

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

BRUCE R. TAYLOR,

Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

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Vet. App. No. 17-2390

**APPELLANT’S APPLICATION FOR AWARD OF ATTORNEY’S 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 Bruce R. Taylor applies for an award of reasonable attorneys’ fees and expenses in the amount of \$75,785.35.

PROCEDURAL HISTORY

Mr. Taylor enlisted in the Army during the Vietnam War. Before leaving for Vietnam, he volunteered for a secret program at Edgewood Arsenal, Maryland, which subjected soldiers to chemical weapons tests. He reported to Edgewood on August 30, 1969, where the Army required him to sign a secrecy oath and then intentionally exposed him to various deadly chemicals including nerve agents and tear gas. Mr. Taylor suffered serious and lifelong physical and psychological

symptoms as a result, including throughout his two combat tours in Vietnam. But because of the secrecy oath, which threatened Mr. Taylor with criminal prosecution, dishonorable discharge, and jail time if he disclosed the Edgewood experiments, Mr. Taylor could not discuss those experiments with medical personnel during his military service or after his honorable discharge in 1971.

Only in 2006 did the VA finally inform surviving volunteers that it was partially abating the secrecy oath and permitting them to apply for disability benefits. Mr. Taylor did so promptly, seeking benefits effective as of his discharge date, September 7, 1971. The VA examiner determined that Mr. Taylor suffered from PTSD and major depressive disorder traceable to his participation in the Edgewood experiments and his subsequent re-traumatization while serving in Vietnam. However, the VA also informed Mr. Taylor that he was only entitled to benefits effective February 28, 2007, the date of his initial application.

On April 14, 2017, the Board of Veterans' Appeals ("Board") issued a decision denying Mr. Taylor's entitlement to an earlier effective date, on three bases: (1) that Mr. Taylor's PTSD diagnosis was based on multiple stressors, not just the Edgewood experiments; (2) that Mr. Taylor already had violated his secrecy oath by seeking medical treatment for his symptoms; and (3) that 38 U.S.C. § 5110 did not allow for equitable tolling, even when the government has committed some malfeasance. R. 3–15.

On April 5, 2019, over the dissent of Judge Greenberg, a panel of this Court affirmed the Board's decision on the sole basis that 38 U.S.C. § 5110 is not subject to equitable tolling. *Taylor v. Wilkie*, 31 Vet. App. 147 (2019). On June 30, 2021, a unanimous panel of the Court of Appeals for the Federal Circuit reversed, finding that Section 5110 was in fact subject to equitable tolling, and that the Government was equitably estopped from denying Mr. Taylor's claim for an earlier effective date. *Taylor v. McDonough*, 3 F.4th 1351 (Fed. Cir. 2021).

On July 22, 2021, the Court of Appeals for the Federal Circuit *sua sponte* vacated the panel opinion and ordered that the case be reheard *en banc*. *Taylor v. McDonough*, 4 F.4th 1381 (Fed. Cir. 2021). On June 15, 2023, the Court of Appeals for the Federal Circuit, sitting *en banc*, again reversed this Court's judgment in an 11-2 decision. *Taylor v. McDonough*, 71 F.4th 909 (Fed. Cir. 2023). Six of the judges in the majority found that the government had denied Mr. Taylor his constitutional right of access to the VA adjudication system, and the remaining five found that Mr. Taylor was entitled to equitable estoppel. Put differently, only two of the 13 judges on the Court found any merit in the government's argument. The Court of Appeals for the Federal Circuit remanded to this Court to determine the effective date of Mr. Taylor's benefits claim.

On August 17, 2023, the Court of Appeals for the Federal Circuit issued its mandate to this Court. On August 30, 2023, this Court reversed the Board's denial

of an effective date earlier than February 28, 2007 and remanded for VA to award Mr. Taylor an effective date of September 9, 1971. As of this submission, the VA still has not acted on the Court's remand order.

ARGUMENT

I. MR. TAYLOR IS A PREVAILING PARTY AND IS ELIGIBLE TO RECEIVE AN AWARD UNDER THE EAJA.

To be a “prevailing party” for purposes of the EAJA, a litigant need only 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) (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791–92 (1989)). In this case, Mr. Taylor is a prevailing party entitled to an award of fees and costs because the Court reversed the Board’s decision rejecting Mr. Taylor’s claim for a 1971 effective date for his disability benefits—again, by a margin of 11-2—and remanded the case for readjudication in accordance with its decision. Such relief constitutes a “material alteration of the legal relationship of the parties necessary to permit an award of attorney’s fees.” *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 605 (2001) (quoting *Tex. State Teachers Ass’n*, 489 U.S. at 792–93).

Furthermore, Mr. Taylor is eligible to receive an award of reasonable fees and expenses because his net worth does not exceed \$2 million and did not exceed that amount at the time this action was filed, as evidenced by the declaration

attached hereto as Exhibit A. Mr. Taylor’s counsel also states, as an officer of the Court, that Mr. Taylor’s net worth at the time the appeal was filed was less than \$2 million. *See Bazalo v. Brown*, 9 Vet. App. 304, 311 (1996), *rev’d on other grounds sub nom. Bazalo v. West*, 150 F.3d 1380 (Fed. Cir. 1998).

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

For the government’s position to be “substantially justified,” it must be “justified to a degree that could satisfy a reasonable person” and “have a reasonable basis in both fact and law.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Int’l Custom Prods., Inc. v. United States*, 843 F.3d 1355, 1358 (Fed. Cir. 2016). “[A]n EAJA award is required . . . if the Secretary does not carry the burden of demonstrating that his position at *both* the administrative *and* the appellate level was substantially justified.” *Calma v. West*, 12 Vet. App. 66, 69 (1998).

The position of the Secretary was not substantially justified at any level. As described in the Procedural History above, the Court of Appeals for the Federal Circuit and this Court both found that the Board erred in denying Mr. Taylor an earlier effective date for his application for benefits. In particular, as this Court found, “the Board’s finding that the appellant could have filed for PTSD-related benefits for his service in Vietnam without divulging information related to the Edgewood experiments is a basic Board error and thoughtless,” amounting to “a

heartless attempt to dehumanize a veteran with an unsubstantiated medical opinion.” *Taylor v. McDonough*, No. 17-2390, slip op. at 10 (Vet. App. Aug. 30, 2023). This Court similarly concluded that “the Board clearly erred in determining that the appellant would not have filed a service-connection claim prior to February 28, 2007, for PTSD.” *Id.* at 10–11.

Nor was the Secretary’s position any more justified on appeal. Initially, a unanimous panel of the Federal Circuit agreed, and then eleven of 13 judges on the en banc Court likewise held that the VA should have awarded Mr. Taylor back benefits, repeatedly rejecting the Secretary’s arguments.

Every single court to adjudicate this issue has agreed on the outcome, unanimously or as close to unanimously as could be expected: The VA did wrong by Mr. Taylor. It does not matter that different judges based that holding on different legal doctrines. When presented with a clear wrong, at each stage, the Courts have all agreed that the law must remedy that wrong. It also does not matter that the VA fought that outcome at every turn, doing its best to avoid justice for Mr. Taylor. If anything, the sound rejections that the VA suffered at each of the twists and turns it induced *underscores* that its position was not substantially justified. The Board’s errors had no reasonable basis in fact or law.

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

Mr. Taylor seeks the following attorney's fees for representation by his counsel, Mark B. Jones, Esq., before this Court and before the Court of Appeals for the Federal Circuit:

Timekeeper	Year	Hourly Rate	Hours	Fee Amount
Mark Jones	2017	\$196.79	14.3	\$2,814.90
Mark Jones	2018	\$201.60	20.1	\$4,052.16
Mark Jones	2019	\$205.25	27.2	\$5,582.80
Mark Jones	2021	\$217.54	12.5	\$2,719.25
Mark Jones	2022	\$234.95	4.7	\$1,104.26
Mark Jones	2023	\$242.78	9.0	\$2,185.02
TOTAL				\$18,458.30

Mr. Taylor further seeks \$994.80 in costs incurred by Mr. Jones.

In addition, Mr. Taylor seeks the following attorney's fees for representation by his counsel, Kenneth M. Carpenter of Carpenter, Chartered, before this Court and the Court of Appeals for the Federal Circuit:

Timekeeper	Year	Hourly Rate	Hours	Fee Amount
Kenneth M. Carpenter	2019-23	\$197.50 ¹	63.0	\$12,442.50

¹ For simplicity of calculation, Mr. Carpenter's attorney's fees under the EAJA have been calculated according to the hourly rate applicable in October 2019, when Mr. Carpenter began his representation of Mr. Taylor. Using the rate at the beginning of the representation results in a conservative calculation.

Finally, Mr. Taylor seeks the following attorneys' fees for representation by his counsel at Williams & Connolly LLP before the Court of Appeals for the Federal Circuit:

Timekeeper	Year	Hourly Rate	Hours	Fee Amount
Anna J. Hrom	2021-23	\$224.50 ²	49.6	\$11,135.20
C. Luke McCloud	2021-23	\$224.50	70.3	\$15,782.35
Liam J. Montgomery	2021-23	\$224.50	19.5	\$4,377.75
Timothy M. Pellegrino	2021-23	\$224.50	56.1	\$12,594.45
TOTAL				\$43,889.75

An itemized statement of the legal services rendered and costs for which Mr. Taylor seeks compensation is attached to this application as Exhibit B.

CONCLUSION

WHEREFORE, Mr. Taylor respectfully requests that the Court award attorney's fees and expenses in the total amount of \$75,785.35.

² For simplicity of calculation, Williams & Connolly LLP's attorney's fees under the EAJA have been calculated according to the locality-adjusted hourly rate applicable in July 2021, when Williams & Connolly LLP began its representation of Mr. Taylor, also a conservative calculation.

Dated: December 20, 2023

Respectfully submitted,

/s/ Liam J. Montgomery

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