UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

THURMAN FULLER, JR., Appellant,	)	
v.	)	
DENIS R. MCDONOUGH, Secretary of Veterans Affairs, Appellee.	)	Vet.App. No. 18-7000

APPELLANT'S REPLY IN SUPPORT OF APPLICATION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and U.S. Vet. App. Rule 39, Appellant Thurman Fuller, Jr. ("Appellant" or "Mr. Fuller"), by and through his undersigned counsel, respectfully submits this concise reply brief in further support of his application for an award of reasonable attorney fees and expenses (the "Application") in the amount of $39,710.30, as a prevailing party, for litigating the merits of this appeal.

I. The Secretary's Position Was Not Substantially Justified

Despite the Secretary's arguments to the contrary, Mr. Fuller is entitled to an EAJA award of fees and expenses because the Secretary's positions were not substantially justified. Notably, the Secretary's opposition to the Application fails to account for the August 19, 2022 opinion in which the BVA granted an effective date of June 28, 2002 for the apportionment of Mr. Fuller's benefits on behalf of his wife. *See* BVA, Aug. 19 Opinion, https://www.va.gov/vetapp22/Files7/22047378.txt (last accessed Nov. 15, 2022). In making this determination, the BVA first found that Mr. Fuller had "met the requirements of all five factors in order to establish standing . . . to pursue the appeal as to the effective date of the apportionment of his benefits to his spouse." *Id.* The Board also found that Mr. Fuller had established entitlement to apportionment. *Id.* Because Mr. Fuller had standing to pursue his appeal, "it logically follows that the Veteran thereby has standing to file a claim for an

apportionment on behalf of his wife during his period of incarceration." *Id.* Thus, the BVA found that Mr. Fuller's "March 17, 2004 VA Form 21-686c served as an intent to file a claim for an apportionment. This claim was received within one year after the notice to the incarcerated Veteran that payments would be reduced as a result of his incarnation. Thus, the first prong in establishing an apportionment was met." *Id.* Additionally, the BVA found that, under the circumstances of Mr. Fuller's case, the VA had "failed in its duty to notify and assist the Veteran that his claim for an apportionment on behalf of his wife was going to be considered abandoned due to a lack of response from his spouse." *Id.* Moreover, the BVA acknowledged that, in litigating Mr. Fuller's appeal, "there has been some fault on the part of the VA in ensuring this claim was adequately developed before procedural actions were taken." *Id.* In other words, the BVA vindicated Mr. Fuller's legal positions throughout the appeals process and ruled in his family's favor, and awarded him the remedies he has been seeking for years. And just as importantly, the BVA did not accept the Secretary's arguments, such as that Mr. Fuller lacked standing, or that his family did not deserve the relief.[1]

Under the "totality of the circumstances," the record does not "supply . . . evidence" that the VA's position has been substantially justified. *White v. Nicholson*, 412 F.3d 1314, 1316 (Fed. Cir. 2004). Instead, the BVA's Opinion indicates that the VA took positions which were inconsistent with the law and not based on facts, and that the VA failed to maintain a proper record relating to Mr. Fuller's claim. Under these circumstances, the Secretary cannot establish substantial justification, and an award of reasonable fees is proper.

[1] At one point during the appeal, the Secretary's brief claimed Mr. Fuller was an opportunistic ex-prisoner who was abusing the appeal to obtain withheld benefits, for himself, after his incarceration ended. There was zero evidence supporting this characterization of Mr. Fuller's motives, which have always been to help his wife collect her lawful benefits.

II. Mr. Fuller's Fees Are Reasonable

The Secretary fails to establish that Mr. Fuller's fees and expenses are not reasonable considering the circumstances of this appeal. Mr. Fuller is entitled to an award of fees based on the "number of hours reasonably spent on the litigation multiplied by a reasonable hourly rate." *Ussery v. Brown*, 10 Vet. App. 51, 53 (1997). Rather that presenting evidence to support its claims that the requested fees are unreasonable or excessive, the Secretary offers only "bald statement[s]" devoid of "any contextual reference." *Id.* at 54. For example, the Secretary claims that Mr. Fuller's counsel spent excessive time performing tasks such as preparing for oral argument or drafting a statement of facts to include in Mr. Fuller's briefing. These assertions fail to account for context, such as the "lengthy timeline of this case." *Id.*; BVA Aug. 19 Opinion (making note of the "lengthy timeline" and complex procedural history of the case). Such "[u]nnsupported allegations of excessive time expended are insufficient to justify a reduction in hours." *Ussery*, 10 Vet. App. at 54. Similarly, the Secretary makes unsupported claims that time entries are "duplicative." For example, the Secretary asserts that Mr. Apicelli and Ms. Danta should not have both billed for attendance at the Rule 33 conference or for working on Mr. Fuller's reply brief. *See* Opp. at 20. However, the "mere fact that two people" performed a similar task "does not indicate . . . that their efforts were duplicative." *Id.* Because the Secretary fails to present evidence that the allegedly duplicative entries were, in fact, duplicative, the Court must find that the hours expended on these tasks were reasonable. *See id.*

In evaluating Mr. Fuller's fee request, the Court may also consider whether he "achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award[.]" *Id.* at 53. The Secretary does not dispute that Mr. Fuller is the prevailing party. Not only did Mr. Fuller achieve success before the Court, but also before the BVA in its consideration of his case on remand. *See* BVA Aug. 19 Opinion. Mr. Fuller's success depended

in part on this Court's, and the BVA's, finding that he had standing to pursue his claims. The issue of standing turned out to be one of the most hotly contested issues in the case, although it was not an issue that Mr. Fuller appealed; the issue turned on factual findings that the Board made in Mr. Fuller's favor; and the Board previously considered and rejected the same arguments the Secretary re-made on appeal. Unsurprisingly, the Court's order and the BVA's August 19 Opinion confirm that Mr. Fuller had standing to pursue his claims. The Secretary's legal positions made it necessary for Mr. Fuller's attorneys to expend such significant time and resources on the issue of standing that otherwise would not have been necessary. These fees would not have been incurred if the Secretary had not pursued the unreasonable argument that Mr. Fuller lacked standing. These fees should be awarded based on Mr. Fuller's level of success and the circumstances surrounding that success.

Finally, in arguing that certain fee entries are "excessive," or were not properly billed in the first place, the Secretary makes many uncharitable assumptions and mischaracterizations of undersigned counsel's work – all of which was necessary to secure the Fullers' relief. An illustrative example of this tactic is in the Secretary's discussion of Ms. Danta's preparation for oral argument before the three-judge panel. Shortly before the argument, the panel issued an order asking the attorneys to be prepared to discuss a Supreme Court opinion, which required a thorough review of not just the opinion, but its context and the many cases on which it relied. The Secretary asserted: "The vagueness of the description of work aside, the 9.5 hours billed on that day to prepare for and attend oral argument on that date appears facially dubious given that oral argument was held at 10:00am." In fact, Ms. Danta did not sleep the night before the argument because she wanted to understand the material thoroughly in order to best represent her client, and to make her best impression before the three-judge panel considering the importance

of this case to the Fullers. It is outrageous to imply that any attorney, including Ms. Danta, falsified time entries to obtain an EAJA award.

III. CONCLUSION

For the foregoing reasons, and for the reasons set forth in Mr. Fuller's EAJA application, Appellant respectfully requests that the Court award him attorneys' fees and expenses in the total amount of $39,710.30.

Respectfully submitted this 15th day of November, 2022.

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