
IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 08-1475

KAREN DIXON,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

**AMENDED RESPONSE TO COURT'S ORDER OF AUGUST 7, 2018,
INCLUDING SUPPLEMENTAL FEE REQUEST**

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Date: October 11, 2018

Counsel for Appellant

In an Order dated June 19, 2018, the Court held:

1. Dixon's May 9, 2008, Notice of Appeal commenced a civil action against the United States by initiating proceedings for judicial review of an agency action.
2. While the litigation had multiple phases, including litigation related to the timeliness of Dixon's Notice of Appeal ("NOA"), each was part of a single overarching civil action.
3. Dixon is eligible to receive EAJA fees and expenses for the entirety of the litigation.
4. Dixon was the prevailing party in the litigation, and the Secretary's position was not substantially justified.
5. There are no special circumstances that weigh against an award of fees and expenses.

Based on these conclusions, the Court ordered that Dixon was entitled to attorney's fees, costs, and expenses beginning on August 24, 2012 and running through the present.

Order at 5 (June 19, 2018).

During oral argument on this matter, the Court asked counsel for Mrs. Dixon and counsel for the Secretary whether each side was willing to negotiate a settlement regarding the amount of fees, costs and expenses to be awarded. Counsel for Mrs. Dixon said she was willing to negotiate. Counsel for the Secretary said that the Secretary was willing to negotiate. To that end, the Court ordered the court staff to convene a Rule 33 conference, "to discuss the reasonableness of the requested fees and expenses." *Id.* That conference was held on August 6, 2018. Counsel for Mrs. Dixon participated in that conference with authority to compromise her claim. Counsel for the Secretary announced that the Secretary was not interested in compromising and would not negotiate.

It appears to Mrs. Dixon that the Secretary is not acting in good faith. For that reason, and to avoid bidding against herself, Mrs. Dixon reasserts that she is entitled to recover the following:

1. The sum of \$164,208.66¹ for fees related to the two rounds of briefing in this Court and two rounds of briefing and argument in the United States Court of Appeals for the Federal Circuit related to the tolling of 38 U.S.C. § 7266.
2. The sum of \$22,393.58 for out-of-pocket expenses related to the briefing described above.
3. Time spent preparing, arguing and defending this EAJA claim and expenses related thereto between December 12, 2016 and September 11, 2018. This includes 100.2 additional hours of attorney time billed at \$210.01/hour² and 21.1 hours of legal assistant time billed at \$116.20/hour.³ In addition the firm has incurred \$4,635.37 in expenses. That brings the total of this supplemental fee request to \$28,130.19. *See* Appendices A and B to Exhibit 2, T. Stoevers Declaration.

¹ As a reminder to the Court, the commercial value of the time devoted to this matter is \$767,069.75. Counsel has already removed time related to overhead and anything that might be considered duplicative (*e.g.*, time for a new lawyer to get up to speed). After discounts and write offs, the amount requested is about 21% of the value of the time worked.

² A rate in excess of \$125 per hour for counsel for Mrs. Dixon is justified based on the increase in the cost of living since the EAJA was amended in March 19, 1996. *See* 28 U.S.C. §2412 (d)(2)(A)(ii). According to the U.S. Department of Labor Bureau of Labor Statistics the 1996 consumer price index (“CPI”) for urban consumers in the Denver-Boulder-Greeley, Colorado region was 153.1 (the base year CPI-U). Given that the work that is the subject of this supplemental fee application was performed from December 2016 to September 2018, late 2017 is an appropriate “mid-point” to calculate a cost of living increase. *See Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994). In late 2017, the CPI-U in the Denver area was 257.23. U.S. Bureau of Labor Statistics, Mountain-Plains Information Office, Press Release, January 12, 2018 (attached as Exhibit 1). Applying this increase to the \$125 hourly rate provided by the EAJA, the hourly rate for the work performed by attorneys is \$210.01 ((257.23/153.1)*\$125).

³ The rate for work performed by a legal assistant has not changed significantly since January 25, 2017, the date of the original fee application.

The Secretary has made broad arguments about the reasonableness of the fees claimed. Rather than challenge a specific line item, the Secretary has argued that counsel should not bill for a review of the Court's rules (even though the Secretary put those rules at issue), that counsel should not bill for a moot court before a Federal Circuit argument, and that counsel's "block billing" is prohibited (even though complete descriptions of the work done is provided, and the Secretary has agreed to pay fees for time billed in precisely the same way by this firm in other cases). In short, the Secretary has given the Court no basis for reducing the fees and expenses requested by Mrs. Dixon.

In his response to this Court's Order of August 7, 2018, the Secretary states that,

[T]he Court did not discuss whether, even if Appellant is permitted to seek fees and expenses incurred in connection with the equitable tolling litigation, it is reasonable for such fees and expenses to be assessed against the Government and Taxpayer given that the litigation in this case arose solely and directly from Appellant's actions and not from any alleged government misconduct.

Secretary's Response To The Court Orders Of June 19, 2018 and August 7, 2018 at 3.

(Sept. 4, 2018) This argument is inapposite for at least two reasons: First, the Court's Order states:

[T]he Secretary has failed to persuade the Court that special circumstances weigh against an award of fees and expenses. The Secretary argues that it would be unfair for the Government and Taxpayers to pay for litigating equitable tolling, because the litigation arose from the veteran's inability to file his NOA. While the Court understands that Secretary's general interest in protecting the public fisc, that interest must be "subordinate to the specific statutory goals of encouraging private parties to vindicate their rights."

Order at 5 (*citations omitted*) (June 19, 2018). Clearly, the Court considered this argument and rejected it.

Second, the premise underlying the Secretary's argument -- that this prolonged, expensive litigation was the result of Mr. Dixon's inability to file his NOA -- is wrong. This litigation arises from the fact that Counsel for the Secretary refused to produce documents, misrepresented the effect of regulations, and otherwise obstructed Mr. Dixon's counsel from preparing his case. Then, after the Secretary had acknowledged that the doctrine of equitable tolling applied to Mr. Dixon's case, the Secretary refused to concede error and forced the parties to litigate, for a second time, before the Federal Circuit Court of Appeals. And all of this took place against the backdrop of an admitted error by the BVA. In short, the Secretary has no one but himself to blame for the time and expense incurred by Mr. Dixon's counsel in this matter. Any argument to the contrary is blind to the error, obfuscation, and obstructionism of the DVA in this case.

In an effort to kindle some interest in compromise, counsel for Mrs. Dixon sent an email to counsel for the Secretary expressing, once again, Mrs. Dixon's willingness to negotiate a settlement on the amount of fees, costs, and expenses owed. Email from T. Stoeve to R. Morris, Aug. 14, 2018 (attached as Ex. 3). The Secretary chose not to respond to that correspondence.

For the reasons set out above, in the Orders of this Court, and elsewhere in the pleadings and papers on file in this matter, Mrs. Dixon asks that \$214,732.43 be awarded in fees, costs, and expenses.

Respectfully submitted this 11th day of October, 2018.

/s/ Thomas W. Stoever, Jr.

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CERTIFICATE OF SERVICE

On October 11, 2018, a copy of this **AMENDED RESPONSE TO COURT'S ORDER OF AUGUST 7, 2018, INCLUDING SUPPLEMENTAL FEE REQUEST** in the matter of *Dixon v. Wilkie*, Docket Number 08-1475 was served on counsel of record via the Court's ECF system and mailed, U.S. First Class Mail, postage prepaid, to:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

/s/ Rebecca A. Golz