UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Anthony Huerta, Appellant. v. Denis McDonough, Secretary of Veterans Affairs, Appellee.	)	No. 19-2805

APPLICATION OF APPELLANT ANTHONY HUERTA FOR ATTORNEY FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT, 28 U.S.C. § 2412

Pursuant to Rule 39(a) of the United States Court of Appeals for Veterans Claims Rules of Practice and Procedure and the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, Appellant Anthony Huerta respectfully submits this application for an award of attorney fees in the amount of $31,056.28 and other expenses in the amount of $176.40 in connection with this Court's reversal of a decision by the Board of Veterans Appeals. *Huerta v. McDonough,* 34 Vet.App. 76 (2021).

Mr. Huerta is eligible under EAJA for an award of attorney fees and expenses because in connection with his successful appeal to this Court of the Board's March 2019 decision: (1) he is a prevailing party; (2) his net worth does not exceed $ 2,000,000; (3) the Secretary's position, including that taken in the administrative proceedings by the Board, was not substantially

justified; and (4) this application is filed within 30 days of the date on which the judgment became final and is supported by an itemized statement of the fees and expenses sought. *See* 28 U.S.C. § 2412(d)(1)(A), (1)(B), (2)(B), 2(G); *Scarborough v. Principi*, 541 U.S. 401, 407-08 (2004); *Norris v. SEC*, 695 F.3d 1261, 1264 (Fed. Cir. 2012); *Blue v. Wilkie*, 30 Vet.App. 61, 65 (2018).

In support of this application, Mr. Huerta files three appendices consisting of the Declaration of Anthony Huerta (Appendix A), the Declaration of Scott W. MacKay (Appendix B), and an Itemized Statement by Counsel of Actual Time Expended and Rate at Which Fees and Other Expenses Were Computed (Appendix C).

STATEMENT OF THE FACTS

Mr. Huerta sought disability compensation for injuries sustained in a motor vehicle accident in 1985, while he was on active duty. *Huerta v. McDonough,* 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 1-2. In August 2016, a VA examiner opined that Mr. Huerta did not have an osteomyelitis infection after 1989 and stated that physical examination revealed no signs attributable to osteomyelitis. *Id.* at 2. Mr. Huerta submitted an "Osteomyelitis Disability Benefits Questionnaire" from his treating orthopedic surgeon, Dr. William Beauchamp, who stated that a recent MRI showed "foreign bodies in the superficial soft tissues ... at or near the site of the 1985 iliac bone graft" and those foreign bodies caused Mr. Huerta's

chronic osteomyelitis. *Huerta v. McDonough,* 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 3. Dr. Beauchamp opined that Mr. Huerta's osteomyelitis was "[c]hronic, recurrent, [and] refractory to medical and surgical treatment." *Id.*

VA obtained an addendum medical opinion in 2017, in which the VA examiner concluded that Mr. Huerta did not have current active osteomyelitis and Dr. Beauchamp's diagnosis of chronic osteomyelitis was incorrect. *Id.* The VA examiner stated that because the veteran's condition was last symptomatic in 1992, his chronic osteomyelitis was "inactive," and that the episodes in 1993 and 1994 were not related to osteomyelitis. *Id.* In a 2017 supplemental opinion, Dr. Beauchamp reiterated that Mr. Huerta had chronic osteomyelitis with a "long history of intractability and debility" that was likely related to the multiple infections he experienced between 1989 and 1994. *Id.* The regional office subsequently granted Mr. Huerta service connection for osteomyelitis and assigned a 10% disability rating. *Id.*

In a March 2019 decision, the Board of Veterans Appeals assigned initial staged ratings dating back to 1986. *Id.* The Board concluded that a 100 percent rating was warranted from November 8, 1986, to February 1, 1992, because the veteran had active pelvic osteomyelitis. *Id.* For the next stage—February 1, 1992, to June 3, 1994, and from July 6, 1995 through January 31, 1997 (reflecting a period of active duty service)—the Board

concluded that a 20 percent rating was warranted because the veteran had had an active infection within the previous 5 years. *See id; see also* R. at 19 (5-20). For the most recent stage—February 1, 1997 to March 2019—the Board assigned a 10 percent rating because, per the VA examiner, Mr. Huerta had not had an active infection since the 1990's. *Id.* The Board denied entitlement to a 100 percent rating for the entire period, finding it "unreasonable to assume that an automatic 100[%] disability rating is warranted for osteomyelitis, which initially manifests in the 'pelvis, vertebrae' or 'extends into major joints,' but which is later resolved without residual symptoms." *Huerta v. McDonough,* 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 4. The Board further reasoned that the "note to [DC 5000] states that a rating for osteomyelitis will not be applied following cure by removal or radical resection of the affected bone" and that the VA examiners said Mr. Huerta's osteomyelitis resolved in 1992 without any further residuals. *Id.*

Mr. Huerta appealed the Board's decision to this Court arguing that under DC 5000 a diagnosis of chronic osteomyelitis of the pelvis provides an independent basis for a disability rating of 100 percent in the absence of an active infection process. Appellant's Opening Brief (App. Br.) at 10-16. Mr. Huerta also argued that the Board committed clear error by failing to consider material evidence favorable to Mr. Huerta consisting of magnetic

resonance imaging (MRI) and Dr. Beauchamp's physical examinations in 2016 supporting his diagnosis that Mr. Huerta's osteomyelitis of the pelvis was chronic, intractable, and an ongoing process with an onset date of 1986. *Id.* at 16-20. Mr. Huerta further argued that the Board committed clear error by affording greater probative weight to the medical opinions of VA examiners than to the conflicting medical opinions of Dr. Beauchamp. *Id.* at 20-27.

In his answering brief, the Secretary argued that "remand, not reversal, is the appropriate remedy here because the record presents a conflict about whether Appellant's osteomyelitis condition is active, which is a [sic] critical to higher ratings under 38 C.F.R. § 4.71A, Diagnostic Code (DC) 5000." Secretary's Brief (Sec. Br.) at 11. In advancing this argument, the Secretary conceded that the Board committed several errors: (1) failing to address the August 2016 MRI results showing metallic foreign bodies in Mr. Huerta's left hip; (2) erroneously relying on the March 2017 VA medical opinion, which did not address the August 2016 diagnostic report when it opined that "[t]here have been no signs of osteomyelitis since 1992;" and (3) erroneously relying on the August 2016 VA examination, which did not appear to consider evidence of a December 1991 infection that was resolved with additional treatment in early 1992 in mistakenly concluding that Mr. Huerta's current osteomyelitis condition was resolved with no additional

episodes or recurring osteomyelitis infections since the initial infection in 1985. Sec. Br. at 11-13. The Secretary also argued that "the text and structure of DC 5000 make clear that osteomyelitis 'acute, subacute, or chronic' is rated, in part, on its active or inactive status, and given the graduated structure of DC 5000, a 100% rating requires evidence of *active* osteomyelitis." Sec. Br. at 16.

In an opinion dated April 21, 2021, this Court reversed the Board's determination that a 100 percent disability rating under DC 5000 is not warranted for the entire period on appeal, vacated that portion of the Board's March 18, 2019, decision, and remanded the case to the Board for further proceedings consistent with its opinion. *Huerta v. McDonough,* 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 8. The Court found "the plain language for assigning a 100% disability rating under DC 5000 clear and unambiguous. Specifically, the plain language of DC 5000 establishes a diagnosis of chronic osteomyelitis of the pelvis as a sufficient basis to warrant a 100% rating." *Id.* The Court concluded "that the Board committed legal error in determining that Mr. Huerta's chronic pelvic osteomyelitis did not entitle him to a 100% disability rating. In light of this outcome, the Court need not address the adequacy of the four contested VA and private medical opinions." *Id.*

Judgment was entered on May 24, 2021. In the absence of a notice of appeal having been filed by either party within 60 days from the date judgment was entered, the date of mandate was, and the judgment became final on, July 23, 2021.

ARGUMENT

I. Mr. Huerta is a Prevailing Party

Mr. Huerta is a prevailing party within the meaning of 28 U.S.C. § 2412(d), because through his appeal he received "judicial action that change[d] the legal relationship between the parties on the merits of the claim." *Akers v. Nicholson*, 409 F.3d 1356, 1359 (Fed. Cir. 2005) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't. of Health & Hum. Res.*, 532 U.S. 598 (2001)); *see Robinson v. O'Rourke*, 891 F.3d 976, 980 (Fed. Cir. 2018). This Court reversed and remanded the Board's March 2019 decision, concluding that the Board committed legal error in determining that Mr. Huerta's chronic pelvic osteomyelitis did not entitle him to a 100 percent disability rating under DC 5000 for the entire period under appeal. *Huerta v. McDonough,* 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 8.

The Court's finding that the Board committed error established Mr. Huerta as a prevailing party. *Johnson v. McDonald,* 28 Vet.App. 136, 140 (2016) ("Prevailing-party status is established either through a merits-stage remand predicated upon the Court's finding of error or a concession of error

by the Secretary."). It is undisputed that Mr. Huerta prevailed on the merits of his claim challenging the Board's flawed denial that his osteomyelitis of the pelvis warranted an evaluation of 100 percent for the entire period under appeal. The Court's decision in that regard changed Mr. Huerta's relationship with the VA by entitling him, contrary to the position of the Secretary, to an evaluation of 100 percent for his osteomyelitis for the entire period under appeal from February 1, 1992 to June 3, 1994, and from July 6, 1995 to the present.

II. The Secretary's Position Denying Mr. Huerta's Claim was Not Substantially Justified

The Secretary's position that Mr. Huerta was not entitled to a 100 percent evaluation for his osteomyelitis of the pelvis for the entire period under appeal was not substantially justified because it was not founded upon a reasonable basis both in law and fact. First, this Court's determination that the Secretary's interpretation of DC 5000 was wholly unsupported by the regulation's plain language precludes a finding that the Secretary's position was substantially justified. Second, the Secretary conceded that the Board's denial of Mr. Huerta's claim was improper, because the Secretary admitted it was based on at least three legal and factual errors. The Secretary's concession of error by the Board precludes a finding that the

Secretary's position at the administrative proceedings was substantially justified.

A prevailing party is entitled to attorney fees under EAJA "unless the Court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A). The Secretary "has the burden of proving that his position was substantially justified ... to defeat the appellant's EAJA application." *Lacey v. Wilkie,* 32 Vet.App. 387 (2020) (quoting *Vaughn v. Gober*, 14 Vet.App. 92, 95 (2000)). The Secretary must establish that his position was substantially justified at both the Board level and before this Court. *Id.* "The Secretary's position is 'substantially justified' when it is founded upon a 'reasonable basis in both law and fact.'" *Dixon v. O'Rourke*, 30 Vet.App. 113, 118 (2018) (per curiam order) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564 (1988)). "[T]he substantial justification inquiry requires an analysis of the 'totality of the circumstances' surrounding the government's adoption of a particular position." *Patrick v. Shinseki*, 668 F.3d 1325, 1332 (Fed. Cir. 2011). It is "relevant to consider the totality of the circumstances surrounding the Secretary's action, including whether the Secretary 'had adopted an interpretation ... wholly unsupported by either the plain language of the statute or its legislative history.'" *Butts v. McDonald,* 28 Vet.App. 74, 83 (2016) (quoting *Patrick v. Shinseki,* 668 F.3d at 1333). "Where … the government interprets a statute in a manner that is contrary to its plain

language and unsupported by its legislative history, it will prove difficult to establish substantial justification." *Patrick v. Shinseki*, 668 F.3d at 1330-31.

A. The Secretary's Interpretation of DC 5000 Was Unreasonable

Both at the Board and before this Court the Secretary asserted that Mr. Huerta's claim should be denied because under DC 5000 a 100 percent evaluation for osteomyelitis of the pelvis required an active infection process. For example, offering no textual analysis the Board stated as *ipse dixit*:

> DC 5000 explicitly contemplates diagnostic criteria for "acute, subacute, or chronic" osteomyelitis based upon its active or inactive status. Therefore, it is unreasonable to assume that an automatic 100 percent disability rating is warranted for osteomyelitis, which initially manifests in "the pelvis, vertebrae" or extends "into major joints,." but which is later resolved without residual symptoms.

R. at 18 (5-20); *see Huerta v. McDonough,* 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 4. Before this Court, the Secretary focused "primarily on the overall structure of DC 5000, contending that it employs a 'graduated' scheme whereby osteomyelitis is rated based upon active or inactive status. Secretary's Brief at 16." *Huerta v. McDonough,* 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 5.

The Court concluded that the Secretary's interpretation of DC 5000 was wholly unsupported by the regulation's plain language: "Focusing on the 100% rating criteria at issue here, we note that the text and structure support Mr. Huerta's reading, whereby each of the five symptom groups

represent alternative symptom groups capable of satisfying the rating." *Huerta v. McDonough,* 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 6. Among other things, the Court found "the use of offsetting commas and the lack of a conjunctive term linking 'of the pelvis' and 'vertebrae,' indicates a clear break between these symptoms" and "the use of the disjunctive 'or' to separate the final three groups shows that they are intended to be viewed separately." *Id.* The Court further found "[a]dditional support for the veteran's interpretation" in "the conspicuous absence of any reference to active infection in the 100% criteria." *Huerta v. McDonough,* 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 7.

On the other hand, the Court concluded the "Secretary's proposed interpretation of DC 5000 is less convincing." *Id.* The Court rejected the Secretary's assertion "that DC 5000 bears a 'graduated' structure and so functions similarly to a 'successive' rating, whereby the criteria for each rating are cumulative, incorporating the criteria of each lower rating." The Court explained:

> The difficulty with this line of reasoning is that DC 5000 bears no indication of a successive or cumulative in nature, which it would have to have for the Secretary's interpretation to hold … However, DC 5000 includes no implied elements, and thus the Secretary's graduated-structure argument is critically flawed. DC 5000 would have to be successive in express terms for the requirement of active infection within a given period to apply beyond the 20% rating. Short of this, it's not clear how DC 5000 differs from any other DC where a veteran must do no more than

> present a disability picture that most nearly approximates a specific rating, even where a disability might not manifest all the criteria in that rating.

Huerta v. McDonough, 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 7-8.

The Court unequivocally rejected the Secretary's interpretation of DC 5000 as inconsistent with its plain, unambiguous language:

> Ultimately, the Court finds the plain language for assigning a 100% disability rating under DC 5000 clear and unambiguous. Specifically, the plain language of DC 5000 establishes a diagnosis of chronic osteomyelitis of the pelvis as a sufficient basis to warrant a 100% rating. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there" … Based on this interpretation, the Court concludes that the Board committed legal error in determining that Mr. Huerta's chronic pelvic osteomyelitis did not entitle him to a 100% disability rating.

Huerta v. McDonough, 34 Vet.App. 76 (2021), No. 19-2805, slip op. at 8.

The Secretary's position both at the Board and before this Court was unreasonable and was not substantially justified, because "[w]here … the government interprets a [regulation] in a manner that is contrary to its plain language … it will prove difficult to establish substantial justification." *See Patrick v. Shinseki*, 668 F.3d 1325, 1330-31 (Fed. Cir. 2011).

B. The Secretary Conceded that the Board Committed Error

Even if the Court were to determine that the Secretary's interpretation of DC 5000 was substantially justified, which it was not, the Secretary's overall position that Mr. Huerta was not entitled to a 100 percent evaluation

for his pelvic osteomyelitis throughout the period on appeal was not substantially justified in light of the Secretary's concession that the Board's decision did not have a reasonable basis both in law and fact.

In his answering brief, the Secretary argued that "remand, not reversal, is the appropriate remedy here because the record presents a conflict about whether Appellant's osteomyelitis condition is active, which is a [sic] critical to higher ratings under 38 C.F.R. § 4.71A, Diagnostic Code (DC) 5000." Sec. Br. at 11. In making this argument, the Secretary conceded that the Board committed several errors in denying Mr. Huerta's claim. The Secretary admitted that the Board failed to address the August 2016 MRI results showing metallic foreign bodies in Mr. Huerta's left hip, contrary to the requirement that the Board consider all relevant evidence of record. *See Schafrath v. Derwinski*, 1 Vet.App. 589, 593 (1991). Sec. Br. at 11. The Secretary admitted that the Board improperly relied on the March 2017 VA medical opinion, which erroneously did not address the August 2016 MRI diagnostic report when it opined that there "have been no signs of osteomyelitis since 1992," contrary to the requirement that a medical opinion must be based on a veteran's prior medical history. *See D'Aries v. Peake*, 22 Vet.App. 97, 104 (2008). Sec. Br. at 12. The Secretary further conceded that the Board erroneously relied on the August 2016 VA examination, which did not appear to consider evidence of a December 1991 infection that was

resolved with additional treatment in early 1992 in mistakenly concluding that Mr. Huerta's current osteomyelitis condition was resolved with no additional episodes or recurring osteomyelitis infections since the initial infection in 1985. *See D'Aries v. Peake*, 22 Vet.App. at 104. Sec. Br. at 12-13.

The Secretary's concession that the Board's denial of Mr. Huerta's claim for a 100 percent evaluation of his osteomyelitis of the pelvis was based on at least three legal and factual errors establishes that the Secretary's position was not substantially justified because it was not "founded upon a 'reasonable basis in both law and fact.'" *See Dixon v. O'Rourke*, 30 Vet.App. 113, 118 (2018) (per curiam order) (quoting *Pierce v. Underwood*, 487 U.S. 552, 564 (1988)).

III. Mr. Huerta's Itemized Statement of Fees and Expenses Supports an Award of Attorney Fees and Expenses

Pursuant to 28 U.S.C. § 2412(d)(1)(B), Mr. Huerta seeks under EAJA an award of $31,056.28 in attorney fees and $176.40 in expenses. Mr. Huerta's fee application is submitted within 30 days of the date on which the Court's judgment, entered on May 24, 2021, became final. *See* 28 U.S.C. § 2412(d)(2)(B), (d)(2)(G) (requiring that a party seeking an award of attorney fees and other expenses under EAJA submit an application to the court within 30 days of the date on which the judgment becomes final and not appealable); *see also* 38 U.S.C. § 7291 (a decision of this Court becomes final

upon the expiration of the time allowed for filing a notice of appeal from such a decision under 38 U.S.C. § 7292, a time period specified by 28 U.S.C. § 2107 as 60 days from the date of the entry of judgment when one of the parties is a United States agency); *see generally Westfall v. McDonald,* 27 Vet.App. 341, 342-43 (2015). In support of his application, Mr. Huerta has provided at Appendix C an itemized statement from counsel stating the actual time expended and the rate at which fees and other expenses were computed.

Under EAJA, the fees available to a prevailing party are "those reasonable and necessary expenses of an attorney incurred or paid in preparation for trial of the specific case before the court, which expenses are those customarily charged to the client where the case is tried." *Oliveira v. United States*, 827 F.2d 735, 744 (Fed. Cir. 1987). In addition, time spent preparing a fee petition is compensable under EAJA. *Schuenemeyer v. United States*, 776 F.2d 329, 333 (Fed. Cir. 1985); *Fritz v. Principi*, 264 F.3d 1372, 1377 (Fed. Cir. 2001); U.S.VET.APP.R. 39(a) ("The application shall include the fees and expenses claimed for the submission of that application."). The term "expenses" is generally understood to include all the expenditures made by a litigant in connection with an action. *See Bennett v. Dep't of the Navy*, 699 F.2d 1140, 1143 (Fed. Cir. 1983). The quantum and method of proof of each allowable expense is discretionary with the court. *Oliveira* at 744.

EAJA states that "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living ... justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A); *Parrott v. Shulkin*, 851 F.3d 1242, 1244 (Fed. Cir. 2017). The Court should use the local CPI of where the prevailing party's counsel is located, instead of a national CPI, when calculating a cost-of-living adjustment to EAJA's $125 maximum hourly rate. *Parrott v. Shulkin*, 851 F.3d at 1249; *Speigner v. Wilkie,* 31 Vet.App. 41, 44 (2019). When calculating a cost-of-living adjustment, this Court has based adjustments on the consumer price index for urban consumers (CPI–U). *See Swanagan v. McDonough*, ---Vet.App.---, 2021 WL 2562340 *5 (Jun. 23, 2021); *Harvey v. Shinseki*, 24 Vet.App. 284, 291 n.3 (2011) (per curiam order). This Court has calculated the cost-of-living adjustment by dividing the CPI for the month in which the fees were incurred by the baseline March 1996 CPI, and then multiplying that ratio by the $125 statutory rate. *See id.*

As reflected in counsel's itemized statement submitted in support of this application at Appendix C, counsel's hourly EAJA rate is calculated by applying the formula approved in *Swanagan* and *Harvey*, *supra*: multiplying the $125 statutory rate by the ratio of each month's CPI-U for the Northeast Region and the baseline March 1996 CPI-U of 162.8 for the Northeast Region. The CPI-U data are reported in a table on the United States Bureau of Labor Statistics website: https://www.bls.gov/regions/new-

england/data/consumerpriceindex_northeast_table.htm. The hourly EAJA rate for work performed in July 2021 was calculated using the CPI-U data for June 2021, as the July 2021 data were not yet published. Counsel used the CPI-U data for the Northeast Region, which includes New Hampshire, because the principal location for the legal work performed in representing Mr. Huerta was in Hebron, New Hampshire. *See Parrott v. Shulkin*, 851 F.3d at 1249.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court approve Appellant Anthony Huerta's EAJA application and order an award of attorney fees in the amount of $31,056.28 and other expenses in the amount of $176.40.

Respectfully submitted,

Date: July 26, 2021

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