

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

ROBERT E. CREWS,	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 21-226
	)	
DENIS MCDONOUGH,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**APPELLANT’S APPLICATION FOR AN AWARD OF REASONABLE  
ATTORNEY FEES AND EXPENSES UNDER 28 U.S.C. § 2412(D)**

Pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. §2412(d), Appellant, Robert E. Crews, moves this Court for an award of reasonable attorney fees and expenses. Appellant seeks an award in the amount of \$23,066.73 for litigating the merits of this appeal and drafting this petition. In support of this motion, Appellant submits that: (1) he is entitled to an award of attorney fees and expenses under EAJA, 28 U.S.C. § 2412(d); and, (2) an award of \$23,066.73 is reasonable and appropriate.

**PRELIMINARY STATEMENT**

In 1980, Congress passed the EAJA in response to its concern that persons “may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights.” Pub. L. No. 96-481, tit. II, §204(a), (c), 94 Stat. 2327, 2329 (1980); *Sullivan v. Hudson*, 109 S.Ct. 2248, 2253 (1989). As the Senate observed, in instances in which the cost of securing vindication exceeds the amount at stake, “it is more practical to endure an injustice than to contest it.” S. Rep. No. 96-253, 96<sup>th</sup> Cong., 1<sup>st</sup> Sess. 5 (1979). The purpose of the EAJA’s fee-shifting provisions is thus “to eliminate for the average person

the financial disincentive to challenge unreasonable government actions.” *Commissioner, I.N.S. v. Jean*, 110 S.Ct. 2316, 2321 (1990).

It has since become clear that the EAJA applies to proceedings in this Court. In the Federal Courts Administration Act of 1992, Congress amended section 2412(d)(2)(F) to add the United States Court of Veterans Appeals (now Court of Appeals for Veterans Claims) to the definition of Courts authorized to make awards under the EAJA. Pub. L. No. 102-572, tit. V § 506(b), 106 Stat. 4506, 4513 (1993) (found at 28 U.S.C. § 2412 note); S. Rep. No. 342, 102d Cong., 2d Sess. 39 (1992), [hereinafter “S. Rep”]]. *See Jones v. Principi*, 985 F.2d 582 (Fed. Cir. 1992) (vacating and remanding *Jones v. Derwinski*, in light of the Federal Courts Administration Act). In amending the EAJA to apply to appeals to this Court, Congress affirmed the Act’s objective of eliminating financial deterrents to defend against unreasonable government action, observing that “[v]eterans are exactly the type of individuals the statute was intended to help.” S. Rep. at 39.

It is also clear that the EAJA amendment applies in this case. The amendment applies, *inter alia*, “to any case pending before the United States Court of Veterans Appeals on the date of the enactment of this Act, to any appeal filed in that court on or after such date in the United States Court of Appeals for the Federal Circuit.” Pub. L. No. 102-572, tit. V, §506(b), 106 Stat. 4506, 4513 (1992) (found at 28 U.S.C. §2412 note). The instant case was pending in the United States Court of Appeals for Veterans Claims after October 29, 1992, when the EAJA amendment became effective.

## SUMMARY OF PROCEEDINGS

This case involves the Board's decision dated November 16, 2020, to the extent it denied entitlement to an effective date prior to September 5, 2018, for the award of disability benefits for coronary artery disease (CAD), status post myocardial infarction and bypass graft.

In April 2023 the Court issued a panel decision that set aside the above noted Board decision and remanded the matter. Specifically, the Court determined that the Board erred in finding that the Appellant was precluded from receiving a retroactive effective date for an award under the Blue Water Navy Vietnam Veterans Act of 2019 (Blue Water Act) for an herbicide-related condition even if his claim was previously denied in part due to the lack of evidence of a currently disability.

## ARGUMENT

### **I. APPELLANT IS ENTITLED TO AN AWARD OF ATTORNEY FEES AND EXPENSES UNDER EAJA, 28 U.S.C. § 2412(D).**

There are four statutory requirements that a party must satisfy to be eligible for an award of attorney's fees under EAJA, 28 U.S.C. § 2412(d). They are: (1) the party must have been a "prevailing party;" (2) the party must be eligible to receive an award under this subsection;" (3) the position of the United States must not have been "substantially justified;" and (4) there must be no special circumstances which would make an award unjust. If these requirements are met, the Court "shall award" reasonable fees and expenses. *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1466 (Fed. Cir. 1986) (en banc). As shown below, Appellant meets these requirements.

#### ***A. Appellant is a Prevailing Party***

Generally, to be a prevailing party, a party must receive "at least some relief on the merits" and the relief must materially alter the legal relationship of the parties.

*Higher Taste v. City of Tacoma*, 717 F.3d 712 (Fed. Cir. 2013) citing *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Res.*, 532 U.S. 598 (2001). More specifically, a party prevails with respect to the EAJA if they “succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit.” *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983) (citations omitted); see also *Sullivan v. Hudson*, 109 S. Ct. 2248, 255 (1989); *Texas State Teachers Ass’n v. Garland Indep. School Dist.*, 109 S. Ct. 1486, 1491-92 (1989). In making this inquiry “substance should prevail over form.” *Devine v. Sutermeister*, 733 F.2d 892 (Fed. Cir. 1984). In *Lematta v. Brown*, 8 Vet. App. 504 (1996), this Court held “[I]t is enough for the Court to make some ‘substantive determination in [the] appeal, based upon the record, the parties’ pleadings, and the Court’s precedent, that is favorable to the appellant.” *Id.* at 508 (quoting *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994)).

The Federal Circuit has issued several decisions relating to the attainment of prevailing party status under the EAJA. In *Vaughn v. Principi*, 336 F. 3d 1360 (Fed. Cir. 2003), the court held that a remand to an administrative agency, to consider the effects of legislation enacted while the case is on appeal does not constitute securing relief on the merits for prevailing party purposes. *Id.*, at 1366. There, the Court affirmed the CAVC’s findings that prevailing party status did not attach based on, *inter alia*, the catalyst theory. *Id.*, citing *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (2001)(Rejecting the catalyst theory as a basis for fee awards and holding that enforceable judgments on the merits and court-ordered consent decrees create the “material alteration of the legal relationship of the parties). Notably, that case involved a remand for re-adjudication solely in light of the enactment of the VCAA – as opposed to based on VA error. See *Vaughn v. Principi*, 15 Vet. App. at 280; see also *Akers v. Sec’y of Veterans Affairs* 04-7132 (Fed. Cir. May 26, 2005) (affirming the CAVC determination that Appellant was not a prevailing party inasmuch as the Board decision on appeal was vacated and remanded as a result of a change in law subsequent to

the Board's decision and did not involve a direct finding by the Court on the merits or an order to do anything as a result of an error found either by the Court or the parties.)

In *Former Employees of Motorola Ceramic Products v. United States*, 336 F. 3d 1360 (Fed. Cir. 2003), the Federal Circuit addressed the meaning of "prevailing party" and appeared to clarify its decision in *Vaughn*. There, the court made clear, *inter alia*, that "where a plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party [] without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court. . ." *Id.*, at 1360; *see also Rice Services, Ltd., v. United States*, 405 F.3d 1017 (Fed. Cir. 2005) (Acknowledging *Motorola* for the principle that a remand order to an administrative agency from a court proceeding constitutes the securing of relief on the merits sufficient to attain prevailing party status); *Kelly v. Nicholson*, 463 F.3d 1349 (Fed. Cir. 2006).

Most recently, the Federal Circuit in *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016), set out a three-part test "to determine a prevailing party status under the EAJA on administrative agency remands." Under this three-part test, a party is a prevailing party if (1) the remand was granted based upon or triggered by administrative error, (2) the remanding court did not retain jurisdiction, and (3) the remand clearly orders further agency proceedings, which allows the party "the possibility of attaining a favorable merits determination." *Blue v. Wilkie*, 30 Vet. App. 61 (2018), *citing Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016). Therefore, by applying the three-part test from *Dover*, the court here should find that Appellant is a prevailing party.

In this case, unlike the facts in either *Vaughn* or *Akers, supra*, the Court of Appeals for Veterans Claims issued a panel decision that vacated and remanded the Board's decision. Specifically, the Court determined that the Board erred in finding that the Appellant was precluded from receiving a retroactive effective date for an award

under the Blue Water Act for an herbicide-related condition even if his claim was previously denied in part due to the lack of evidence of a currently disability.

***B. Appellant is a Person Eligible to Receive an Award Under 28 U.S.C. § 2412(2).***

In order to be eligible to file a petition for fees under 28 U.S.C. § 2412(d), a prevailing party must not be: (i) an individual whose net worth exceeded \$2,000,000.00 at the time the litigation began, nor (ii) a business entity whose net worth exceeded \$7,000,000.00 and which had more than 500 employees at the time the litigation began. 28 U.S.C. § 2412(d)(2)(B)(i), (ii).

Appellant had a net worth *under* \$2,000,000.00 on the date this action was commenced. (*See* Exhibit A, Certification of Net Worth). Moreover, Appellant was not a business entity. Therefore, Appellant is a person eligible to receive an award under the EAJA.

***C. The Position of the Government was not Substantially Justified.***

In order to be considered “substantially justified” under the EAJA, the government must show that its position was “justified to a degree that could satisfy a reasonable person,” i.e., has a reasonable basis in both law and fact. *Pierce v. Underwood*, 108 S. Ct. 2541, 2549-50 (1988); *Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989). The burden is on the Secretary to demonstrate that his position was substantially justified. *Brewer v. American Battle Monument Comm’n*, 814 F.2d 1964, 1569 (Fed. Cir. 1987); *Gavette*, 808 F.2d at 1465-66; *Essex Electro Eng’rs v. United States*, 757 F.2d 247, 252 (Fed. Cir. 1985).

To determine whether the government’s position was substantially justified, the Court is “instructed to look at the entirety of the government’s conduct and make a judgment call whether the government’s overall position has a reasonable basis both in law and fact.” *Chiu v. United States*, 948 F.2d 711, 715 (Fed. Cir. 1991). The “overall” position is that taken by the government “both prior to and during litigation.” *Id.* Thus,

to prevail on “substantial justification” in this case, the government must demonstrate that the agency action leading to litigation, i.e. the denial of Appellant’s claim, as well as its litigation position in this Court, were “overall reasonable.”

This Court further explained substantial justification in *Moore v. Gober*, 10 Vet. App. 436 (1997). In *Moore*, the Court held that in order “[t]o determine whether the Secretary’s position was ‘reasonable’ during the administrative proceedings, the Court looks to the relevant determinative circumstances, including the state of the law at the time of the BVA decision.” *Id.* at 440 (citing *Bowyer v. Brown*, 7 Vet. App. 549, 552 (1995)).

In this case, the government’s position leading up to, and throughout this litigation was not “substantially justified” where the Court issued a panel decision that vacated and remanded the above-noted claim. Specifically, the Court determined that the Board erred in finding that the Appellant was precluded from receiving a retroactive effective date for an award under the Blue Water Act for an herbicide-related condition even if his claim was previously denied in part due to the lack of evidence of a currently disability.

***D. No Special Circumstances Make an Award Unjust on this Appeal.***

The Secretary does not meet the heavy burden of proving that “special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). See *Devine v. Sutermeister*, 733 F.2d 892, 895 (Fed. Cir. 1984); *Love v. Reilly*, 924 F.2d 1492, 1495 (9<sup>th</sup> Cir. 1991). Courts narrowly construe the “special circumstances” exception so as not to interfere with the Congressional purpose for passing the EAJA, i.e., to ensure that litigants have access to the courts when suing the Government. See *Martin v. Heckler*, 772 F.2d 1145, 1150 (11<sup>th</sup> Cir. 1985); *Taylor v. United States*, 815 F.2d 249, 253 (3d Cir. 1987). “[T]hat few courts apparently have relied upon this exception to EAJA awards in denying fee applications is evidence that the circumstances of a case will infrequently

justify a denial of an award.” There is no reason or special circumstance to deny this Fee Petition.

## **II. THE COURT SHOULD AWARD APPELLANT REASONABLE FEES AND EXPENSES OF \$23,066.73.**

The EAJA provides that a court “shall” award “fees and other expenses” when the other prerequisites of the statute have been met. 28 U.S.C. § 2412(d)(1)(A). The statute defines “fees and other expenses” to include reasonable attorney fees.” 28 U.S.C. § 2412(d)(2)(A).

When Congress has authorized the award of “reasonable” attorney fees, the amount to be awarded is based upon “the number of hours expended on the litigation multiplied by a reasonable hourly rate.” *See Hensley*, 461 U.S. at 433; *National Ass’n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982).

### ***A. Hours Reasonably Expended***

As the Declaration of Glenn R. Bergmann, Esq. (attached hereto as Exhibit B) documents, in the exercise of sound billing judgment, Appellant’s counsel is not asking for payment for time spent on administrative matters such as copying or filing, nor for communications (either written or oral) among co-counsel. Moreover, being mindful of the reasonableness requirement, Appellant is not requesting compensation for ***15.9 hours – totaling \$3,512.52*** -- of billable attorney time. (*See* Exhibit B). Appellant’s counsel submits that a reasonable attorney, exercising sound billing judgment, would charge for time spent on all matters included in Exhibit B – this may have included limited time expended for “peer review” where necessary to ensure that any briefs filed contained comprehensive and complete arguments pertinent to the underlying appeal. To the extent “peer review” time was expended, such would have involved senior attorneys and would have taken the place of “supervisory review” of a substantive pleading.



### ***B. Reasonable Hourly Rate***

Under the EAJA, the amount of fees awarded “shall be based upon the prevailing market rates for the kind and quality of services furnished” but “shall not be awarded in excess of \$125.00 per hour unless the Court determines that an increase in the cost of living” is necessary. Appellant’s counsel, Glenn R. Bergmann, avers that the usual and customary fee for working on similar matters has ranged from \$395.00 in 2019 for attorneys with less than one year experience to \$670.00 per hour in 2021 for attorneys with 20 years’ experience according to the most recent fees matrix prepared by the Civil Division of the United States Attorney’s Office for the District of Columbia (USAO).<sup>1</sup>

1. The EAJA Statutory Cap of \$125.00 Should be Adjusted Upward to Reflect the Increase in the Cost of Living.

Under 28 U.S.C. § 2412(d)(2)(A)(ii), attorneys may demonstrate that an increase in the cost of living justifies an increase in the \$125.00 per hour statutory cap. *See Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988) (referring to a cap of \$75.00 per hour “adjusted for inflation.”); *Philips v. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991). An increase for cost of living is generally allowed. *Johnston v. Sullivan*, 919 F.2d 503, 508-10 (8<sup>th</sup> Cir. 1990); *Animal Lovers Volunteer Ass’n, inc. v. Carlucci*, 867 F.2d 1224, 1227 (9<sup>th</sup> Cir. 1989); *Coup v. Heckler*, 839 F.2d 313, 320 (3d Cir. 1987); *Baker v. Brown*, 839 F.2d 1075 (5<sup>th</sup> Cir. 1988) (allowed except in unusual circumstances).

This Court in *Elczyn v. Brown*, 7 Vet. App. 170 (1994), decided for the first time that an Appellant’s attorney can petition for a fee in excess of the then statutory cap based upon the Consumer Price Index as published by the Bureau of Labor Statistics. *Id.* at 179-181. This Court further directed attorneys filing for an increased fee based upon the CPI to choose a mid-point in the litigation to establish the appropriate date for calculating

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<sup>1</sup> See The Fitzpatrick Matrix, 2013-2021, U.S. Attorney’s Office, District of Columbia, Civil Division (“It has been developed to provide ‘a reliable assessment of fees charged for complex federal litigation in the District of Columbia,’ as the United States Court of Appeals for the District of Columbia Circuit urged.”) (quoting *DL v. District of Columbia*, 924 F.3d 585, 595 (D.C. Cir. 2019)).

the cost-of-living increase. *Id.* at 181. In this case, the Court issued a memorandum decision in April 2023. Appellant selects September 2021, as the date for calculating the CPI increase. *See Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994).

Appellant submits that the Court should increase the \$125.00 per hour cap by the general inflationary index in the cost of living since March of 1996, as reflected by the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV, area.<sup>2</sup> According to the most recent report from the Bureau of Labor Statistics, the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV, area – rose 77.36% between March 1996, and September 2021. Applying the increase in the CPI to the statutory rate, Appellant’s counsel should be compensated at the rate of \$221.70 per hour. This rate was calculated by subtracting the CPI-U for September 2021 (280.933) from that of March 1996 (158.4), and dividing the result (122.533) by the CPI-U for March 1996. The result (.7736), representing the increase between March 1996 and September 2021 was then multiplied by the statutory rate (\$125.00), demonstrating an increase of \$96.70, which was added to the \$125.00 statutory rate to arrive at the inflation-adjusted rate of \$221.70 per hour.

In addition, the Court has held that work done by attorney-supervised paralegals and law students fall under the EAJA, and it is compensable at the prevailing market rate for the area in which such work was performed. *Sandoval v. Brown*, 9 Vet. App. 177, 181 (U.S. 1996); *see also Cook v. Brown*, 6 Vet. App. 226, 230 (1994). Appellant avers that paralegals and law clerks should be compensated at a rate of \$180.00 per hour, where the customary market rate for the work done by paralegals and law clerks was, \$199.00 in 2020, and \$200.00 in 2021, according to the most recent legal fees matrix prepared by the

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<sup>2</sup> This Court determined that the local CPI-U should be used to calculate the cost-of-living increase. *Mannino v. West*, 12 Vet. App. 242 (1999). Accordingly, counsel has selected CPI-U for Washington-Arlington-Alexandria, DC-VA-MD-WV, to calculate the rate of inflation.

USAO.<sup>3</sup> This fees matrix explains that rates for the 2022 calendar year and subsequent years will be generated using the CPI to adjust for inflation.<sup>4</sup>

Considering the foregoing, Appellant's counsel requests a fee of \$23,034.63 based upon 103.9 hours of attorney work; and \$32.10 in expenses (See exhibit B) for a total of \$23,066.73.

Respectfully submitted,

/s/ Glenn R. Bergmann  
**GLENN R. BERGMANN, ESQ.**  
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25 W. Middle Lane  
Rockville, MD 20850  
(301) 290-3106

Counsel for Appellant

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<sup>3</sup> See The Fitzpatrick Matrix, *supra*.

<sup>4</sup> *Id.* (explaining that because the data collected for this matrix runs through 2020, “[t]o generate rates in 2021, an inflation adjustment (rounded to the nearest whole dollar) was added. The United States Attorney’s Office determine that, because courts and many parties have employed the legal service index of the Consumer Price Index to adjust attorney hourly rates for inflations, this matrix will do likewise.”).

Exhibit A

**CERTIFICATE OF NET WORTH**

I, Glenn R. Bergmann, of Rockville, Maryland, hereby declare that at the time this appeal was filed, Appellant did not have a net worth of, or in excess of, \$2,000,000.00.

*See* Paragraph 3 of the retainer agreement filed with the Court.

/s/ Glenn R. Bergmann  
Glenn R. Bergmann

Exhibit B  
**DECLARATION OF APPELLANT'S COUNSEL,**  
**GLENN R. BERGMANN**

In support of Appellant's application for attorney's fees under 28 U.S.C. § 2412(d), I Glenn R. Bergmann hereby declare as follows:

1. I am an attorney licensed to practice in the State of Maryland, and am admitted to practice before the United States Court of Appeals for Veterans Claims.
2. I have represented Robert E. Crews in Crews v. McDonough, Vet. App. No. 21-226 without charge.
3. In June 2023 I visited the website maintained by the U.S. Dept. of Labor, Bureau of Labor Statistics and ascertained the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV, area rose by 122.533 between March 1996, when the EAJA was amended, and September 2021.
4. In June 2023 I visited the website maintained by USAO and determined that market rate for paralegals and law clerks was \$199.00 in 2020, and \$200.00 in 2021.

The following is a statement of the exact service rendered and expenses incurred in the representation of the Appellant. In addition to Glenn Bergmann, Esq. (GRB), attorneys who worked on this appeal include: Bryan Andersen (BBA); Brian Blake (BJB); Dan Wedemeyer (DDW); Hannah Youh (HCY); Jonathan Murphy (JCM); Joseph Murphy (JLM); Kelsey Binder (KLB); Melissa Hendricks (MAH); David Ames (DSA); Lila Kanovsky (MLK); Sunhee Choi (SHC); Steven Spitzer (SMS); Sharon Kim (SRK); Tom Polseno (TMP); and Yoon Ha Park (YHP). All are members of the Court's bar. Additionally, the (P)aralegal who worked on this appeal was Brian Poole (P) (BJP).

## BERGMANN &amp; MOORE, LLC

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Timesheet: Robert E. Crews (21-226)

July 20, 2023

*Legal Services*

<b>Date</b>	<b>Description of Services</b>	<b>Total Hours (N/C)</b>	<b>Billed Hours</b>
12/13/20	BVA decision case screen (MAH/DSA)	.4	.4
1/11/21	T/C to client sign up (LML)	.2 (.2)	.0
1/12/21	Correspondence to veteran w/ attachments	.1	.1
1/13/21	Review documents from veteran including POA docs	.2	.2
	Prepare/file appearance/POA	.1	.1
	Prepared Financial Hardship	.1 (.1)	.0
1/14/21	Review notice of docketing	.1	.1
3/5/21	Evaluate BVA decision denial for assignment (SRK)	.1	.1
3/8/21	Prepare new client correspondence outlining appellate process w/ attachments (JCM/GRB)	.2	.2
	Prepare notice of appearance as co-counsel (KLB)	.1	.1
	Review VA notice of appearance (KLB)	.1	.1
3/12/21	Review RBA filing notice (KLB)	.1	.1
3/13/21	Receive RBA (3343 pages) (JLM)	.2 (.2)	.0
3/24/21	E-corres to and from VA re: our extension (KLB)	.2 (.2)	.0
	Prepare motion for extension RBA (KLB)	.1 (.1)	.0
4/7/21	T/c to client left vm re: case status update (JLM)	.1	.1
4/8/21	RBA page-by-page review for legibility/completeness pursuant to R. 10; confirmed accuracy of all evidence/documents relied upon in BVA decision; determined relevance of incomplete/illegible documents identified in review, 1-2542 (JLM)	3.5	3.5
	RBA page-by-page review for legibility/completeness pursuant to R. 10; confirmed accuracy of all evidence/documents relied upon in BVA decision; determined relevance of incomplete/illegible documents identified in review, 2543-3343 (JLM)	.8	.8

<b>Date</b>	<b>Description of Services</b>	<b>Total Hours</b>	<b>(N/C)</b>	<b>Billed Hours</b>
4/8/21	Prepare report re: RBA completeness/legibility; e-corres re: RBA review (JLM)	.4		.4
	T/c to client re: case status update (JLM)	.1		.1
4/15/21	Review Rule 10 memo & pertinent portions of RBA in contemplation of RBA dispute (KLB)	.1	(.1)	.0
5/11/21	Review notice to file brief (KLB)	.1		.1
5/13/21	Review order scheduling CLS conference (KLB)	.1		.1
6/21/21	RBA merits review (ignoring illegible / incomplete documents previously deemed not relevant at R. 10) in preparation for drafting Rule 33 memo identifying potential bases for alternative resolution, taking notes, pp. 3343-2313 (KLB)	3.5		3.5
	RBA merits review (ignoring illegible / incomplete documents previously deemed not relevant at R. 10) in preparation for drafting Rule 33 memo identifying potential bases for alternative resolution, taking notes, pp. 2312-1283 (KLB)	3.5		3.5
6/22/21	RBA merits review (ignoring illegible / incomplete documents previously deemed not relevant at R. 10) in preparation for drafting Rule 33 memo identifying potential bases for alternative resolution, taking notes, pp. 1282-252 (KLB)	3.5		3.5
6/23/21	RBA merits review (ignoring illegible / incomplete documents previously deemed not relevant at R. 10) in preparation for drafting Rule 33 memo identifying potential bases for alternative resolution, taking notes, pp. 251-1 (KLB)	.9		.9
	Draft Rule 33 memo; identifying errors for alternative resolution consideration; re: all args (RvB for fav. ev + misapplying Bwana), citing to RBA and authorities where necessary (e.g., Thompson, Caluza, Wise, Majeed, 38 U.S.C. 1116A, Todd, Massey, Procopio, Wagner, Burton, Tucker) (KLB)	3.4		3.4
	Create abstract RBA for CLS review (KLB)	.1	(.1)	.0
	E-corres to VA with R.33 memo (KLB)	.1	(.1)	.0
	Prepare R33 Certificate of Service (KLB)	.1		.1
	Draft assessment re: case goals/merits (KLB)	.2		.2
7/7/21	Review litigation file inc. Rule 33 memo in preparation for CLS conference (KLB)	.2		.2

<b>Date</b>	<b>Description of Services</b>	<b>Total Hours</b>	<b>(N/C)</b>	<b>Billed Hours</b>
7/7/21	Participate in CLS conference; and discuss alt res (DEFEND) (KLB)	.2		.2
	Prepare CLS conference notes for file (KLB)	.2		.2
7/14/21	Supervisory review of conference notes & memo to assess bases for defense unique/novel issues - strategies for briefing reviewed (BBA)	1.0	(1.0)	.0
8/4/21	E-corres to and from VA re: our extension (KLB)	.2	(.2)	.0
	Prepare motion for extension Brief (KLB)	.1	(.1)	.0
9/12/21	Review lit. file (including R33 and post-BC conference notes) in preparation to draft brief (KLB)	1.2		1.2
9/13/21	Draft principal brief w/ nature of case / summary of issues, statement of relevant facts & procedural history; re: complete SOF and procedural hx up to Nov. 2020 Board Decision on appeal (e.g., DD-214s, Sept. 2013 SC claim, July 2014 RD, Aug. 2019 claim to reopen, Apr. 2020 RD, May 2020 RD) (KLB)	2.3		2.3
	Draft principal brief; re: RvB args (favorable ev + begin stat. interpretation arg), citing to RBA and authorities where necessary (e.g., 38 U.S.C. § 7104(d)(1), Thompson, Caluza, Wise, Majeed, 38 U.S.C. § 7104(a), 38 U.S.C. § 1116A; 38 U.S.C. § 1116; 38 C.F.R. §§ 3.307, 3.309, Todd, Massey, Pernorio, Dingess, Procopio, Lane, Butts) (KLB)	3.5		3.5
	Draft principal brief; re: complete RvB (stat interpretation), citing to RBA and authorities where necessary (e.g., Gomez, Chevron, Good Samaritan Hospitals, Trafter, Hatfield, SAS Hospital, Pierce, Tadlock, Wagner, Burton, Tucker) (KLB)	3.5		3.5
9/20/21	Supervisory review of draft principal brief; review related materials & identify add'l brief content (BBA)	2.0		2.0
	Revise principal brief; in accordance w/ supervisory comments (e.g., add reversal argument), and add add'l cites to RBA & authorities where necessary (e.g., Beasley, Hersey, Westfed Holdings, U.S. Gypsum Co., Gutierrez, Johnson) (KLB)	1.5	(1.0)	.5
	Prepare table of authorities and table of contents for principal brief (KLB)	.9	(.9)	.0
	Final review & revision of principal brief for filing (KLB)	.8		.8
9/21/21	Correspondence to client with attached principal brief	.1		.1



<b>Date</b>	<b>Description of Services</b>	<b>Total Hours</b>	<b>(N/C)</b>	<b>Billed Hours</b>
11/2/21	E-corres to and from VA re: VA extension (KLB)	.2	(.1)	.1
11/19/21	Review re: VA ext motion to file VA brf (KLB)	.1		.1
1/4/22	Review notice of VA's brief (KLB)	.1	(.1)	.0
1/11/22	E-corres to and from VA re: our extension (KLB)	.2	(.2)	.0
	Prepare motion for extension reply brief (KLB)	.1	(.1)	.0
	T/c to client re: discuss case update w/ client's wife (inform VA brf filed) (KLB)	.1		.1
2/28/22	T/c to client re: case update (KLB)	.1		.1
	Review litigation file inc. briefs in preparation to prepare reply brief; taking notes on Sec's responses (KLB)	1.3		1.3
	Draft reply brief; re: begin response to Sec's args (i.e., Board not addressing contents of July 2014 RD)	3.5		3.5
	Draft reply brief; re: begin response to Sec's arg re: statutory interpretation and BWNVVA (KLB)	1.0		1.0
3/1/22	Draft reply brief; re: complete reply brief - finish arg re: statutory interpretation of BWNVVA & why reversal, not remand, more appropriate remedy (KLB)	3.5	(1.5)	2.0
3/4/22	Supervisory review of draft reply brief; review related materials & identify add'l brief content (BBA)	1.7		1.7
	Revise reply brief; in accordance w/ supervisory comments (KLB)	2.0		2.0
	Prepare table of authorities and table of contents for reply brief (KLB)	.8	(.8)	.0
	Final review & revision of principal brief for filing (KLB)	.7		.7
3/7/22	Correspondence to client with attached reply brief (GRB)	.1		.1
3/9/22	Review ROP filing notice (KLB)	.1		.1
3/14/22	Review ROP for compliance with Rule 28 and note findings (HCY)	1.4		1.4
3/18/22	Review ROP memo (KLB)	.1	(.1)	.0
3/23/22	Review Judge assignment (KLB)	.1	(.1)	.0
4/13/22	Review re: panel assignment (J. Merideth, Falvey, and Jacquith) (KLB)	.1		.1
5/10/22	T/c to client re: spoke to client's wife b/c client resting and informed her case w/ panel of Judges (KLB)	.1		.1
5/16/22	Review Court order re: requesting supp memoranda + noting oral arg. to be scheduled (KLB)	.1		.1

<b>Date</b>	<b>Description of Services</b>	<b>Total Hours</b>	<b>(N/C)</b>	<b>Billed Hours</b>
5/19/22	Review re: Court Order scheduling OA for 8/16 @ 10AM (KLB)	.1		.1
5/25/22	Prepare notice of appearance as co-counsel replacing Kelsey Binder (BBA)	.1		.1
5/31/22	Review VA notice of appearance Jonas replacing Campbell (BBA)	.1		.1
6/7/22	Draft supplemental memo; research and outline canons of interpretation (BBA)	3.3		3.3
	Draft supplemental memo; research and arguments on text, structure, scheme (BBA)	3.0		3.0
6/8/22	Draft supplemental memo; research and argument on statute purpose and legislative history (BBA)	3.5		3.5
	Draft supplemental memo; research recent cases application of prejudicial error (BBA)	2.5		2.5
	E-corres to and from VA amend ROP (BBA)	.2		.2
6/9/22	Prepare notice of appearance as co-counsel will be 2nd chair for OA (MLK)	.1		.1
	Prepare notice of appearance as co-counsel (TMP)	.1	(.1)	.0
6/10/22	Review litigation file inc. briefs to prepare for supp briefing and OA moot as a second chair for OA (MLK)	3.0	(1.5)	1.5
	Supervisory review Supp brief (MLK)	1.5	(1.5)	.0
6/13/22	Supervisory review of case materials; review/revision of supplemental mem. of law (TMP)	2.8	(.5)	2.3
	Review amended ROP filings by VA (BBA)	.1		.1
6/14/22	Revise supplemental memo, incorporating supervisory comments, additional arguments and citations (BBA)	1.3		1.3
6/15/22	Prepare table of authorities for supplemental memo; final review, revision, prepared for filing (BBA)	2.7	(2.7)	.0
7/12/22	Review notice of oral argument (BBA)	.1		.1
7/22/22	E-corres to and from VA possible status with Nehmer (BBA)	.1		.1
7/25/22	E-corres to and from VA clarification of Nehmer status (BBA)	.1		.1
8/8/22	T/c to client & spouse, discuss case status/merits, updated information (BBA)	.3		.3
	E-corres to/from Court, preparations (BBA)	.2		.2
8/9/22	Prepare for Oral Argument - prepare materials, outline arguments, & practice presentation (BBA)	3.0		3.0

<b>Date</b>	<b>Description of Services</b>	<b>Total Hours</b>	<b>(N/C)</b>	<b>Billed Hours</b>
8/10/22	Prepare for Oral Argument - finish outline & practice (BBA)	3.0		3.0
	Prepare for Oral Argument - review/revise outline & practice (BBA)	2.0		2.0
8/11/22	Review case materials in preparation for oral argument moot (TMP)	1.2	(.3)	.9
	Participate in oral argument moot & subsequent discussion (TMP)	1.5		1.5
	Review case materials in preparation for oral argument moot (SMS)	.5		.5
	Participate in oral argument moot & subsequent discussion (SMS)	1.5		1.5
	Review case materials in preparation for moot argument (SHC)	.9		.9
	Participate in oral argument moot & subsequent discussion (SHC)	1.5		1.5
	Participate in oral argument moot & subsequent discussion (BBA)	1.5		1.5
	Participate in oral argument moot & subsequent discussion (MLK)	1.5		1.5
8/12/22	Prepare for Oral argument - revise outline/presentation based on feedback first moot & practice (BBA)	2.5		2.5
8/15/22	Review case materials in preparation for second oral argument moot (TMP)	.5		.5
	participate in second oral argument moot & subsequent discussion (TMP)	1.0		1.0
	Participate in second oral argument moot & subsequent discussion (BBA)	1.0		1.0
	Final revision of materials & practice for argument, based on feedback from second moot (BBA)	1.5		1.5
	Review pleadings in prep for moot (DDW)	.6		.6
	Participate in moot; post-moot discussion of issues (DDW)	1.0		1.0
8/16/22	Oral Argument at CAVC (1st chair) (BBA)	1.0		1.0
	Oral argument at CAVC (2nd chair) (MLK)	1.0		1.0
10/20/22	T/c to client left vm/check-in/status (BBA)	.1	(.1)	.0
11/17/22	T/c to client status (BBA)	.1		.1
3/8/23	T/c to client left vm/check-in/status (BBA)	.1		.1
3/9/23	T/c from client spouse; update info (BBA)	.1		.1
4/21/23	T/c to client discuss Mem Dec outcome & next steps (BBA)	.2		.2
	E-corres to client copy of Mem Dec (BBA)	.1		.1
	Review mem. dec.; prepare memo summarizing outcome and consideration of R.35 (BBA)	1.6		1.6

<b>Date</b>	<b>Description of Services</b>	<b>Total Hours</b>	<b>(N/C)</b>	<b>Billed Hours</b>
4/25/23	Supervisory review of case materials inc. court decision & R.35 memo in consideration of seeking further review (TMP)	.5	(.5)	.0
4/26/23	Prepare client memory drive with C-file	.1	(.1)	.0
5/8/23	Commence client correspondence re: case disposition and next steps (BJB)	2.2		2.2
5/9/23	T/c to client spouse; discussed case disposition, next steps, and answered questions (BJB)	.3		.3
	E-corres to client's representative re: case disposition & next steps (BJB)	.1		.1
	Complete client correspondence re: case disposition and next steps (P) (BJP)	.1	(.1)	.0
7/11/23	Review mandate (GRB)	.1		.1
7/13/23	Review timesheet entries for accuracy and no-charge time in consideration of reasonableness and billing judgment (SRK)	2.0	(1.2)	.8
7/19/23	Prepare EAJA application (YHP)	.5		.5
7/20/23	Supervisory review of EAJA application (SRK)	.2		.2

<b>Total Services Rendered</b>	<b><u>119.8</u> hrs</b>	<b><u>26,547.15</u></b>
<b>Total Services Not Charged</b>	<b><u>(-15.9)</u> hrs</b>	<b><u>(-3,512.52)</u></b>
Total Charged Attorney Services	<u>103.9</u> hrs	<u>23,034.63</u>
Total Charged Paralegal Services	<u>0.0</u> hrs	<u>0.00</u>
<b>Total Services Charged</b>	<b><u>103.9</u> hrs</b>	<b><u>23,034.63</u></b>

**Expenses**

Standard Mail Rate	0.55	03/08/21
Priority Mail	7.95	09/21/21
Priority Mail	8.95	03/07/22
Client Memory Drive	5.00	04/26/23
Priority Mail	9.65	05/09/23

Total Expenses	32.10	32.10
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**Total current services rendered plus expenses \$23,066.73**

**I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.**

/s/Glenn R. Bergmann      July 20, 2023  
**Glenn R. Bergmann**      **Date**