# Exhibit B

**Subject:** RE: [EXTERNAL] RE: position on extension to respond to your EAJA
**From:** tgoffney@attorney4vets.com
**Date:** Fri, Jun 12, 2020 2:34 pm
**To:** "Schneider, Robert A. (OGC)" <Robert.Schneider2@va.gov>

Good morning/afternoon Robert:

Who is Nicole/Mary? If you are speaking of Nicole DeGraffenreid, then you were speaking to the wrong person. The attorney who conducted the CLS conference on this case was Elizabeth H. Talbot.

**I won't go so far as to venture to say that the information provided to you about a remand is a lie; but let me just stop by saying you were mis-informed. IT IS ABSOLUTELY FALSE THAT A REMAND WAS OFFERED AND REJECTED BY ME!**

It is a good thing that I have email records and CLS conference notes which belie your contentions.

1) The obvious sign on the EAJA application that there was no remand offer at the conference is the length of the conference. Less than 18 minutes. The Secretary, by Ms. Varga, definitively said "We will defend". Her reasons were that although we are still reviewing this, the Court and the Agency believe this to be a liberalizing law. WE WILL DEFEND" She rambled off some Court cases in support.

2) The conference ended at 2:18 pm. Five minutes later, at 2:24 pm, I emailed Ms. Varga and asked, in part: I would appreciate it if you would kindly forward to me the list of single judge decisions which you referenced during the conference wherein the judges determined that the PTSD regulation was a liberalizing law.

3) In that same email I also stated: I would also appreciate it if you would pass the actual Federal Register notations along to your superiors and/or to comp and pen. This case should be settled. **I believe that it is a complete waste of judicial resources to go to briefing on this.** ...They are possibly many cases of CUE our there where veteran have been denied benefits prior to April 11, 1980, despite having filed claims prior to that date. If there is a precedential decision on this, there will likely be a new class action because of this case.(MONK). **Kindly let me know at your earliest convenience, as my opening brief is due within 30 days.**

4) At 3:15 pm on 1-25-18, Ms. Varga replied to my email, stating:

Hi Tara,
I believe the most recent memorandum decision where the Court held that for purposes of 38 C.F.R. 3.114(a), the addition of PTSD to the rating schedule constituted a liberalizing law, is Bush v. Shulkin, 2017 U.S. App. Vet. Claims Lexis 953 (2017). There are others available on Lexis.

I've also just received confirmation from Comp & Pen that under VA policy, the earliest effective date in this case is April 11, 1980. **Thus, the Secretary will be defending the Board's decision at this time.**

5) At 3:26 pm, I responded to Ms. Varga's email as follows:

Thanks. You should note, however that the decision to which you refer is "for purposes of 38 CFR 3.114". As mentioned in my memo, Kellogg's case does not rely on 3.114.

**I will start to prepare my brief. Kindly let me know if your superiors (deputy attorneys) decide otherwise. Comp and Pen is the client, they should be taking advice from their lawyers, not the other way around.** I have stated in other cases that the reason why there are so many appeals is because comp and pen needs legal guidance. If your deputy's read the Federal Register, they may decide otherwise.

6) On February 15, 2018, I emailed Ms. Varga again, in an attempt at reason. I said, in part:

Good afternoon Ms. Varga

In light of the Court's panel decision in Foreman, 15-3463 regarding whether or not 38 cfr 3.304(f) is a liberalizing law (particularly as it relates to 38 cfr 3.114), do you still take the same position as you stated regarding PTSD being added to the schedule of disabilities in 1980? ... At the conference, you indicated that you wee still investigating this "liberalizing law" thing. The Foreman panel decision should support an answer to your question, by which you should conclude that this is clearly NOT a liberalizing law. **Since it has been almost a month since our conference and I am working on the opening brief, I just thought that I would check with you.**

You stand the chance of risking yet another panel decision on this as well as a possible class action by veterans who were robbed out of an earlier effective date due to VA's mis-interpretation of the addition of PTSD to the ratings. Mr. Kellogg would love nothing more either being a class plaintiff, or getting a panel decision in his favor with his name on it.

7) On February 20, 2018, at 11:44 a.m. Ms. Varga responded as follows:

Hi Tara, I am aware of the Court's decision in Foreman and had reviewed it prior to our conference in January. However, I do not think it applies to Mr. Kellogg's case.

-Ashley

At 1:04 pm, I thanked Ms. Varga and continued the drafting of my brief.

**So, my response, in lieu of the use of profanity, is an emphatic NO!. A REMAND WAS NEVER OFFERED! (I apologize, but based on your experience in our last phone conversation, you know how the perceived a "combative urgency" in the natural inflections of my voice have recently sent you the wrong message. I write the same way! LOL)**

**I am so curious to know who within your group related this FALSE information to you!!**

8) As to your supervisors concerns regarding expenses, I can only say that the documents (hotel bills) speak for themselves. Moreover, you are no doubt aware that prices, especially hotel prices in D.C., have been increasing exponentially every year. First, the suggestion that hotel rates in the D.C. area must remain staid year over year simply because your "government rates" have remained the same, or are less than so called "market rates" is rather ridiculous. No one has ever offered me a "government hotel" or a discount code for "government rates" at any D.C. hotel. As far as I know, there is no such thing.

And to suggest that I paid less for hotels for my last OA in 2017 is equally flawed, particularly given the fact that average rates continue to go up every year, and it also depends on the particular TIME of the year that a room is booked, particularly in the D.C. area. In fact, my hotel stay for the OA in June 2017 was equally as expensive. The room rate even then, two years, three months PRIOR to September 2019 was $631.00 per night

plus mandatory valet parking of $59.00 for a total of $690.00 per night. (See my amended EAJA filed 8-26-18 - This case is on appeal to the FC).

Thus, it is not surprising at all that the room rates at the Watergate, two years three months later was $746.00 per night. The timing of the Order for OA is also a factor. In this case, the court issued an order during peak season for hotels, which is May to October. I searched for hotels and booked as soon as I could. As you know, similar to airfares, the closer to the date, the higher the rates. I recall seeing some nightly rates as much as $1,500.00 per night. **You try booking a hotel room in D.C. during peak months!** I booked a local hotel in D.C. because the Court is located in D.C. I do not believe that the courts, will penalize me for that.

If GC is so concerned about hotel rates for OA, then you need to alert all the hotels in the area that the Secretary has a cost schedule for hotel stays in D.C. and that they are prohibited from charging attorneys before the court at their market rates. LOL!

**On my recollection, I have already reduced the overall fees by 15%. I believe this to be the fair and reasonable deductions which are expected.** I don't believe that a federal court, especially in the D.C. area, is going to tell me that it is my fault that the nightly rate for a hotel in September for out-of-town business travelers is unreasonable. Anyone not living under a rock knows that D.C. hotel rates are among the highest rates in the entire world (even more than New York, due to the District being our nations governmental seat), especially during the month of September after the summer recess is over. I submitted a copy of the invoice with my application. I actually paid for one night out of my pocket. As far as meals, they are a part of necessary business expenses when you are on business and staying at a hotel local to the courthouses.

And the fact that the panel was dis-banded and the single judge ended up doing a remand is of no moment. Clearly, there were issues that the SJ thought warranted a panel. And this is an unusual case. I won't be surprised at all if the BVA denies it for the fourth time. And I will be back at the court for a fourth EAJA fee!. The fact is...it is the system which causes the government to spend exorbitant amount of money in EAJA on issues that should have been resolved years ago. This includes the Court's reluctance to REVERSE the Board despite their authority to do so.

You should look at my supplemental authorities and you will find that EED's for PTSD have been granted many times prior by the BVA. Mr. Kellogg, unfortunately is a victim of a denial in 1974 (ie., a §3.156( c ) case). Many practitioners contacted me after the OA to say that they thought the entire appeal is ridiculous because their clients all got ED's for PTSD prior to April 1980.

I think I have been reasonable by reducing my overall fees by 15%. So I am not willing to reduce by another 2K plus. Another nearly 10% reduction would be an abuse. But I trust that this was your original position, which is based on outrageous mis-information.

By the way, take a look at Ward/Neal - 17-1204. The VA paid a $50K plus EAJA fee. In that case, the OA was in the middle of the winter (in February during snow/winter there are lower rates), but the government paid hotel bills for 4 attorneys (nightly rate total for the 4 attorneys of $600) when ONLY ONE ATTORNEY IS REQUIRED TO ARGUE THE CASE! In that case, the attorney voluntarily reduced their EAJA by about 15%, just as I have. Why didn't the government have a problem with paying the hotel bill for 4 people?

Also, take a look at Waters - (19-2440). The EAJA paid in that case as $24K for a JMR on a very simple issue (R&B for chronic fatigue syndrome)! Although there was a large searchable disc record in that case; (ie. 197k pages) the government didn't seem to have a problem paying 24K for a JMR. Why didn't the government have a problem with that?

By the way, whose paying me for all this extra work defending the fact that other GC's or others have relayed false information to you; and also, in essence, blaming me for D.C hotel charges which everyone knows skyrocket in the month of September when it is the end of summer, and Congress and business travelers return to the District?.

Unfortunately, if after reading this email and correcting your prior assumption you still maintain the same position, then I guess we will just have to fight about it. I have just now spent an additional 3 hours on this case. I don't think the judges will agree to cut my fees after I submit the documentary evidence, emails, etc. to rebut your perceptions. As for hotel bills, they speak for themselves. Perhaps, in the future, the

government should offer to make my hotel reservations and pay the hotels the government rate themselves.

Take care Robert. Major Covid-19 outbreaks are increasing down here in Texas. Everything is delayed and requires government approval, even for a funeral. Funeral services are scheduled for next week.

TRG