UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

WILLIAM E. ZIMINSKY,	)	
Appellant	)	
	)	**No. 17-3807**
	)	
v.	)	
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

APPELLANT'S APPLICATION FOR AN AWARD OF REASONABLE ATTORNEY FEES AND EXPENSES

Appellant asks the Court to award reasonable attorney fees and expenses under the Equal Access to Justice Act ("EAJA") in the amount of $7,444.93. 28 U.S.C. § 2412(d).

1. Appellant Meets the Basic Criteria for an award under EAJA.

To receive an award of attorney fees and expenses, Appellant must establish he was a "prevailing party" in the underlying suit, unless the Secretary's position was substantially justified or special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A).

Appellant is a prevailing party if he "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought" on appeal. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (internal quotations omitted). Appellant establishes prevailing party status when his remand is "predicated upon administrative error". *Zuberi v. Nicholson*, 19 Vet. App. 541, 544 (2006).

Appellant must prove 4 elements to successfully plead entitlement to EAJA fees:

(1) An assertion he is a prevailing party as defined by EAJA; (2) An assertion his net worth is not more than $2 million; (3) An allegation the Secretary's position at the administrative or litigation levels was not substantially justified; and, (4) inclusion of an itemized statement of the fees and expenses in an affidavit of Appellant's counsel. 28 U.S.C. §2412(d); *Cullens v. Gober,* 14. Vet. App. 234 (2001) (en banc).

The third element requires only a mere allegation that the Secretary's position at the administrative or litigation stage(s) was not substantially justified – the burden then shifts to the Secretary to prove his position at both stages was substantially justified. *Swiney v. Gober*, 14 Vet. App. 65, 70 (2000). Neither the correctness of the parties' positions, nor the success of specific arguments (or even whether arguments were reached) are the focus of evaluating substantial justification; instead, the Court assesses whether the Secretary's position at both stages has a "reasonable basis both in law and fact". *Pierce v. Underwood*, 487 U.S. 552, 566 (1988); *Cullens,*14 Vet. App at 240; *citing, Stillwell v. Brown,* 6 Vet. App. 291, 302 (1994).

1.1 Appellant is a prevailing party within the meaning of EAJA.

Appellant is a prevailing party: the parties jointly agreed to a remand of his appeal because the Board erred when it failed to provide any analysis as to whether Appellant explicitly, unambiguously, and with a full understanding of the consequences, withdrew his appeal for the issue of entitlement to an initial rating higher than 10% for tinnitus at his February 2017 BVA hearing, and erred when it did not provide an adequate statement of reasons and bases for its finding regarding the effective date for the hearing loss and tinnitus claims. *Joint Motion for Remand*, at page 3 – 4.

1.2 Appellant's net worth does not exceed $ 2 million.

Appellant's net worth was less than $2 million at the time the appeal was filed. *Appendix ("App")* at 1.

1.3 Appellant alleges the Secretary's position at administrative and/or litigation levels did not have a reasonable basis in law or fact.

Appellant alleges that the Secretary's position, at both the administrative and litigation stages, was not substantially justified, and that there are no special circumstances that would render an award of fees unjust.

1.4 Appellant's itemized billing is supported by his attorney's affidavit.

Appellant attached an itemized invoice of the hours billed by his attorney in this matter, supported by an affidavit from Appellant's counsel. *App.* at 2 – 17.

Shorthand references are used in that invoice. Time entries which have "CA" in the "Role" column indicate the work was performed by attorney of record Chris Attig who has been licensed to practice law in Maryland (since 2003) and Texas (since 2006). *App.* at 2 – 3.

In the attached itemization, time entries which have "PL" in the "Role" column indicate the work performed was paralegal in nature; attorney Attig employed multiple individuals who performed work that is paralegal in nature multiple locations in this appeal. *App.* at 3 – 5. The qualifications and experience of each person performing work that is paralegal in nature is listed in attorney Attig's affidavit. *App.* at 3 – 5. Their names are with-held for privacy, security, and safety reasons. *App.* at 4 – 5.

Appellant alleges that paralegal work requires no certification or licensure by any state or federal government; paralegal work is defined not by the qualifications of the person who performs that work, but the nature of the work performed. *Teixeira v. Nicholson*, 21 Vet. App. 77 (2006) (work of paralegal or specialized staff may be billed if an explanation as to the experience and education of the individual for whom the fee is sought is provided, as well as a description of the work performed and the standard billing rate for such staff), *citing*, *Baldridge*, 19 Vet. App. at 236, *quoting Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004).

Appellant is aware of no federal court decision which has ever required individuals performing work that is paralegal in nature be identified by name for purposes of an EAJA application; indeed, he argues that because paralegal work requires no certification or licensure, the name of the individual who performed paralegal work is not relevant to a request for EAJA fees for their work. *App.* at 4 – 5; *see, Role Models America, Inc. v. Brownlee*, 353 F.3d 962, 974 (D.C. Cir. 2004); *Hyatt v. Barnhart*, 315 F.3d 239 (4th Cir. 2002); *Miller v. Alamo*, 983 F.2d 856 (8th Cir. 1993).

2. This application seeks reasonable fees and costs under EAJA because the hourly rate and hours billed are both reasonable.

Appellant bears the burden of demonstrating reasonableness of the EAJA application. *See, Andrews v. Principi*, 17 Vet. App. 319, 321 (2003); *Baldridge v. Nicholson*, 19 Vet. App. 227 (2005). A reasonable fee is generally the product of reasonably billed hours and a reasonable hourly rate. *Blum v. Stenson*, 465 U.S. 886, 897 (1984), *quoting Hensley*, 461 U.S. at 434. Reasonable fees are those "that would normally be charged to and paid by a private client", and

the Court's focus is on whether each billing entry may be reasonably billed to the government. *Baldridge v. Nicholson*, 19 Vet. App. 227, 234 (2005).

Reasonableness is demonstrated by such factors as: (1) whether particular hours billed are unreasonable on their face, (2) whether the fee sought is contraindicated by factors itemized in *Hensley* or *Ussery;* or, (3) whether the fee is persuasively opposed by the Secretary. *McCormick v. Principi*, 16 Vet. App. 407, 413 (2002). *Hensley,* 461 U.S. at, 430 (1983); *Ussery,* 10 Vet. App. at 53.

Since Appellant was ultimately successful on appeal, he may recover EAJA fees for unsuccessful, but reasonable, arguments. *See Chesser*, 11 Vet. App. at 503-04, *quoting Jaffee v. Redmond*, 142 F.3d 409, 414 (7th Cir. 1998) ("time reasonably spent on an unsuccessful argument in support of a successful claim" is compensable, in part because to deny fees for "zealous advocacy that was appropriately provided …would be at odds with the norms of professional responsibility"). Unsuccessful arguments "made in good faith" constitute "effort reasonably expended in advancing" an appeal. *Hensley v. Principi*, 16 Vet. App. 491, 499 (2002).

2.1 Appellant's proposed hourly rate is Reasonable.

Appellant is entitled to recover the EAJA base hourly rate of $125 per hour for attorneys, adjusted to compensate for cost-of-living changes since that base rate was established. To calculate the hourly rates for the attorneys in this case, Appellant chose the month his JMR was filed (**September 2018**) as the litigation mid-point upon which to adjust base this adjustment. *Elcyzyn v. Brown*, 7 Vet. App. 170, 179-181 (1994).

Appellant asserts attorney Attig is entitled to the regional rate for Little Rock, Arkansas, as attorney work was exclusively performed in the law firm's office in that city. *App*. at 5. Appellant

therefore seeks a $125 hourly rate for attorney Attig, increased to adjust for the cost of living in Little Rock, Arkansas, based on the cost-of-living adjustment for the stated region at the aforementioned midpoint, yielding an hourly attorney rate of $199.84 per hour. *Id.*

Individuals performing work that is paralegal in nature are compensated under EAJA at prevailing market rates, not the cost to the firm. *Richlin Sec. Serv. Co., v. Chertoff*, 553 US 571 (2008). The U.S. Attorney's "Laffey Matrix" identifies prevailing market rates for paralegals, and is a "reliable indicator of fees"). *App.* at 2 - 4. *Wilson v. Principi*, 16 Vet. App. 509, 213 (2002) *vacated on other grounds by* 391 F.3d 1203 (Fed. Cir. 2004); *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part by* 746 F.2d.4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). Appellant has attached a chart, and the name and link to an online industry report, showing that the average prevailing market rate for paralegals in the Arkansas market is between a range of $140 - $160 per hour. App. at 4, 21. Appellant asserts the Department of Justice's paralegal rate in the "Laffey Matrix" is a reasonable indicator of the prevailing market rate for individuals performing work that is paralegal in nature under EAJA and before this Court. *Kiddey v. Shinseki,* 22 Vet. App. 367, 373 (2009), *citing Baldridge and Sandoval v. Brown,* 9 Vet.App. 177, 181 (1996) (using the U.S. Attorney's Office's "Laffey Matrix" as an indicator of prevailing market rate).

Based on the most recent edition of the Laffey Matrix, Appellant seeks paralegal fees at the rate of $164 per hour for their work on his appeal using the hourly rate on the date of the midpoint noted above. *App.* at 4, 18 - 20. There is no windfall to Appellant by seeking application of the above rates in this case.

2.2 Hours claimed by Appellant's counsel are reasonable, as counsel thoroughly exercised and explained his billing discretion.

Appellant contends the hours billed to his appeal were time reasonably expended and hours reasonably billed. As explained below, attorney Attig exercised his billing discretion as follows. First, attorney Attig reviewed individual line item entries and daily billing totals. Second, he reviewed the total hours expended on the case in distinct phases of this appeal, and included an across-the-board percentage reduction to facilitate the efficient resolution of this petition. *Baldridge*, 19 Vet. App. at 241-243 (Use of a percent global reduction for reducing EAJA fees is reasonable exercise of billing discretion and preferred approach of this court). Third, he considered the relation of the total amount billed to the outcome achieved for Appellant.

2.2.1 Appellant's attorney's exercise of billing discretion while reviewing individual line-item entries and daily billing totals resulted in a billing reduction of $1,293.42 (Tier I).

After reviewing all individual line-item time entries on the invoice, and the total daily amount billed, attorney Attig eliminated or reduced the time billed when the time included clerical tasks, tasks he would not bill to a private client, tasks with excessive hours, days on which hours spent were unreasonable, unnecessary, and /or redundant hours. *App*. at 5, 16. As a result of this first tier of billing discretion, Appellant's attorney reduced the overall fee sought by $1,293.42, eliminating a) 3.5 hours of paralegal time ($574.00); and, b) 3.6 hours of attorney Attig's time ($719.42). *App*. at 5, 16.

2.2.2 Appellant's attorney exercise of billing discretion while reviewing time spent in each phase of this appeal resulted in a reduction of $2,350.94. (Tier II)

Appellant's attorney considered the total spent for all employees in each distinct phase of this appeal: 1) File & Docket; 2) Record Review; 3) Rule 33; 4) JMR/Judgment; and, 5) Original EAJA Fee Petition). *See App.* at 5 – 6.

Appellant contends the total amounts billed for each employee in each phase of this litigation are reasonable on their face. *App.* at 5. He discusses 1 of these phases in this petition, specifically, attorney and paralegal work performed in furtherance of a record dispute. *App.* at 6. As discussed in more detail in his billing affidavit in the attached appendix, even though an attempt to supplement the record was not successful, the time on that attempt to supplement was reasonably expended, necessary and productive of the outcome. *App.* at 6. However, because it was not resolved in Appellant's favor, his attorney exercised billing discretion to reduce the total time spent on the record dispute by 50%: this equates to a reduction of .2 hrs of paralegal time ($32.80) and a reduction of 11.6 hours of attorney time ($2,350.95), for a total reduction of $2,383.75.

Appellant billed a total of 19.1 hours of time ($3,132.40) billed for paralegal work in the Record Review phase. *Accord, App.* at 6 – 9, 12 – 13 . Appellant contends the time spent was reasonable, necessary and productive of the results obtained. The bulk of the time in this phase of the appeal occurred when paralegals under the direct supervision of the attorney Attig reviewed, indexed and compared 2 documents (a C-File delivered by the Secretary's Record Management Center in December 2017 consisting of 1,059 pages, and an RBA served by the Secretary's

attorney consisting of 924 pages) to independently verify that the record before the agency ("RBA") submitted by the Secretary to the Court contained all the materials required by the Court's rules. *Id, at* 6 – 9, 12 - 13. The Court's rules define the RBA as "all materials that were contained in the claims file on the date the Board issued the decision from which the appeal was taken," along with "any other material from the record before the Secretary and the Board relevant to the Board's decision on appeal." U.S. VET. APP.R. 10(a)(1)-(2).

To independently verify the completeness of the 924 page record proposed by the Secretary, Appellant's attorney used the Freedom of Information Act (FOIA) to request and receive a 1,059 page claims file (herein, "C-File") from the VA Regional Office and the VA Record Management Center where the C-File was maintained. *Accord, App.* at 6 – 9, 12 – 13. Appellant's attorney exercised his billing discretion in reviewing the hours spent in this phase of the appeal to ensure the least possible time was billed at the lowest rates possible, considering the following factors, in his words:

> A) I considered that my firm reviewed an 8 page BVA decision, a 924 page RBA and a 1,059 page C-File produced by the VA Record Management Center (RMC) in December 2017 (total of 1,983 pages), with both documents identified by different parts of the Agency as the record before the BVA at the time of its decision. *App.* at 6.
>
> B) A thorough, complete and reliable record review of 2 files totaling nearly 1,983 pages was needed in order to verify that we not only had a proper record for the Court to review in this case, and complied with Rule 10, but also to ensure that I competently and diligently identified all potential errors of law and fact, identified the claims and appeals timelines for each issue that would be raised before the Court, and could present those errors in a clear and cogent statement of issues to ensure the greatest likelihood of a remand without the need for a brief. *App.* at 7.

C) I considered that reviewing over 1,983 pages of records took only 19.1 hours of paralegal time, as well as additional hours of time by a supervisory attorney – time that was not billed – to ensure the record review was done as quickly, efficiently and accurately as possible to avoid repeat reviews and "double-checks". *App.* at 7.

D) Paralegals under my direct supervision worked to index, analyze, compare and identify potential legal ramifications of thousands of pages in disparity between the BVA, the Secretary and OGC's inconsistent representation of the contents of the C-Files and the RBA produced in these proceedings. The pages in each files were not a perfect overlap - many of the pages that appeared in one file did not appear in another file, and in some cases similar documents were not identical or were different versions. Resolving this disparity between what the Secretary's "left hand" represented before the court as the RBA and what his "right hand" asserted was the contents of the C-File at the time of the BVA decision in a FOIA response, and then assessing the legal implications to our client and to this appeal is a critical legal task and not clerical in nature, and is necessary to achieve the results obtained. To have ignored this disparity, or to have trusted it to untrained clerical workers, would require me to disregard my duties of loyalty and competence to my client, and to "cut corners" on my duty of candor to the tribunal. *App.* at 7.

E) I exercised my billing discretion in reviewing the hours spent in this phase of the appeal to ensure the least possible time was billed at the lowest rates possible. *App.* at 7.

F) I minimized the time by not billing for any time spent directly supervising paralegals in the document review process rather than expending and billing time at my higher attorney hourly rate. *App.* at 7.

G) I required the paralegals to use an identical process and workflow to eliminate any wasted time. *App.* at 8.

H) I reduced the actual amount of each paralegal's time billed in this task to reflect a rate of approximately 105 pages/hr, to account for any time on this task that might have been clerical but was non-segregable from the recorded time spent. *App.* at 8.

I) I ensured the rates billed for time spent by individuals performing record review was consistent with amounts the Secretary has agreed to, and what this court has previously granted, in other cases. *App.* at 8.

J) I considered that only 2 issues were on appeal, and that the JMR was granted on both of those issues (effective date and extra-schedular hearing loss). *App.* at 8.

K) I considered that while the full record review was necessary to comply with Rule 10, the greatest value came from the factual summaries and citations to the record generated in the review. *App.* at 8.

L) Although more than one individual was used for the record reviews in this case, I considered that the total and unreduced time spent (i.e., 19.1 hours) is the equivalent of having one worker spend approximately a half a week working full-time on no other work besides reviewing the record in this appeal. *App.* at 8.

M) In light of the above, and solely for the purpose of attempting to avoid protracted EAJA litigation by motivating the Secretary to resolve this matter without need for the use of judicial resources to determine the reasonableness of fees, and/or the need for supplemental fee petitions, I believe the total paralegal time spent reviewing the record in this case is plausible, reasonable, necessary, and productive of the results achieved, and have made no reduction to the total amount of Paralegal time spent in this phase (19.1 hours). *App.* at 8.

N) I contend the full amount of attorney and paralegal time billed for record review is reasonable and necessary to achieve the results obtained; should the Court reduce or reject this billed time below the reduced amounts sought, it effectively penalizes appellant for his attorney's diligence in ensuring the record before the agency was accurate and complete, and scrutinized carefully to provide the best possible outcome for the client. *App.* at 8.

O) Billing 19.1 hours of time by paralegals performing record review of a 1,983 page record equates to a page rate of 104 pages per hour, which has not been found unreasonably by the Court (to my knowledge).[1] *App.* at 9.

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[1] *See Thompson v. Shulkin,* No. 14-2356E, 2017 U.S. App. Vet. Claims LEXIS 723 (May 19, 2017) (in case involving Mr. Attig as counsel, comparing 810 page RBA to 353 page file provided by prior

Based on the above considerations, Mr. Ziminsky contends the full remaining amount of attorney and paralegal time billed for record review (19.1 hours and $3,132.40) is reasonable and necessary, and requests the Court not penalize Appellant for his attorney's diligence in ensuring the record before the agency was accurate and complete.

2.2.3 Consideration of the relationship of the time billed as a whole to the outcome achieved. (Tier III).

Third, Appellant's attorney assessed the reasonableness of the overall amount billed for the entirety of the case, considered the reductions identified above, and compared the value of the total amount billed to the outcome achieved for the client. *App.* at 9. Appellant's attorney considered his client received remand on the critical issues he challenged on appeal. *App.* at 9. He considered that he had already exercised his billing discretion in 2 tiers, and thoroughly explained that exercise to

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attorney at 105 pages per hour (hereinafter, "pph") is not duplicative or unreasonable); *Parrott v. McDonald,* No. 14-3209E, 2015 U.S. App. Vet Claims LEXIS 1386 (October 14, 2015) (in case involving Mr. Attig as counsel, record review and comparison is not clerical, and Court will not reduce billing and penalize claimant for attorney's diligence in ensuring record on appeal was accurate and complete by comparing 918 page C-file to 1,102 page RBA at rate of 120 pph); *Gordon*, 22 Vet. App. 265 (2008) (43 pph for record review is "plausibly reasonably"); *Canada v. Shinseki,* No. 09-2203E, 2012 U.S. App. Vet. Claims LEXIS 1566 at *9 (July 24, 2012) (rate of review of 2 pages per minute to review 6,000 page record is "eminently reasonable on its face"); *Strazzella v. Shinseki,* No. 07-2864E, 2011 U.S. App. Vt. Claims LEXIS 257, *8 (February 8, 2011) (73 pph rate by attorney to review and compare claims file and RBA totaling more than 4,000 pages is not unreasonable); *Sperry v. Shinseki*, 24 Vet. App. 1, 7 (2010) (102 pph is not unreasonable rate to review 844 page record); *Mynes v. Shinseki*, 09-4438E, 2011 U.S. App. Vet. Claims LEXIS 905 (111 pph for record review is "plausibly reasonable" amount of time to review the record: the task is "time consuming, but it is necessary"); *Lawson v. Peake*, 05-2313E, 2008 U.S. App. Vet. Claims LEXIS 1524 (December 19, 2008) (74 pph for record review is reasonable because "with a record nearing 2,000 pages, such review can be complicated by the inherent tedium of simply matching and identifying documents.").

the Court, making substantial reductions in individual line item entries and to the amounts billed for particular phases of the appeal. In light of the above, Appellant argues the remaining time billed was reasonably expended, adequately described, and/or, properly billed.

In summary, Appellant's attorney's billing discretion itemizes the reductions Appellant has made in this petition; in the end, the lower hourly fee paid to Appellant's attorney, when compared to what a private client would pay for appellate representation before a state or federal appellate court, amounts to nearly a 53% reduction in attorney fees billed to the government; Appellant's total reduction in hours spent in furtherance of expediting the processing of this petition, based on all the reasons listed above, accounts for an overall 33% reduction to the total amount billed.

3. Appellant asks the Court to award $7,444.93 in fees and expenses.

When Appellant meets all the eligibility requirements for EAJA fees and expenses, the Court "shall award" them. *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1466 (Fed. Cir. 1986) (en banc). Multiplying the total hours spent by attorney Attig after the exercise of billing discretion (19.2 hrs) and his hourly rate of $199.84 yields a total of $3,836.93 sought for attorney Attig's work. Multiplying the total hours spent by paralegals after the exercise of billing discretion (22.0) and the hourly rate of $164.00, yields a total of $3,608.00 sought for paralegal work. Accordingly, Appellant respectfully requests the Court grant this petition for attorney fees and award a total amount of $7,444.93.

DATE: October 31, 2018

Respectfully Submitted,
ATTIG | STEEL, PLLC

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on October 31, 2018, I caused this petition to be served on the Appellee by and through the Court's E-Filing system:

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