

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CHARLES C. BOLTON)	
Appellant)	
)	
v.)	Vet. App. No. 21-4627
)	
DENIS MCDONOUGH)	
Secretary of Veterans Affairs)	
Appellee)	

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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APPELLANT’S APPLICATION FOR AWARD OF REASONABLE 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. R. 39, Appellant, Charles C. Bolton, applies for an award of reasonable attorneys’ fees and expenses in the amount of \$6,124.07.

PROCEDURAL HISTORY

On April 26, 2021, the Board of Veterans’ Appeals (“Board” or “BVA”) issued a decision that denied the veteran entitlement to service connection for an acquired psychiatric disability, to include unspecified mood disorder, polysubstance dependence, and unspecified personality disorder (claimed as depression) and denied entitlement to service connection for human immunodeficiency virus (HIV). Appellant, through undersigned counsel, timely appealed the decision to this Court and the parties joined a Rule 33 conference on November 4, 2021. The parties were unable to agree to a compromise resolution. Appellant filed his initial brief on January 20, 2022, and by May 2022 the matter was fully briefed before the Court. On October 31, 2022 the Court issued

a memorandum decision vacating the April 26, 2021 Board decision and remanding for readjudication consistent with the Court's decision.

The Court vacated the Board's decision because its reasons and bases for finding the presumption of soundness were inadequate. The Court agreed with Appellant's argument that the Board failed to consider a VA examiner's opinion that Appellant is an unreliable historian when it found his statements regarding a preexisting condition probative evidence to rebut the presumption of soundness. The Court found judicial review frustrated because "it is unclear what weight the Board afforded to Mr. Bolton's statements provided during the January 2020 VA examination, how it reconciled that determination with the VA examiner's opinion that Mr. Bolton was an unreliable historian, and to what extent its ultimate preexistence finding was dependent on Mr. Bolton's January 2020 statements." Court's Mem. Dec. at 6. The Court also advised that the Board shall reconsider Appellant's claim on the evidence as it currently sits and is not to supplement the record. Lastly, the Court also vacated and remanded the Board's decision on service connection for HIV, finding that claim was inextricably intertwined with the other claim on appeal.

The Court issued Mandate on January 23, 2023 and thus this application is timely.

ARGUMENT

I. APPELLANT IS A PREVAILING PARTY AND ELIGIBLE TO RECEIVE AN AWARD.

Under 28 U.S.C. § 2412(d), a court shall award to a prevailing party fees and other expenses incurred by that party in any civil action, including proceedings for judicial review of agency action. To obtain “prevailing party” status, a party need only to have obtained success “on any significant issue in litigation which achieve[d] some of the benefit ... sought in bringing the suit.” *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993). Appellant is a prevailing party entitled to an award of fees and costs because the Court vacated the Board’s decision on appeal based on the Board’s failure to provide an adequate statement of the reasons and bases for its findings. The Court remanded the case for further adjudication in accordance with its mandate. *See Sumner v. Principi*, 15 Vet. App. 256 (2001) (*en banc*). The Court-ordered relief creates the “material alteration of the legal relationship of the parties necessary to permit an award of attorney’s fees.” *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health and Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Garland Indep. Sch. Dist.*, 489 U.S. at 792).

Appellant is a party eligible to receive an award of reasonable fees and expenses because his net worth did not exceed \$2 million at the time this civil action was filed. As an officer of the Court, the undersigned counsel hereby states that Appellant’s net worth did not exceed \$2 million at the time this civil action was filed and Appellant did not own any unincorporated business, partnership, corporation, association, unit of local

government, or organization, of which the net worth exceeded \$7 million and which had more than 500 employees. *See Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996).

II. THE POSITION OF THE SECRETARY OF VETERANS AFFAIRS WAS NOT SUBSTANTIALLY JUSTIFIED.

The Secretary can defeat Appellant's application for fees and costs only by demonstrating that the government's position was substantially justified. *See Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The U.S. Supreme Court has held that for the position of the government to be substantially justified, it must have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *accord, Beta Sys. v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

In this case, the Secretary's administrative position was not substantially justified. As described more fully in the "Procedural History," *supra*, the Court vacated and remanded the Board's decision based on its findings as to various errors made by the Board. These errors had no reasonable basis in fact or in law.

III. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES.

An itemized statement of the services rendered is attached to this application as Exhibit A, and the reasonable fees and expenses for which Appellant seeks compensation are listed below in this section. Included in Exhibit A is a certification that lead counsel has "(1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all counsel and (2) considered and eliminated all time that is

excessive or redundant.” *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005).

In the exercising of billing judgment, Appellant eliminated .9 hours of attorney time. In addition, several activities related to the appeal (e.g. paralegal time spent preparing procedural motions and filing the briefs) are removed entirely from the invoice.

Appellant seeks attorneys’ fees at the following rates for representation in the Court of Appeals for Veterans Claims:

Matthew Greig ¹ (2006 law graduate, New Orleans, LA based)	\$228.51
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Pursuant to U.S. Vet. App. R. 39(f), Exhibit A contains a single, consolidated, chronological billing statement for the full fee award requested.

WHEREFORE, Appellant respectfully requests that the Court award attorneys’ fees and expenses in the total amount of **\$6,124.07**.

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¹ A rate in excess of \$125 per hour for counsel for Appellant in this case is justified based on the increase in the cost of living since the EAJA was amended in March 1996. See 28 U.S.C. § 2412(d)(2)(A)(ii). The \$125 attorney fee rate, adjusted for inflation for urban consumers in the Southern Region was \$228.51 in January 2022, the month in which Appellant filed his initial brief and considered the midpoint of litigation. See Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the Department of Labor’s Consumer Price Index for Urban Consumers (“CPI-U”) in the Southern Region area adjusted for inflation between March 1996 and January 2022. See Exhibit B; *Mannino v. West*, 12 Vet. App. 242 (1999). The market rates for Appellant’s attorney exceeded \$228.51 per hour during the relevant time period. *Covington v. District of Columbia*, 839 F. Supp. 894, 904-05 (D.D.C. 1993), *aff’d*, 58 F.3d 1101 (D.C. Cir. 1995). See “Laffey Matrix” (Exhibit C).

Respectfully,

/s/ Matthew Greig

Matthew G. Greig

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EXHIBIT

A

Attorney Hours

Charles C. Bolton v. Denis McDonough
Docket No.: 21-4627

<u>Date</u>	<u>Hours</u>	<u>Description</u>	<u>Billable (\$)</u>	<u>Attorney</u>
7/8/21	0.5	Analyze 4.26.21 BVA decision for appealable error	\$114.26	Matthew Greig
7/8/21	0.4	Conversation with client re appeal to CAVC	\$91.40	Matthew Greig
9/15/21	1.5 [.3hrs eliminated]	Analyze and catalog RBA to ensure it is complete	\$342.77	Matthew Greig
10/18/21	1.1	Analyze claim history, incl prior BVA remands, agency decisions, appeals, and related processing docs	\$251.36	Matthew Greig
10/18/21	0.5	Analyze lay statements, incl BVA hearing transcript	\$114.26	Matthew Greig
10/18/21	0.8	Analyze relevant DBQs	\$182.81	Matthew Greig
10/18/21	2.3	Analyze appellant's post-service medical records	\$525.57	Matthew Greig
10/19/21	2.8	Prepare R33 memo	\$639.83	Matthew Greig
10/19/21	0.9 [.4hrs eliminated]	Analyze CAVC precedent finding reversal, not remand, the appropriate remedy	\$205.66	Matthew Greig
11/4/21	0.4	Prepare for R33 conf by reviewing SOI, BVA decision, relevant pages from RBA, and Horn decision	\$91.40	Matthew Greig
11/4/21	0.2	Attend R33 conf	\$45.70	Matthew Greig
11/4/21	0.4	Conv w client re R33 outcome	\$91.40	Matthew Greig
11/30/21	0.1	E-mail to Sec's counsel responding to remand offer	\$22.85	Matthew Greig
1/19/22	1.3	Prepare statement of the case	\$297.06	Matthew Greig
1/19/22	1.7 [.2hrs eliminated]	Conduct additional analysis re Horn and how it relates to Nieves, et al. standards	\$388.47	Matthew Greig
1/19/22	1.6	Analyze CAVC precedent re phrases used to describe the as likely as not and other standards	\$365.62	Matthew Greig
1/20/22	3.8	Prepare primary argument for brief	\$868.34	Matthew Greig
1/20/22	0.7	Prepare summary of argument	\$159.96	Matthew Greig
1/20/22	0.9	Review and make substantive edits to draft brief	\$205.66	Matthew Greig
5/18/22	1.5	Analyze Secretary's brief	\$342.77	Matthew Greig
10/31/22	0.5	Analyze court's memo decision	\$114.26	Matthew Greig
11/2/22	0.4	Conversation with client re court's memo decision	\$91.40	Matthew Greig
1/11/23	0.4	Prepare correspondence to client	\$91.40	Matthew Greig
2/12/23	2.1	Prepare EAJA application	\$479.87	Matthew Greig

Total Hrs **26.8**

Total Amount **\$6,124.07**

CERTIFICATION

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

Date: February 13, 2023

/s/ Matthew Greig
Matthew G. Greig

EXHIBIT
B

Fee Calculation for Attorney Matthew Greig (New Orleans, LA based)

March 1996 to January 2022 Inflation Calculation

$$125 \times \frac{271.634}{152.4} = 222.797$$



U.S. BUREAU OF LABOR STATISTICS

HOME ▾ SUBJECTS ▾ DATA TOOLS ▾ PUBLICATIONS ▾ ECONOMIC RELEASES ▾ CLASSROOM ▾ BETA ▾

Databases, Tables & Calculators by Subject

Change Output Options: From: 1996 To: 2022 GO
 include graphs include annual averages [More Formatting Options](#) ➔

Data extracted on: January 20, 2023 (9:39:10 AM)

CPI for All Urban Consumers (CPI-U)

Series Id: CUUR0300SA0, CUUS0300SA0
 Not Seasonally Adjusted
Series Title: All items in South urban, all urban consumers, not seasonally adjusted
Area: South
Item: All items
Base Period: 1982-84=100

Download: [xlsx](#)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
1996	151.1	151.5	152.4	153.2	153.5	154.0	154.0	154.1	154.5	154.9	155.1	155.1	153.6	152.6	154.6
1997	155.7	156.1	156.5	156.7	156.6	157.0	157.0	157.1	157.5	157.8	157.8	157.3	156.9	156.4	157.4
1998	157.6	157.8	158.2	158.5	158.8	159.1	159.3	159.5	159.5	159.8	159.6	159.6	158.9	158.3	159.6
1999	159.9	160.0	160.6	161.5	161.6	161.7	162.2	162.6	163.2	163.6	163.5	163.6	162.0	160.9	163.1
2000	164.1	164.8	166.5	166.7	166.7	167.5	168.0	168.0	168.5	168.5	168.6	168.4	167.2	166.1	168.3
2001	169.3	170.2	170.6	171.4	171.7	172.2	171.6	171.5	172.2	171.7	171.0	170.3	171.1	170.9	171.4
2002	170.6	171.0	172.1	173.1	173.2	173.5	173.6	173.8	174.2	174.9	174.9	174.6	173.3	172.3	174.3
2003	175.1	176.4	177.5	177.4	176.8	177.2	177.3	177.9	178.3	178.1	177.5	177.5	177.3	176.7	177.8
2004	178.2	179.1	180.1	180.9	182.0	182.9	182.6	182.6	182.8	183.7	183.7	183.3	181.8	180.5	183.1
2005	183.6	184.7	185.9	187.3	187.3	187.8	188.5	189.4	192.0	192.5	190.7	190.1	188.3	186.1	190.5
2006	191.5	191.8	192.8	194.7	195.5	196.3	197.0	197.1	195.8	194.7	194.3	194.8	194.7	193.8	195.6
2007	195.021	195.950	197.904	199.618	200.804	201.675	201.571	201.041	201.697	202.155	203.437	203.457	200.361	198.495	202.226
2008	204.510	205.060	206.676	208.085	210.006	212.324	213.304	212.387	212.650	210.108	205.559	203.501	208.681	207.777	209.585
2009	204.288	205.343	206.001	206.657	207.265	209.343	208.819	209.000	208.912	209.292	209.738	209.476	207.845	206.483	209.206
2010	210.056	210.020	211.216	211.528	211.423	211.232	210.988	211.308	211.775	212.026	211.996	212.488	211.338	210.913	211.764
2011	213.589	214.735	217.214	218.820	219.820	219.318	219.682	220.471	220.371	219.969	219.961	219.469	218.618	217.249	219.987
2012	220.497	221.802	223.314	224.275	223.356	223.004	222.667	223.919	225.052	224.504	223.404	223.109	223.242	222.708	223.776
2013	223.933	225.874	226.628	226.202	226.289	227.148	227.548	227.837	227.876	227.420	226.811	227.082	226.721	226.012	227.429
2014	227.673	228.664	230.095	231.346	231.762	232.269	232.013	231.611	231.762	231.131	229.845	228.451	230.552	230.302	230.802
2015	226.855	227.944	229.337	229.957	230.886	232.026	231.719	231.260	230.913	230.860	230.422	229.581	230.147	229.501	230.793
2016	229.469	229.646	230.977	231.975	232.906	233.838	233.292	233.561	234.069	234.337	234.029	234.204	232.692	231.469	233.915
2017	235.492	236.052	236.154	236.728	236.774	237.346	236.942	237.892	239.649	239.067	238.861	238.512	237.456	236.424	238.487
2018	239.772	241.123	241.595	242.486	243.279	243.770	243.776	243.605	243.640	244.163	243.484	242.150	242.737	242.004	243.470
2019	242.547	243.856	245.554	246.847	246.667	246.515	247.250	246.953	246.891	247.423	247.385	247.289	246.265	245.331	247.199
2020	248.005	248.412	248.136	246.254	245.696	247.223	248.619	249.639	250.193	250.542	250.255	250.693	248.639	247.288	249.990
2021	252.067	253.386	255.319	257.207	259.343	261.668	263.013	263.728	264.593	267.160	268.360	269.263	261.259	256.498	266.020
2022	271.634	274.688	278.598	279.879	283.307	287.427	287.608	287.168	287.656	288.836	288.991	288.205	283.666	279.256	288.077

EXHIBIT
C

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'").