley; KSG = Kenneth S. Guerra; RLS = Ronald L. Smith; and TES = Thomas E. Sullivan.

Date	Attorney	Description	Hours Worked	Hours Reduced
3/21/2017	RLS	Prepared and filed my notice of appearance. Updated my docket. Added the client to the veterans' pro bono spreadsheet.	0.5	
5/16/2017	RLS	Reviewed CAVC order to file the opening brief within 60 days. Determined the date by which the brief is due. Updated dockets.	0.4	
5/16/2017	RLS	Reviewed the Board decision and the Record Before the Agency. Began drafting a memo setting the theories of the appeal and the laws and regulations supporting our arguments.	2.5	

Date	Attorney	Description	Hours Worked	Hours Reduced
5/17/2017	RLS	Reviewed CAVC order scheduling a briefing conference. Determined the date by which the conference memo is due. Updated by docket and calendar for the two events.	0.5	
5/22/2017	RLS	Met with AES. Discussed the theory of the appeal and preparation of the briefing-conference memo. Sent example memos to AES.	0.6	
5/23/2017	AES	Writing the Rue 33 Memo	3.4	3.4
5/25/2017	ALF	Conference with AES regarding arguments for memo.	0.5	0.5
5/25/2017	AES	Spoke with ALF for guidance on the legal argument; Continued to write the Rule 33 memo	5.0	5.0
5/26/2017	AES	Finished the Rule 33 memo; Sent the memo to DL, RLS, ALF, and TES to review	3.0	3.0
5/30/2017	AES	Met with RLS to discuss the memo; Edited the memo as per RLS's feedback; Submitted the edited memo to RLS for review.	5.0	5.0
5/30/2017	RLS	Reviewed and revised the draft briefing-conference memo.	1.0	
5/31/2017	AES	Edited the memo as per RLS's feedback; Filled out the certificate of service; Sent the memo and certificate of service to DL for submission to the VA and the CAVC	2.0	2.0
6/13/2017	RLS	Received voicemail from VA counsel proposing a joint motion for remand. Reviewed our briefing-conference memo. Returned counsel's call and discussed the proposal.	0.8	

Date	Attorney	Description	Hours Worked	Hours Reduced
6/13/2017	AES	Met with RLS and spoke to VA counsel about H. Roby and the pre-briefing conference.	2.0	2.0
6/14/2017	RLS	Received a call from the client. Explained the substance of the terms of the VA's offer of remand. Mr. Roby instructed us to decline the offer.	0.3	
6/14/2017	RLS	Prepared for and participated in the briefing conference. Conference with AES. Discussed drafting of the opening brief. Emailed example briefs to AES.	0.8	
6/19/2017	RLS	Reviewed the client's signed net-worth affidavit.	0.2	
7/10/2017	AES	Continued drafting the appeal brief to the CAVC for RLS.	2.7	2.7
7/11/2017	AES	Continued drafting the CAVC brief for RLS.	3.0	3.0
7/18/2017	AES	Continued to work on the CAVC brief regarding H. Roby for RLS.	2.0	2.0
7/20/2017	AES	Finished the first draft of the CAVC brief for H. Roby; Submitted it to RLS.	1.5	1.5
8/7/2017	RLS	Reviewed the Record Before the Agency. Reviewed and revised the statement of the issues, preliminary statement, and statement of facts for the opening brief.	2.7	
8/8/2017	RLS	Searched the Record Before the Agency for a transcript of a hearing reported in the Board decision. No such transcript was located. Revised the statement of facts in the opening brief based on the statements in the Board decision. Revised the statement of issues by eliminating two of the four assignments of error.	1.5	

Date	Attorney	Description	Hours Worked	Hours Reduced
8/9/2017	RLS	Revised the draft statement of issues and preliminary statement for the brief.	1.5	
8/14/2017	RLS	Revised the statement of the issues, course of proceedings, and statement of facts for the opening brief.	2.5	
8/15/2017	RLS	Drafted the first argument for the opening brief. Reviewed and expanded the statement of facts after further review of the Record Before the Agency. Revised the summary of the argument.	2.5	
8/16/2017	RLS	Revised the second argument. Reviewed the Record Before the Agency and updated the fact statement.	3.0	
8/21/2017	RLS	Reviewed and finalized the brief. Submitted the draft for review and comment.	2.0	
8/22/2017	RLS	Began revising the brief based on the August 22, 2016, Fed. Cir. decision in Gazelle v. Schulkin.	1.0	
8/23/2017	RLS	Researched additional case law. Revised arguments, statement of issues, summary of the argument, and conclusion. Revised the draft brief based on reviewer comments.	2.9	
8/28/2017	RLS	Reviewed and edited the draft brief. Completed the table of record citations. Verified the cites to the record. Filed the brief. Called the client. Wrote to the client and enclosed a copy of the brief.	3.0	
12/11/2017	RLS	Reviewed the opening briefs. Began draft the reply brief.	2.5	
12/12/2017	RLS	Researched CAVC case law. Reviewed and revised the draft Reply Brief.	1.5	

Date	Attorney	Description	Hours Worked	Hours Reduced
12/13/2017	RLS	Continued drafting the reply brief.	1.0	
12/18/2017	RLS	Researched CAVC case law. Continued drafting responses to the arguments in the VA brief.	2.0	
12/19/2017	RLS	Researched CAVC case law addressing section 4.7. Drafted a new section for the Reply Brief.	1.5	
12/20/2017	RLS	Completed, reviewed, and revised the draft reply brief. Submitted the brief to DGS for preparation of tables of contents, cases, regulations, and record citations.	2.5	
12/26/2017	RLS	Wrote to the client and enclosed a copy of the as-filed reply brief.	0.3	
12/26/2017	RLS	Reviewed and revised the tables of contents, authorities, and record citations. Reviewed reviewer comments on the draft reply brief. Filed the reply brief.	1.5	
1/8/2018	RLS	Received voicemail from the client. Returned the call and discussed the present status.	0.3	
1/10/2018	RLS	Reviewed and verified the contents of the Record on Appeal filed by VA.	0.5	
1/27/2018	RLS	Reviewed email from VA counsel regarding our motion for oral argument. Updated the draft motion accordingly. Submitted the draft for review and approval.	0.4	
2/24/2018	RLS	Reviewed order assigning the appeal to Judge Bartley.	0.1	
2/26/2018	RLS	Received voicemail from the client. Returned his call and discussed the present status of his appeal.	0.3	

Date	Attorney	Description	Hours Worked	Hours Reduced
3/26/2018	RLS	Discussed Mr. Roby's case with Roy Spicer of the DAV National Appeals Office. Called Mr. Roby and briefed him on the substance of my conversation with Mr. Spicer.	0.5	
5/8/2018	RLS	Reviewed CAVC order granting our motion for oral argument. Reviewed the Fed. Cir. decision denying the motion for rehearing en banc in the case of Kisor. Reviewed the opening brief in this appeal.	1.0	
5/16/2018	RLS	Reviewed the Fed. Cir. decision deny rehearing and rehearing en banc in Kisor v. Shulkin. Prepared and filed a notice of supplemental authority with the CAVC.	1.0	
5/21/2018	RLS	Reviewed CAVC order scheduling oral argument. Updated my docket and calendar. Set a date for a moot court and updated my calendar. Sent email to a number of Finnegan attorneys seeking judges for the moot court.	1.0	
6/26/2018	CTC	Analyze CAVC briefing.	0.4	
7/9/2018	CTC	Prepare admission materials for Court of Appeals for Veterans Claims.	0.1	
7/18/2018	RLS	Reviewed VA amended brief and CAVC order granting VA motion for leave to file that brief.	0.3	
7/19/2018	RLS	Reviewed briefs and record on appeal. Began drafting an outline for oral argument.	3.5	
7/21/2018	RLS	Reviewed the VA brief, Mr. Roby's brief, and the reply brief. Reviewed dictionary definitions for various terms likely to be questioned by the	3.8	0.8

Date	Attorney	Description	Hours Worked	Hours Reduced
		Court. Completed and revised an outline for oral argument.		
7/22/2018	CTC	Read CAVC briefs and record to prepare for moot session.	1.5	
7/22/2018	KAD	Review briefs for the Roby case in preparation for a moot court for the upcoming Roby oral argument.	1.8	1.8
7/23/2018	RLS	Prepared for and presented the appeal at a moot court.	2.5	
7/23/2018	RLS	Reviewed the briefs in light of comments from moot-court judges. Reviewed the relevant parts of the Record on Appeal. Revised my oral argument presentation.	3.7	0.7
7/23/2018	TES	Attend moot court.	1.0	1.0
7/23/2018	CTC	Prepare for and attend moot session for CAVC argument; prepare CAVC entry of appearance.	1.3	
7/23/2018	KAD	Prepare for and participate in moot court for the Roby case.	2.5	2.5
7/24/2018	RLS	Received a phone call from the client. Briefed Mr. Roby on the oral argument. Answered his question regarding the range of possible outcomes and the time it may take for the Court to issue a decision.	0.4	
7/24/2018	RLS	Prepared for and participated in oral argument at CAVC.	3.5	0.5
7/24/2018	CTC	Prepare for and attend oral argument at CAVC; confer with RLS regarding oral argument.	3.3	

Date	Attorney	Description	Hours Worked	Hours Reduced
1/15/2019	RLS	Received a phone call from Mr. Roby. Discussed the case and the fact that the appeal has been pending with the panel for nearly six month post argument.	0.3	
3/19/2019	CTC	Analyze CAVC decision.	0.5	
3/25/2019	RLS	Updated the docket. Sent emails to CTC and Paul Browning suggesting a time for a meeting to discuss either a motion for reconsideration the CAVC or an appeal to the Fed. Cir. Called the client and discussed the CAVC decisions. Informed Mr. Roby that options are still available and that we will be considering whether any should be undertaken.	0.5	
3/25/2019	CTC	Analyze CAVC decision.	0.5	
4/17/2019	CTC	Review CAVC decision.	0.5	
5/6/2019	CTC	Draft rehearing petition.	1.0	
5/7/2019	MLS	Discuss issues regarding potential motion for reconsideration with CTC.	0.3	0.3
5/7/2019	RLS	Researched statutes and VA regulations.	1.5	
5/7/2019	RLS	Began drafting a motion for panel reconsideration.	2.0	
5/7/2019	RLS	Reviewed the CAVC decision.	1.0	
5/7/2019	CTC	Draft rehearing petition.	4.9	1.9
5/8/2019	CTC	Draft rehearing petition.	0.8	
5/9/2019	MLS	Conduct legal research regarding deference afforded to VA for positions taken during litigation.	2.7	2.7
5/9/2019	CTC	Draft rehearing petition.	0.6	
5/10/2019	MLS	Conduct legal research regarding deference afforded to VA for positions taken during litigation.	2.1	2.1

Date	Attorney	Description	Hours Worked	Hours Reduced
5/13/2019	MLS	Conduct legal research regarding deference afforded to VA for positions taken during litigation.	2.0	2.0
5/14/2019	MLS	Conduct legal research regarding deference afforded to VA for positions taken during litigation; prepare summary of the same to CTC.	3.5	3.5
5/16/2019	MLS	Conduct further legal research regarding deference afforded to VA for positions taken during litigation; prepare update of the same to CTC.	2.2	2.2
5/21/2019	CTC	Draft motion for reconsideration of CAVC decision.	0.4	
5/22/2019	RLS	Reviewed and revised the draft motion for CAVC reconsideration.	2.5	
5/22/2019	JMV	Review Motion for Reconsideration for consistency, clarity, and any obvious errors.	2.5	
5/22/2019	CTC	Review and revise petition for rehearing in CAVC.	2.2	
5/23/2019	JMV	Draft table of contents for Motion for Reconsiderations.	1.1	
5/23/2019	CTC	Draft motion for reconsideration of CAVC decision.	1.0	
5/24/2019	CTC	Revise and finalize Motion for Reconsideration for filing.	2.0	
5/27/2019	RLS	Called the client. Discussed the motion for reconsideration filed on Friday and its implications both at the CAVC and potentially at the Federal Circuit.	0.5	

Date	Attorney	Description	Hours Worked	Hours Reduced
7/22/2019	RLS	Reviewed the CAVC order denying the motion for reconsideration and the CAVC judgment. Updated the docket for an appeal to the Fed. Cir. Determined the date an appeal is due. Sent email to all involved asking whether further consideration is needed before proceeding with the new appeal.	0.5	
8/14/2019	RLS	Met with CTC to prepare for the proposed appeal to the Federal Circuit. Called the client for express approval for the appeal. Briefed the client that an engagement agreement would be mailed to him this week.	0.5	
8/14/2019	RLS	Drafted an engagement agreement for the proposed appeal to the Federal Circuit.	0.6	
8/14/2019	CTC	Call Mr. Roby to discuss engagement agreement; confer with RLS regarding engagement letter and case.	0.6	
10/7/2019	RLS	Confirmed the due date for a notice of appeal. Coordinated with CTC on preparation of the notice. Requested a check for \$500 for the Fed. Cir. Filing fee.	0.4	
10/7/2019	JMV	Call with CTC regarding Notice of Appeal.	0.3	
10/8/2019	RLS	Phone conference with JMV. Revised an example notice of appeal to the Federal Circuit and emailed it to JMV.	0.5	
10/8/2019	JMV	Draft notice of appeal per CTC's instructions.	1.2	
10/9/2019	RLS	Discussed the final version of the notice of appeal to the Federal Circuit with CTC.	0.5	

Date	Attorney	Description	Hours Worked	Hours Reduced
		Revised and filed the notice of appeal.		
10/9/2019	CTC	Review and finalize draft Notice of Appeal for Federal Circuit.	0.4	
10/21/2019	KSG	Meet with RLS to discuss assignment; review lower court decision; review appendix and record from lower court decision.	3.3	3.3
10/21/2019	CTC	Confer with RLS regarding Federal Circuit appeal.	0.3	
10/23/2019	RLS	Reviewed CAVC notice of docket activity that the CAVC transmitted the notice of appeal to the Federal Circuit. Updated docket. Forwarded the notice to JMV and KSG.	0.3	
10/23/2019	KSG	Discuss docket update with RLS; update case files to include activity.	0.2	0.2
10/23/2019	CTC	Consider Federal Circuit filings.	0.2	
10/24/2019	KSG	Review CAFC rules for submitting a joint appendix; pull docket from Court of Appeals for Veteran's Claims.	0.9	0.9
10/25/2019	KSG	Review record for Roby appeal.	0.9	0.9
10/28/2019	KSG	Review record before Court of Appeals for Veteran's Claims; meet with team about docketing and deadlines; confer with CLM about joint appendix; review notice of docketing.	3.6	3.6

Date	Attorney	Description	Hours Worked	Hours Reduced
10/28/2019	RLS	Reviewed the Fed. Cir. notice of docketing. Determined filing deadlines and updated docket. Met with appeal team to assign preliminary tasks including preparation of appearances, statement of issues, and designation of materials from which the joint appendix will be prepared.	0.7	
10/28/2019	JMV	Review materials before meeting; meet with RLS, KSG, and CM to discuss tasks for case.	1.5	
10/29/2019	KSG	Review certificate of interest; review docketing statement; prepare materials for joint appendix and designation of materials.	1.7	1.7
10/29/2019	RLS	Reviewed and revised the draft Docketing Statement and Certificate of Interest.	1.0	
10/30/2019	RLS	Reviewed the appearance of JMV.	0.2	
10/30/2019	JMV	Draft Notice of Appearance in CAVC case; draft statement of the issues; draft letter to VA counsel regarding designating materials for appendix.	1.8	
10/30/2019	KSG	Research case law for definition of liquid for CAFC appeal issue.	0.9	0.9
11/1/2019	KSG	Review letter to opposing counsel outlining statement of issues.	0.1	0.1
11/1/2019	JMV	Circulate draft Statement of the Issues and Designation Letter for review.	0.4	
11/4/2019	KSG	Prepare files for joint appendix designation and begin numbering appendix pages.	2.4	2.4
11/4/2019	KSG	Discuss joint appendix material designation to opposing counsel.	0.3	0.3

Date	Attorney	Description	Hours Worked	Hours Reduced
11/4/2019	RLS	Reviewed and revised the Statement of Issues and the draft letter transmitting the designation of joint appendix materials to VA counsel.	0.6	
11/4/2019	JMV	Download restricted items from docket.	0.5	
11/5/2019	KSG	Prepare joint appendix table of contents for materials designation.	2.5	2.5
11/5/2019	JMV	Download restricted materials for joint appendix.	0.5	
11/6/2019	KSG	Complete table of contents appendix; confirm rules for order of appendix.	3.6	3.6
11/6/2019	JMV	Review order of appendix.	0.3	
11/7/2019	KSG	Confer with JMV about CAFC filing.	0.2	0.2
11/7/2019	JMV	Review and implement edits to designation letter and statement of the issues.	0.4	0.4
11/8/2019	KSG	Update information in CAFC filings.	0.6	0.6
11/8/2019	JMV	Convert forms to new format.	0.4	
11/11/2019	KSG	Review updates on plan for filing CAFC documents.	0.2	0.2
11/11/2019	JMV	Draft preliminary documents and revise for comments.	1.7	
11/11/2019	CTC	Review and revise Docketing Statement, Certificate of Interest, and letter to VA regarding joint appendix and identification of issues on appeal.	1.0	
11/12/2019	KSG	Review documents for CAFC filing deadline; confer with litigation assistant regarding filing.	0.8	0.8
11/12/2019	JMV	Prepare preliminary papers for filing and coordinate service with JK.	2.4	

Date	Attorney	Description	Hours Worked	Hours Reduced
11/12/2019	CTC	Finalize and file entries of appearance, docketing statement, and certificate of interest in Federal Circuit; review and revise letter to opposing counsel regarding joint appendix.	0.4	
11/15/2019	KSG	Review documents for appearance provided by opposing counsel.	0.2	0.2
11/15/2019	JMV	Review government appearance and attempt to contact government attorney.	0.4	
11/18/2019	CTC	Review and revise email to opposing counsel regarding service of Joint Appendix documents.	0.3	
11/19/2019	KSG	Review emails to be sent to opposing counsel.	0.3	0.3
11/19/2019	JMV	Email with opposing counsel regarding service of designated materials; coordinate delivery of designated materials.	0.5	
11/20/2019	KSG	Review briefing at CAVC; begin to prepare outline of issues for appeal.	2.9	2.9
11/20/2019	JMV	Coordinate meeting regarding brief; prepare outline for brief.	0.7	
11/21/2019	KSG	Research case law on Gardner and Auer deference; begin to prepare appeal brief outline.	4.8	4.8
11/21/2019	JMV	Draft corrected docketing statement in response to notice of non-compliant document.	1.3	
11/22/2019	KSG	Research Auer and Skidmore deference; 2AR documents for filing; prepare outline of appeal brief.	5.5	5.5
11/25/2019	KSG	Edit CAFC appellate opening brief outline.	1.3	
11/25/2019	JMV	Review outline for brief from KSG.	5.8	

Date	Attorney	Description	Hours Worked	Hours Reduced
11/26/2019	KSG	Respond to JMV's question; review red-lines and edit Roby brief outline; circulate brief outline to team.	0.5	
11/26/2019	JMV	Review outline for brief; coordinate team meeting.	0.4	
12/2/2019	KSG	Review CAVC briefing; meet with RLS, CTC, and JMV; update Roby brief outline.	3.7	0.5
12/2/2019	RLS	Conference to discuss the outline for the opening brief in the Federal Circuit.	1.0	
12/2/2019	JMV	Meeting to discuss briefing; draft motion to extend time.	3.9	
12/2/2019	CTC	Meet with Finnegan team to discuss outline of Federal Circuit brief and case strategy.	0.8	
12/3/2019	KSG	Research case law on raising issue first time on appeal and agency deference; edit brief outline.	2.6	
1/2/2020	KSG	Discuss next steps for Roby CAFC brief with JMV.	0.2	
1/2/2020	JMV	Review new filings.	0.2	
1/7/2020	KSG	Plan meeting with JMV regarding Roby appeal brief outline draft.	0.1	
1/7/2020	JMV	Review KSG's edits to the brief outline, prepare for team meeting.	0.6	
1/8/2020	KSG	Meet with JMV regarding Roby appeal brief; begin drafting Roby appeal brief.	3.2	
1/8/2020	JMV	Review outline of brief; meet with KSG regarding upcoming tasks.	1.3	
1/10/2020	KSG	Write draft of Roby appeal brief.	3.9	0.4
1/10/2020	CTC	Confer with team regarding Federal Circuit brief outline.	0.5	
1/13/2020	KSG	Draft Roby appellant brief statement of facts.	6.0	3.5

Date	Attorney	Description	Hours Worked	Hours Reduced
1/13/2020	KSG	Review argument outline to revise statement of facts.	1.4	
1/14/2020	KSG	Proofread and circulate draft brief.	1.4	
1/15/2020	KSG	Review email from JMV.	0.2	
1/15/2020	JMV	Review draft sections of opening brief drafted by KSG.	3.0	
1/16/2020	KSG	Update brief with JMV's comments.	2.1	
1/16/2020	JMV	Draft facts section of opening brief.	5.0	2.0
1/17/2020	JMV	Draft facts section of opening brief.	4.3	
1/20/2020	KSG	Meet with JMV to discuss brief; take notes on outline for drafting brief.	1.2	
1/20/2020	JMV	Meet with KSG regarding assignments for drafting brief; draft statement of facts section of brief.	4.7	2.7
1/21/2020	KSG	Update statement of facts for Roby brief; update standard of review.	2.5	
1/22/2020	KSG	Draft Roby brief.	11.3	6.3
1/22/2020	JMV	Draft sections of appellate opening brief.	1.6	
1/23/2020	KSG	Review changes to brief; search case law for JMV; research dictionary and medical textbooks for definitions for brief; bluebook cite check.	4.2	
1/23/2020	JMV	Draft opening appeal brief; correspondence with KSG regarding tasks.	5.3	2.3
1/24/2020	KSG	Review and proofread brief draft; add case law to brief; cite check facts with joint appendix; file Entry of Appearance.	4.7	2.7

Date	Attorney	Description	Hours Worked	Hours Reduced
1/24/2020	JMV	Proofread and revise opening brief.	1.2	
1/27/2020	KSG	Review edits to draft brief by RLS.	0.4	
1/27/2020	JMV	Review edits from RLS on draft opening brief.	0.2	
1/27/2020	RLS	Reviewed and edited the first draft of the opening brief for the Federal Circuit.	2.0	
1/31/2020	JMV	Review CAFC O'Brien opinion.	0.2	
2/6/2020	KSG	Confer with JMV and CTC regarding Roby brief feedback.	0.1	
2/10/2020	RLS	Prepared for and participated in a conference to review and revised the draft opening brief.	1.2	
2/10/2020	RLS	Received voicemail from the client. Returned the call and briefed Mr. Roby on the status of his appeal and an approximate time line for future proceedings.	0.4	
2/10/2020	KSG	Review materials for team meeting; research and respond to RLS's questions about CAFC docket; meet with team to discuss Roby brief; review Chevron application; confer with JMV about next steps; circulate update email to team.	5.0	2.5
2/10/2020	JMV	Review draft of opening brief; meet with RLS and KSG regarding opening brief; review email to CTC summarizing meeting.	1.9	
2/11/2020	RLS	Reviewed email from KSG outlining revisions to the opening brief. Respond with further suggestions.	0.5	
2/11/2020	KSG	Research case law distinguishing Chevron and Auer deference; confer with	4.6	1.6

Date	Attorney	Description	Hours Worked	Hours Reduced
		JMV; research case law on Skidmore deference.		
2/11/2020	JMV	Review research from KSG on Chevron applied to regulation interpretation.	0.5	
2/12/2020	KSG	Research case law on agency deference and constructions of statutes and regulations; make revisions to Roby brief.	8.1	5.1
2/13/2020	JMV	Review edits circulated by KSG to opening brief.	0.5	
2/13/2020	KSG	Make final edits to Roby draft brief; research case law to support arguments; confer with JMV about edits.	5.5	2.5
2/14/2020	JMV	Review edits to Roby opening brief.	2.2	
2/16/2020	JMV	Draft Roby opening brief.	1.6	
2/16/2020	KSG	Research case law for citations in section transitions for Roby brief.	0.5	
2/17/2020	KSG	Proofread brief; make edits and responses to comments on brief; find previously filed briefs raising Chevron analysis for ambiguous regulations.	5.9	3.5
2/18/2020	JMV	Update draft opening report.	0.6	
2/19/2020	KSG	Review record for food types veteran can eat.	0.9	
2/19/2020	CTC	Review and revise draft Federal Circuit brief.	1.5	
2/19/2020	CTC	Review and revise Federal Circuit opening brief.	2.0	
2/21/2020	KSG	Check in with JMV about proofreading and filing brief.	0.2	
2/23/2020	CTC	Review and revise Federal Circuit brief.	7.5	4.5
2/24/2020	KSG	Confer with CTC regarding brief edits; confer with JMV about updating brief and filing.	0.3	

Date	Attorney	Description	Hours Worked	Hours Reduced
2/24/2020	JMV	Coordinate proofread of opening brief; review edits from CTC to opening report.	2.6	
2/25/2020	KSG	Review CTC edits to brief; meet with JMV to discuss filing plan; discuss filing with litigation support staff; research case law for brief; fill in pin cites to brief; cite check brief; proofread brief.	6.1	4.1
2/25/2020	JMV	Meet with KSG regarding finalizing opening brief; review edits from CTC and DGS.	1.4	
2/25/2020	CTC	Review and revise Federal Circuit brief.	7.0	
2/26/2020	KSG	Edits draft of opening brief; compile edits among team for final brief; finalize opening brief; work with litigation support staff to file brief at CAFC.	11.1	8.0
2/26/2020	JMV	Review, revise, and finalize opening brief.	7.7	5.7
2/26/2020	JLR	Research case law for CAFC appeal brief.	1.3	
2/26/2020	CTC	Review and revise Federal Circuit brief; confer with JMV and KSG regarding edits to brief; finalize brief for filing.	7.2	4.0
2/27/2020	JMV	Correspondence with opposing counsel regarding index to appendix.	0.2	
2/27/2020	KSG	2AR emails to opposing counsel; draft email to RLS regarding brief completion; compare final brief edits to first draft.	0.8	
2/28/2020	KSG	Send email updating RLS on status of brief.	0.2	
4/6/2020	KSG	Review appellee reply brief from government; begin to review citations in appellee reply brief.	2.9	

Date	Attorney	Description	Hours Worked	Hours Reduced
4/6/2020	JMV	Review government's responsive brief.	5.5	1.5
4/7/2020	KSG	Review citations in appellee's brief.	1.7	
4/7/2020	JMV	Review and analyze government's brief.	3.1	
4/8/2020	CTC	Analyze Government's responsive Federal Circuit brief.	1.0	
4/9/2020	KSG	Review appellee brief case law citations.	6.2	4.0
4/9/2020	JMV	Review and analyze government's brief.	3.6	
4/9/2020	CTC	Confer with MJ about plan to "moot" the reply brief in Roby appeal.	0.5	
4/10/2020	KSG	Discuss Roby reply brief plan with CTC and JMV; review appellee brief.	4.7	
4/10/2020	JMV	Review and analyze cases cited in government's responsive brief; call with CTC and KSG regarding strategy for responding.	7.9	5.0
4/10/2020	CTC	Analyze Government's responsive Federal Circuit brief; confer with JMV and KSG regarding outline for reply brief.	2.0	
4/13/2020	KSG	Prepare outline for appellant reply brief; review record, CAVC briefs, CAVC decision, and oral argument materials.	8.6	5.0
4/13/2020	JMV	Review government's brief and analyze for responding, coordinate filing motion for extension of time.	4.7	
4/14/2020	KSG	Prepare outline for Roby reply brief.	3.7	
4/14/2020	JMV	Review government's brief and analyze for responding.	5.0	2.0

Date	Attorney	Description	Hours Worked	Hours Reduced
4/15/2020	KSG	Prepare outline for Reply Brief; discuss Reply Brief strategy on call with JMV.	3.5	
4/15/2020	JMV	Call with KSG to discuss Roby Reply; review draft outline sent by KSG; combine outlines to send to CTC for review; research using cannons of statutory construction for regulatory interpretation.	4.7	
4/16/2020	KSG	Prepare outline for Reply Brief, add case law and record citations.	5.1	2.1
4/16/2020	JMV	Review outline for reply brief.	0.9	
4/21/2020	CTC	Set up "moot" for drafting Federal Circuit reply brief.	0.4	
5/6/2020	CTC	Revise outline of Federal Circuit reply brief.	1.3	
5/7/2020	KSG	Review Roby reply brief outline.	0.7	
5/18/2020	JMV	Draft motion for extension of time; coordinate moot argument for determining strategy for reply briefing.	1.0	
5/18/2020	CTC	Review and revise draft motion for extension of time; review and revise email to counsel for Secretary.	0.5	
5/19/2020	JMV	Compile list of questions for moot judges.	2.2	
5/20/2020	CRH	Review briefs in advance of strategy call for reply.	2.0	2.0
5/21/2020	CRH	Conference call to discuss strategies for reply brief.	1.0	1.0
5/21/2020	JMV	Prepare for moot with CRH and KAD; attend moot with CRH, KAD, CTC; KSG.	2.1	

Date	Attorney	Description	Hours Worked	Hours Reduced
5/21/2020	KAD	Review decision and opening and response brief in Federal Circuit appeal; consider issues on appeal, questions for appeal team, and strategy for reply brief and appeal; participate in a team meeting to discuss issues and strategy for reply brief.	4.5	4.5
5/21/2020	CTC	Prepare for and conduct "moot session" to hone reply brief.	2.5	
5/27/2020	JMV	Update outline for Reply Brief.	1.7	
5/28/2020	JMV	Outline Reply Brief.	1.3	
6/1/2020	CTC	Prepare for "moot" session.	1.0	
6/5/2020	CTC	Draft Federal Circuit reply brief.	2.7	
6/6/2020	CTC	Draft Federal Circuit reply brief.	4.9	
6/7/2020	CTC	Draft Federal Circuit reply brief; consider record before VA.	10.2	5.0
6/8/2020	KSG	Check in with CTC and JMV regarding reply brief.	0.2	
6/8/2020	CTC	Draft Federal Circuit reply brief; consider record before VA.	3.5	
6/9/2020	KSG	Prepare and edit CAFC reply brief; bluebook cite check brief; and confirm record cites.	9.4	4.4
6/9/2020	CRH	Review and provide comments on reply brief.	1.4	
6/9/2020	JMV	Call with CTC and KSG to discuss finalizing brief; Review Reply brief.	4.3	
6/9/2020	CTC	Draft Federal Circuit reply brief; consider record before VA.	9.5	6.5
6/10/2020	KSG	Edit and finalize CAFC reply brief.	5.3	3.3
6/10/2020	JMV	Edit Reply brief, review edits from CTC and KSG, and finalize Reply brief for filing.	2.2	

Date	Attorney	Description	Hours Worked	Hours Reduced
6/10/2020	KAD	Review draft reply brief and correspond with CTC regarding the same.	1.2	
6/10/2020	CTC	Draft Federal Circuit reply brief; consider record before VA.	6.7	3.7
6/11/2020	KSG	Call with CM discussing joint appendix preparation and redactions.	0.4	
6/12/2020	KSG	Review record citations in opening, response, and reply briefs; confirm citations in joint appendix; review redactions to cited sections of record before the agency.	3.1	
6/13/2020	KSG	Confirm pages to produce for unsealed joint appendix; review redactions to joint appendix for completion.	3.9	1.4
6/13/2020	TES	Review Reply brief filed on June 12.	1.0	1.0
6/14/2020	KSG	Confirm pages to produce for unsealed joint appendix; review redactions to joint appendix for completion.	3.3	
6/15/2020	KSG	Confirm joint appendix draft is complete; review CAFC joint appendix rules; confer with CTC that joint appendix is complete and explain what each section is; finalize joint appendix pages; proof table of contents and joint appendix page labeling; confirm redactions are complete.	4.8	1.5
6/15/2020	CTC	Finalize Federal Circuit joint appendix.	1.2	
6/16/2020	KSG	Review final copy of joint appendix for filing.	1.5	
8/24/2020	KSG	Review government supplemental authority submission; check in with CTC	0.3	

Date	Attorney	Description	Hours Worked	Hours Reduced
		and JMV regarding potential reply.		
8/24/2020	JMV	Review Supplemental Authority filed by Secretary.	0.2	
8/25/2020	JMV	Review Supplemental Authority filed by Secretary and consider strategy for responding.	1.7	
8/27/2020	KSG	Review VA supplemental authority filing; review JMV's proposed strategy for response.	0.6	
8/27/2020	CTC	Confer with Mr. Roby about appeal.	0.3	
8/31/2020	JMV	Draft response to Supplemental Authority filed by Secretary	1.2	
8/31/2020	CTC	Draft responsive Rule 28(j) letter regarding Kisor case.	3.5	
9/2/2020	KSG	Review DOJ notice of supplemental authority and Kisor remand; review draft letter response.	0.9	
9/3/2020	KSG	Review Federal Rules of Appellate Procedure and Federal Circuit local rules filing on supplemental authority response.	0.6	
9/3/2020	JMV	File response to supplemental authority.	3.0	
9/3/2020	CTC	Finalize and file Rule 28(j) letter.	1.5	
9/15/2020	KSG	Review notice of scheduling conflicts; review Federal Circuit Oral Argument Guide.	1.2	
9/16/2020	CTC	Prepare Notice to Advise of Scheduling Conflicts; confer with team regarding argument.	1.9	
9/21/2020	KSG	Review CAFC notice of DOJ's late filing; review local rules on consequences for DOJ's late filing; discuss filing with JMV.	1.8	

Date	Attorney	Description	Hours Worked	Hours Reduced
10/30/2020	KSG	Review Federal Circuit briefing.	2.6	
11/2/2020	KSG	Shepardize cited cases in briefs; check for developments in relevant case law.	2.8	
8/4/2021	KSG	Review Roby CAFC opinion; prepare summary of opinion; research petition for rehearing; review Kisor case progeny.	3.9	
8/4/2021	JMV	Review decision from the Federal Circuit.	0.8	
8/4/2021	CTC	Analyze Federal Circuit opinion; confer with client; confer with TES regarding remand; confer with RLS; draft summary of Federal Circuit opinion.	5.3	2.0
8/5/2021	KSG	Verify bill of costs form information; review citation to supplemental authority.	0.6	
8/5/2021	CTC	Prepare summary of case; confer with TES and D. Hines regarding request to make Federal Circuit's opinion precedential.	3.0	
8/6/2021	CTC	Edit press release; consider remand issues.	2.0	
9/23/2021	CTC	Confer with client regarding appeal and remand.	0.3	
10/29/2021	KSG	Evaluate the Roby docket and reach out to CTC.	0.3	
11/4/2021	KSG	Check in on Roby remand.	0.2	
11/9/2021	KSG	Check in with CTC.	0.1	
11/11/2021	KSG	Check in with CTC.	0.2	
11/29/2021	KSG	Confer with CTC regarding Roby remand.	0.2	
11/30/2021	KSG	Review Roby docket; review local rules on remand mandates; respond to request from CTC; contact TES regarding next steps for remand.	1.4	

Date	Attorney	Description	Hours Worked	Hours Reduced
1/10/2022	KSG	Check Roby docket for remand.	0.2	
1/20/2022	KSG	Review docket.	0.1	
1/24/2022	KSG	Check Roby Docket.	0.2	
2/7/2022	KSG	Check Roby docket.	0.2	
2/14/2022	KSG	Check Roby docket.	0.3	
2/21/2022	KSG	Check Roby docket.	0.3	
3/23/2022	KSG	Correspondence with client regarding Veterans Discharge Upgrade Claim; confirm docket status.	1.0	
4/5/2022	KSG	Review docket for written mandate.	0.3	
4/11/2022	KSG	Check Roby docket.	0.3	
4/18/2022	KSG	Review docket for updates.	0.3	
4/25/2022	KSG	Check Roby docket for remand mandate.	0.3	
4/29/2022	CTC	Consider Veterans Court decision.	1.0	
5/2/2022	KSG	Check Roby docket for mandate.	0.2	
5/2/2022	KSG	Review Roby mandate order and opinion, confirm accuracy, and confer with CTC.	1.7	
5/5/2022	CTC	Confer with Mr. Roby regarding Veterans Court opinion.	0.9	
6/1/2022	KSG	Review CAVC mandate.	1.1	
6/4/2022	KSG	Review materials for mandate filing and begin outlining EAJA application.	2.7	
6/7/2022	KSG	Research EAJA standard and guidance.	1.2	
6/22/2022	KSG	Revise EAJA application.	1.6	
Subtotal Attorney Hours Expended				630.6
Attorney Hours Reduced				206.2
Total Net Attorney Hours Claimed				424.4

4. The rate at which fees are claimed for attorney services is based on the statutory rate of \$125.00 per hour plus the cost-of-living allowance, which is adjusted to the midpoint of the period during which work was performed. This results in a rate of \$201.64 per hour.² See *Levernier Constr., Inc. v. United States*, 947 F.2d 497, 504 (Fed. Cir. 1991) (“EAJA authorizes the award of the lower of either the prevailing market rate or [\$125.00] per hour plus a COLA”); *Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994) (“[T]he Court will permit—and encourage—the selection of a single mid-point date, such as the date upon which an appellant’s principal brief . . . is filed with the Court, as the base for calculating a cost of living increase.”). Therefore, the reasonable fee for legal services in this matter is \$85,576.00, representing 424.4 attorney hours expended at the rate of \$201.64 per hour.

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

² The rate of \$201.64 per hour was determined by multiplying the statutory rate of \$125.00 per hour by the consumer price index for Washington, DC, July 2017, the month prior to the filing of Appellant’s opening brief to this Court.

Date: 08/17/2022

Respectfully submitted,

/s/ Thomas E. Sullivan

Thomas E. Sullivan

Charles T. Collins-Chase

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