

REFORMING THE EQUAL ACCESS TO JUSTICE ACT TO MAXIMIZE VETERANS' RECEIPT OF BENEFITS AND INCREASE EFFICIENCY OF THE CLAIMS PROCESS

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INTRODUCTION

Generally, United States civil court cases require litigants to bear the burden of their own attorneys' fees and any other fees associated with litigation. Under the Equal Access to Justice Act ("EAJA"), however, the courts may award reasonable representation fees to prevailing parties that have successfully litigated against the Federal Government ("Government") for an action in which the Government's position was not "substantially justified."⁴

The pro-claimant nature of the Department of Veterans Affairs (VA) adjudication system requires satisfaction of numerous procedural hurdles before a denial by the Board of Veterans' Appeals ("Board") can be affirmed by the Court of Appeals for Veterans Claims ("Veterans Court") on the basis of insufficient evidence.⁵ At the Government's expense, a veteran is assisted in developing his claim at all levels of administrative

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⁴ 28 U.S.C. § 2412(d)(1)(A) (2006).

⁵ *Hensley v. West*, 212 F.3d 1255, 1262 (Fed. Cir. 2000) (noting that, in determining whether a claim is well grounded, "[t]he low threshold is . . . appropriate in light of the uniquely pro-claimant nature of the veterans compensation system"); *Hayre v. West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999) (observing that the system is a "uniquely claimant friendly system of awarding compensation"); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (stating that courts have "long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant").

review.⁶ This type of nonadversarial process is unlike any other system in the United States, albeit, similar to the case review and appeal process at the Social Security Administration (SSA).⁷ As discussed more fully below, the SSA has a more accountable and transparent system for attorney fee awards than the VA. Specific provisions in the Social Security Act,⁸ which specify the types of claims that can be compensated for, govern attorney compensation. The VA has no equivalent provisions.

Rather, the Veterans Court liberally applies the “lack of substantial justification” requirement of the EAJA when compared to other courts, and has *essentially* found that “*any error warranting remand*” for any reason “will establish that the Government’s position was not substantially justified.”⁹ As a result, EAJA fees can be awarded where the veteran is not ultimately gaining any benefit, either monetary or a change in eligibility status.¹⁰

⁶ See *Thurber v. Brown*, 5 Vet. App. 119, 123 (1993) (noting that “[t]he entire thrust of the VA’s nonadversarial claims system is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process”).

⁷ *Hodge*, 155 F.3d at 1362 (noting that the uniquely pro-claimant principles applicable to veterans’ claims for benefits is not consistent with that applicable to Social Security claimants).

⁸ Social Security Act (SSA) § 206(b), 42 U.S.C. § 406 (2006); SSA § 1631(d), 42 U.S.C. § 1383.

⁹ Letter from Eric K. Shinseki, Secretary of VA, to the Honorable Charles E. Grassley, United States Senator (April 22, 2010) [hereinafter Letter to Senator Charles E. Grassley] available at <http://www.grassley.senate.gov/about/upload/Veterans-04-22-10-VA-response-to-CEG-letter.pdf> (last visited Oct. 22, 2011) (discussing *Thompson v. Principi*, 16 Vet. App. 467, 470 (2002), which noted that a “reasons or bases” error, such as failing to address material evidence, has no reasonable basis in law or fact, and *Cullens v. Gober*, 14 Vet. App. 234, 251 (2001) (en banc), where the dissent noted that “no other federal court awards [Equal Access to Justice Act (“EAJA”)] fees when an agency fails to appropriately articulate reasons for its administrative decision”). The authors note that there are a few exceptions in which the Court of Appeals for Veterans Claims (“Veterans Court” or “Court”) has declined EAJA fees (i.e., change in law).

¹⁰ For the sake of brevity and clarity, the authors refer to only attorneys; however, agents, other service organizations, and representatives can also collect fees under the EAJA. With regard to who is able to collect fees under the EAJA, the Veterans Court previously held that a non-attorney representative was not entitled to fees under the EAJA even though the representative was recognized by the Secretary as an agent who could represent veterans and the veteran prevailed in the underlying action.

The Veterans Court's current practice and interpretation of the EAJA creates an incentive for attorneys to obtain multiple remands from the court rather than a final decision. Multiple remands back to the Board do not ultimately benefit the veteran, whereas arguing the case on its merits would ensure a final determination of the claim. In some instances, attorneys will contract only to represent the veteran at the Veterans Court level and will not continue with representation after a remand to the Board is obtained. A possible explanation for this practice is that EAJA fees can only be obtained at the Veterans Court level.¹¹ In fact, a senior law clerk for a member of the Veterans Court recognized that the goal of an attorney taking a case before the Veterans Court is often to secure a remand on any basis possible.¹²

See Cook v. Brown, 6 Vet. App. 226, 233 (1994). The Court noted that Congress specifically used the phrase “reasonable attorney fees” to restrict courts awarding EAJA fees to only work done by a licensed attorney. *Id.* at 231. The Veterans Benefits Act of 2002 (VBA) overruled *Cook* and provided that the Veterans Court has authority to award fees under the EAJA for time spent by a non-attorney agent where the appellant was represented by such non-attorney. Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 403, 116 Stat. 2820, 2833. Following enactment of the VBA, the Court awarded EAJA fees to a non-attorney representative who assisted a licensed attorney in a veteran's representation. *See* Abbey v. Principi, 17 Vet. App. 282, 290 (2003). The Court considered both the skill level and previous experience of the non-attorney representative in determining an appropriate hourly rate. *Id.* at 292. A veteran appearing *pro se* before the Veterans Court can recover expenses, but not fees under the EAJA. *March v. Brown*, 7 Vet. App. 163, 168-70 (1994).

¹¹ *See generally* Jackson v. Shinseki, 23 Vet. App. 27, 35 (2009) (absent an appeal to the Veterans Court, there is no free-standing cause of action by an attorney to file for EAJA fees). The authors could not find recorded statistical information on the frequency or rate which attorneys are only representing a client at the Veterans Court level and do not continue with their representation after a remand is granted by the Court. Therefore, the authors postulated as to a possible reason why the practice occurs.

¹² *See* James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeal for Veterans Claims*, 1 VETERANS L. REV. 113, 134-35 (2009) (stating that “the goal of an attorney taking a case before the [Veterans Court] is often to secure a remand on any basis possible to preserve the claimant's effective date, so that the attorney can then proceed with an open record to present a well-developed theory in support of the claim on remand”).

The current VA EAJA practice depletes VA funding and spends taxpayers' money by paying EAJA fees to attorneys that merely obtain a joint remand regardless of whether the veteran actually receives a benefit. In 2005, VA paid \$3.7 million in EAJA fees.¹³ In 2006, VA paid \$5.5 million.¹⁴ In 2007, VA paid \$8.3 million.¹⁵ In 2008, VA paid \$12.7 million and \$12.3 million in 2009.¹⁶

This note advocates reformation of the current VA EAJA practice by proposing solutions including: adopting an approach similar to that used by SSA, narrowing the definition of "prevailing party," amending the Board's current "reasons and bases" requirement, and changing the Veterans Court standard of review. The goal would be to promote more accountability in fee awards, improve quality of representation, limit waste, preserve resources for veterans, award the maximum amount of past-due benefits for the veteran, minimize attorney incentives for prolonged litigation and conserve taxpayers' money, while keeping with Congress' original intent to provide sufficient compensation to attract competent attorneys for the continued handling of veterans' claims.¹⁷

Section I provides an overview of the history of the EAJA. Section II provides an overview of the VA claims process. Section III provides a brief overview of the current EAJA practices in veterans' cases. Section IV discusses SSA's claims process. Section V discusses attorney fees paid under SSA proceedings. Finally, Section VI proposes possible solutions with consideration of the advantages and disadvantages of each solution with attention to logic, practicality, and possible consequences of implementation.

¹³ See Letter to Senator Charles E. Grassley, *supra* note 9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Although not the focus of this Note, the phrase "pro bono" representation has been interpreted by multiple courts to allow for the recovery of EAJA fees and costs by an agent or attorney.

I. HISTORY OF THE EAJA

Historically, Congress restricted attorneys' fees for representing veterans before the VA. Originally, an attorney could only charge \$5 for helping a veteran apply for a pension, reenlistment bounty, or other allowance.¹⁸ This fee was later raised to \$10 and attorneys who violated this maximum could be subject to a fine and hard labor.¹⁹ Congress' intent was to protect veterans from representatives who took advantage of them by filling out simple forms and charging excessive amounts.²⁰

Congress originally enacted the EAJA in October 1980:

(1) to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States; and (2) to insure the applicability in actions by or against the United States of the common law and statutory exceptions to the "American rule" respecting the award of attorney fees.²¹

The EAJA originally had a sunset provision that caused it to expire on October 1, 1984.²² It was renewed in 1985 and included a retroactive provision to cover cases commenced on or after October 1, 1984.²³

¹⁸ See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 359 (1985) (Stevens, J., dissenting).

¹⁹ *Id.* at 359-61.

²⁰ See *id.* at 359-62.

²¹ Equal Access to Justice Act, Pub. L. No. 96-481, § 202(c), 94 Stat. 2321 (1980).

²² *Id.* § 204(c).

²³ EAJA, Pub. L. No. 99-80, § 7(b), 99 Stat. 183 (1985).

The 1985 amendments increased the maximum net worth for both individuals and entities that could collect EAJA fees.²⁴ The amendments also stated that whether or not an agency was substantially justified would be determined based on the administrative record as a whole.²⁵

In 1992, the Veterans Court ruled *en banc*, by a vote 6 to 1, that the EAJA did not apply to claims before them.²⁶ The issue, when appealed to the Federal Circuit Court, was found to be moot when Congress specifically stated that the EAJA was applicable to the Veterans Court.²⁷

The EAJA was amended again in January 1996 and allowed an increase of attorney fees from \$75 to \$125 an hour.²⁸ The purpose of this increase was to bring the hourly rate “more closely into line with current hourly rates charged by attorneys,” and to make the “suits more attractive to attorneys, which in turn means prospective plaintiffs [would] have a larger pool of attorneys from which to choose.”²⁹

One of the most significant amendments that changed the practice of attorneys representing veterans before the VA became effective in 2007. The Veterans Benefits, Health Care, and Information Technology Act (“VBHITA”) of 2006 amended Title 38 of the US Code to expand representation by attorneys

²⁴ See *id.* § 1(c)(1).

²⁵ *Id.* § 1(a)(1).

²⁶ See generally *Jones v. Derwinski*, 2 Vet. App. 231, 231 (1992) (holding that there was insufficient explicit authorization from Congress authorizing EAJA fees before the Veterans Court), *vacated by Jones v. Principi*, 985 F.2d 582 (Fed. Cir. 1992).

²⁷ See Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 506, 106 Stat. 4506, 4513 (amending 28 U.S.C. § 2412 (d)(2)(f) to include Veterans Court in the Act’s definition of “court”).

²⁸ Pub. L. No. 104-121, § 231(b)(1), 110 Stat. 847, 863; see also Judith E. Kramer, *Equal Access To Justice Act Amendments of 1996: A New Avenue for Recovering Fees from the Government*, 51 ADMIN. L. REV. 363, 376 (1999).

²⁹ 141 CONG. REC. S3895, S3896 (daily ed. Mar. 14, 1995) (statement of Sen. Feingold).

or agents for veterans benefits.³⁰ Previously, collection of money under fee agreements could only begin after a final decision by the Board of Veterans Appeals.³¹ However, under the 2006 amendments, the language was changed so that “for fee” representation could begin as soon as a notice of disagreement was filed,³² which essentially allowed attorneys and agents to begin representation at the Regional Office level.

Attorneys can have contingency fee agreements to recover a percentage of the past-due benefits that the veteran is awarded.³³ The percentage of past-due benefits is different than an EAJA award. The past-due benefits payment arises where an attorney or agent and claimant have an agreement where he or she will receive the fee directly from the Secretary and the recovery of the fee is contingent on whether or not the matter is resolved in a manner favorable to the claimant.³⁴ A claim is considered to have been resolved “in a manner favorable to the claimant if all or any part of the relief sought is granted.”³⁵ An EAJA award, as discussed further below, is awarded to a “prevailing party” in an action brought by or against the United States and is proscribed statutorily.³⁶

An attorney can collect either an EAJA award *or* a percentage of past-due benefits under a contingency fee agreement, but not both.³⁷ If the work done before the Regional

³⁰ Veterans Benefits, Health Care, and Information Technology Act (“VBHITA”) of 2006, Pub. L. No. 109-461, § 101, 120 Stat. 3403, 3405.

³¹ 38 U.S.C. § 5904(c)(1) (2000).

³² VBHITA of 2006, § 101(d)(1).

³³ 38 C.F.R. § 14.636(e), (g) (2010).

³⁴ 38 U.S.C. § 5904(d) (2006). If the fee agreement is found to be unreasonable, the Board may review this finding or order and look to a variety of factors under 38 C.F.R. § 14.636(e) to determine reasonableness.

³⁵ 38 U.S.C. § 5904(d)(2)(B).

³⁶ 28 U.S.C. § 2412 (2006).

³⁷ See *Carpenter v. Principi*, 15 Vet. App. 64, 76 (2001) (holding that “a fee which includes both an EAJA award plus a contingency fee for work performed before the Court, Board, and VA on the same claim such that the fee is enhanced by an EAJA award is unreasonable”).

Office, the Board, and the Veterans Court was the same work, then the EAJA award will enhance the money received under the contingency fee agreement.³⁸ The attorney can keep the higher of the two fees, but must give the veteran the lower fee award.³⁹ The Veterans Court has held that a fee agreement that provides for a contingency fee award in addition to an EAJA award, but does not provide an offset to the veteran if both fees are awarded, is excessive and unreasonable.⁴⁰ The “same work” concept applies to work done on a claim before the Regional Office, Board, and Veterans Court, even though they are different tribunals.⁴¹

II. VA CLAIMS PROCESS

The VA has a two-step process for adjudicating veterans’ benefits claims for service-connected disabilities: 1) a VA Regional Office makes an initial decision on the claim and 2) a veteran dissatisfied with the decision may seek *de novo* review with the Board.⁴² The Board is a body within the VA that renders final decisions on behalf of the Secretary.⁴³ The Board proceedings are informal and nonadversarial.⁴⁴

³⁸ *See id.*

³⁹ DVA Op. Gen. Counsel Prec. 12-97 (Mar. 26, 1997); *see also* Curtis v. Brown, 8 Vet. App. 104, 108-09 (1995).

⁴⁰ *Carpenter*, 15 Vet. App. at 71.

⁴¹ *Id.* at 76.

⁴² *See* 38 U.S.C. §§ 5104, 7105(a); *see also* Henderson v. Shinseki, 131 S. Ct. 1197, 1200-01 (2011) (“The VA’s adjudicatory ‘process is designed to function throughout with a high degree of informality and solicitude for the claimant.’” (quoting Walters v. Nat’l Ass’n. of Radiation Survivors, 473 U.S. 305, 311 (1985))).

⁴³ 38 U.S.C. §§ 7103, 7104; 38 C.F.R. § 20.1100 (2010).

⁴⁴ *Henderson*, 131 S. Ct. at 1200; 38 C.F.R. §§ 3.103(a), 20.700(c).

If the veteran is not satisfied with the final Board decision, an appeal can be made to the Veterans Court,⁴⁵ an Article I tribunal that reviews adverse Board decisions.⁴⁶ The Veterans Judicial Review Act (VJRA) defines the jurisdiction of the Veterans Court. It grants the tribunal “exclusive jurisdiction to review decisions of the [Board]” and the “power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.”⁴⁷ If the appeal to the Veterans Court is successful (i.e., an award of benefits or remand) then the attorney may apply to receive EAJA fees from the Government.⁴⁸ In addition, there must not be special circumstances that make an award unjust.⁴⁹

A remand from the Veterans Court occurs in two forms: 1) decisions issued from the Veterans Court and 2) orders by the Clerk of the Court granting joint motions for remand (JMRs). JMRs are a form of settlement action between the parties.⁵⁰ The Clerk of Court, in a ministerial action, accepts the JMR.⁵¹ The Clerk then issues an order vacating the prior Board decision and implementing the provisions of the JMR

⁴⁵ With the issuance of a final decision, the Board furnishes the appellants a VA Form 4597, “Your Rights to Appeal Our Decision.” The VA Form 4597 instructs appellants in layman’s terms on the process of initiating an appeal, the location of the forms, how to obtain representation, and how to pursue other methods of obtaining review of a Board decision.

⁴⁶ 38 U.S.C. §§ 7251, 7252(a); *accord Henderson*, 131 S. Ct. at 1201.

⁴⁷ Veterans Judicial Review Act (VJRA), Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4113-15 (1988).

⁴⁸ The veteran may also appeal to the Federal Circuit, and ultimately the Supreme Court, but for the purposes of this note the authors are focusing on remands at the Veterans Court level.

⁴⁹ For a further description, see, for example, Ralph V. Seep, *What Constitutes “Special Circumstances” Precluding Award of Attorneys’ Fees Under Equal Access To Justice Act* (28 U.S.C.A. § 2412(d)), 106 A.L.R. Fed. 191 (1992) (discussing what constitutes “special circumstances” for EAJA awards).

⁵⁰ It is possible for one of the parties to submit a unilateral or opposed motion for remand, but the vast majority of them are mutual agreements.

⁵¹ See *What Changes are Needed to Improve the Appeals Process?: Hearing on Review of Veterans Disability Compensation Before the U.S. Senate Comm. on Veterans Affairs*, 111th Cong. 15-19 (2009) (responses for the record by Chairman James P. Terry), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg47762/html/CHRG-111shrg47762.htm> (last visited Sept. 3, 2011); *accord Breeden v. Principi*, 17 Vet. App. 475, 478 (2004).

without review of the merits of the case. These remands can occur for a variety of reasons. For example, new changes in the law where no notification was provided; error of applying law to fact; inadequate reasons and bases;⁵² failure with duty to assist; *Stegall*⁵³ violation; *Colvin*⁵⁴ violation; and inadequate examinations.⁵⁵ As noted above, the “reasons and bases” requirement also gives the Veterans Court a broad license to remand cases.⁵⁶ “Even if an issue were not raised by the record, [the Veterans Court] may exercise discretion to remand the matter for consideration in the first instance if appropriate.”⁵⁷ Accordingly, the Veterans Court “treatment of new issues on appeal favors a higher rate of remand than” Article III courts.⁵⁸

III. CURRENT EAJA PRACTICES IN VETERANS’ CASES

Under the EAJA, 28 U.S.C. § 2412(d), an attorney can be reimbursed for reasonable fees and expenses incurred (i.e., legal fees and expert witness fees) in the course of representing a litigant in administrative proceedings involving a government agency

⁵² “Inadequate reasons and bases” is a nebulous concept and one of much controversy. For clarity and brevity, the authors will not attempt to tackle or define the concept.

⁵³ *Stegall v. West*, 11 Vet. App. 268, 271 (1998) (finding that, as a matter of law, the appellant had the right to compliance with remand orders).

⁵⁴ *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991) (the Board may only consider independent medical evidence to support its findings and may not provide its own medical judgment in the guise of a Board opinion).

⁵⁵ *Bryant v. Shinseki*, 23 Vet. App. 488, 491 (2010) (finding that a Veterans Law Judge must comply with certain duties set for in 38 C.F.R. § 3.103(c)(2) (2010)), *superseded by amendments to regulation*, 38 C.F.R. §§ 3.103(a), 3.103(c), 20.706 (effective Aug. 23, 2011); *Brannon v. West*, 12 Vet. App. 32, 34 (1998) (concluding that the Board must “adjudicate all issues reasonably raised by a liberal reading of the appellant’s substantive appeal, including all documents and oral testimony in the record prior to the Board’s decision”); *see Urban v. Principi*, 18 Vet. App. 143, 145 (2004) (per curiam) (“When reviewing [the appellant’s] claim, the Board was obligated to consider all reasonably raised matters regarding the issue on appeal.”). For synopses of several nonprecedential memorandum decisions and JMRs, see *Veterans Court Dockets*, U.S. CT. OF APPEALS FOR VETERANS CLAIMS, <https://efiling.vetapp.gov/cmecf/servlet/TransportRoom?servlet=CaseSearch.jsp> (last visited Feb. 7, 2011).

⁵⁶ *Ridgway*, *supra* note 12, at 137.

⁵⁷ *Id.* at 135; *see also Maggitt v. West*, 202 F.3d. 1370, 1377 (Fed. Cir. 2000).

⁵⁸ *See generally Ridgway*, *supra* note 12, at 135.

if a two-prong test is satisfied: 1) the party must “prevail” and 2) the position of the United States must not be “substantially justified.”⁵⁹ Under the EAJA, it is the “prevailing party” and not the attorney or agent who is entitled to EAJA fees.⁶⁰

The application for an EAJA award must include a timely filed itemized statement of fees and expenses sought, and a statement that the party is the “prevailing party” in the action and is eligible to receive an EAJA award under the net worth restrictions as discussed above.⁶¹ The party also needs to file a statement alleging that the government’s position was not “substantially justified;” however, the U.S. Supreme Court held this statement can be filed after a 30-day time limit has expired.⁶² In order for the Veterans Court to grant an EAJA award, it must have had jurisdiction over the claim.⁶³

⁵⁹ 28 U.S.C. § 2412(d)(1)(A) (2006).

“[P]arty” means (i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of Title 5.

Id. § 2412(d)(2)(B).

⁶⁰ *Shaw v. Gober*, 10 Vet. App. 498, 506 (1997). For further discussion of this distinction, see Joseph A. Fischetti, *Ratliff v. Astrue: The Collision of the Equal Access To Justice Act and the Debt Collection Improvement Act*, 40 SETON HALL L. REV. 723, 724 (2010). In addition, there must not be special circumstances which make an award unjust. See generally Seep, *supra* note 49.

⁶¹ *Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998); see also 28 U.S.C. § 2412.

⁶² *Scarborough v. Principi*, 541 U.S. 401, 406, 423 (2004) (holding that while the third requirement may be filed after the 30-day time limit, the first two requirements cannot be cured by filing an amended or supplemental application after the 30 days have expired).

⁶³ See *Burkhardt v. Gober*, 232 F.3d 1363, 1368 (Fed. Cir. 2000).

In order to collect an award under the EAJA, the attorney or agent must timely file an application. “Timely” has been defined by the EAJA as filed within 30 days of the final judgment in the action.⁶⁴ Under the EAJA, “final judgment” is defined as “a judgment that is final and not appealable, and includes an order of settlement.”⁶⁵ A JMR, which is a motion agreed to by counsel for the veteran and the VA Office of General Counsel, is considered “an order of settlement,” and the 30-day time limit to file an EAJA application begins the day following the entry of the Veterans Court’s order mandating the JMR.⁶⁶ The Veterans Court has held that it is unable to extend the 30-day time limit. After the 30 days have elapsed, it no longer has subject matter jurisdiction over the issue and thus cannot grant an award.⁶⁷

Attorneys are allowed to collect fees under the EAJA when a veteran’s case is remanded from the Veterans Court to the Board, even if the veteran’s claim ultimately remains denied. The veteran is considered the “prevailing party” on one of these remands and his attorney can be awarded EAJA fees.⁶⁸

The Veterans Court allows for EAJA fees to be collected when the veteran’s counsel and VA General Counsel’s Office agree to a JMR.⁶⁹

A. Party Must Be A “Prevailing Party”

As previously discussed, an EAJA award of costs and fees may be awarded to the “prevailing party in any civil action

⁶⁴ 28 U.S.C. § 2412(d)(1)(B).

⁶⁵ *Id.* § 2412(d)(2)(G).

⁶⁶ *See* Bowers v. Brown, 8 Vet. App. 25, 27 (1995); *see also* Luyster v. Principi, 16 Vet. App. 96, 99 (2002) (holding that a Veterans Court judgment becomes final and not appealable 60 days after it is entered and that the EAJA application 30-day time limit does not begin to run until the original 60 days have expired).

⁶⁷ *See* Grivois v. Brown, 7 Vet. App. 100, 101-02 (1994).

⁶⁸ Kelly v. Nicholson, 463 F.3d 1349, 1353 (Fed. Cir. 2006).

⁶⁹ *See generally* Letter from Senator Charles E. Grassley, *supra* note 9.

brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.”⁷⁰

A party is a “prevailing party” if that party succeeds on “any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing the suit,” as defined by case law and precedent.⁷¹ Furthermore, a “prevailing party” has been interpreted by the Veterans Court to “either require the ultimate receipt of a benefit that was sought in bringing the litigation, i.e., the award of a benefit, or, at a minimum, a court remand predicated upon administrative error.”⁷²

In *Buckhannon Board and Home Care, Inc. v. West Virginia Department of Health and Human Resources*,⁷³ the Supreme Court further defined “prevailing party” as a party in whose favor a judgment is rendered, regardless of the amount of damages awarded (i.e., nominal damages) or a court ordered consent decree (i.e., settlement agreement).⁷⁴ The Supreme Court concluded that “[a]lthough a consent decree does not always include an admission of liability by the defendant . . . it nonetheless is a court-ordered chang[e] [in] the legal relationship between [the plaintiff] and the defendant.”⁷⁵ The Court concluded that “enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.”⁷⁶

⁷⁰ 28 U.S.C. § 2412(b).

⁷¹ *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)).

⁷² *Sumner v. Principi*, 15 Vet. App. 256, 264 (2001); *see also Swiney v. Gober*, 14 Vet. App. 65, 69-70 (2000) (explicitly rejecting the argument that EAJA fees should not be awarded when only a remand is obtained and the veteran may not ultimately obtain the monetary relief requested).

⁷³ 532 U.S. 598 (2001).

⁷⁴ *Id.* at 603.

⁷⁵ *Id.* at 604 (citing *Tex. State Teachers Ass’n*, 498 U.S. at 792) (internal quotation marks omitted).

⁷⁶ *Id.*

For a remand to be “predicated upon administrative error” either the Veterans Court must have expressly “recognize[d] administrative error” or “the Secretary acknowledge[d] error” in the pleadings he filed with the Veterans Court and the Veterans Court predicated its remand on that concession of administrative error.⁷⁷ As long as there is a recognized administrative error, even if the veteran does not ultimately prevail on the claim when it is remanded to the Board, he or she is still considered the “prevailing party” for EAJA purposes.⁷⁸ However, if the Veterans Court orders a JMR that does not include language that “expressly, or by necessary implication, recognizes Board error,” then the appellant is not considered a “prevailing party” under the EAJA.⁷⁹ As is discussed in Section IV below, this is in stark contrast to the SSA proceedings where an administrative reevaluation is not considered to have left the jurisdiction of the court and therefore is not a “final” judgment subject to EAJA fees.⁸⁰

There are also situations where the appellant achieves an order from the Veterans Court vacating the Board’s decision, but is not ultimately declared a “prevailing party.” One such instance is where the appellant obtains a remand, but it is solely based on a change in a statute, or regulation, which was not in affect at the time the Board issued its final decision.⁸¹ A similar instance arises where the appellant obtains a remand that is based solely on a change in the case law interpreting a statute or regulation after the Board has issued its decision in the appellant’s case.⁸²

⁷⁷ *Sumner*, 15 Vet. App. at 265; *see* *Briddell v. Principi*, 16 Vet. App. 267, 271-72 (2002); *see generally* *Zubieri v. Nicholson*, 19 Vet. App. 541 (2006).

⁷⁸ *See* *Kelly v. Nicholson*, 463 F.3d 1349, 1353-55 (Fed. Cir. 2006).

⁷⁹ *See* *Rollins v. Principi*, 17 Vet. App. 294, 300 (2003); *accord* *Akers v. Nicholson*, 409 F.3d 1356, 1359-60 (Fed. Cir. 2005) (finding that JMRs only provide the opportunity for further adjudication with consideration of the merits of the case and claimants were not “prevailing parties” because there was no change in the legal relationship or judicial imprimatur).

⁸⁰ *See* *Melkonyan v. Sullivan*, 501 U.S. 89, 95-98 (1991).

⁸¹ *See, e.g., Akers*, 409 F.3d at 1359.

⁸² *See, e.g., Johnson v. Principi*, 17 Vet. App. 436, 439 (2004); *see also* *Flemming v. Principi*, 16 Vet. App. 52, 53 (2002); *Sachs v. Principi*, 15 Vet. App. 414 (2002).

The Veterans Court's rationale is that the Board was using the proper law that was in effect at the time it made the ruling, even though that law was later changed.⁸³

Another situation where the appellant is not considered a "prevailing party" occurs when the Veterans Court determines that the issue is a matter of first impression and remands the claim to the Board to consider it in the first instance.⁸⁴ The Veterans Court has held the veteran was not a "prevailing party" in this situation because the remand decision did not recognize explicitly or implicitly any administrative error in the Board's decision.⁸⁵

The last instance where the Veterans Court has determined the appellant is not a "prevailing party" takes places when the Veterans Court remands the appellant's claim to preserve judicial resources and avoid piecemeal litigation where the Board has denied one claim, but remanded another, and the two are inextricably intertwined.⁸⁶ The Veterans Court found that in this instance, the appellant was not a "prevailing party" because no administrative error had occurred.⁸⁷

B. Government Must Not Be "Substantially Justified"

After the "prevailing party" prong is met, the next inquiry is whether the position of the United States was "substantially justified" in defending its claim.⁸⁸ The term "substantially justified" means that the position of the government must have been reasonable, both at the administrative and judicial levels.⁸⁹

⁸³ See *Sachs*, 15 Vet. App. at 416.

⁸⁴ See, e.g., *Gordon v. Principi*, 17 Vet. App. 221, 224 (2003).

⁸⁵ *Id.*

⁸⁶ See, e.g., *Gurley v. Peake*, 528 F.3d 1322 (Fed. Cir. 2008) (citing *Harris v. Derwinski*, 1 Vet. App. 180 (1991)).

⁸⁷ *Gurley v. Nicholson*, 20 Vet. App. 573, 578 (2007).

⁸⁸ 28 U.S.C. § 2412(d)(1)(A) (2006).

⁸⁹ *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); see also *Scarborough v. Principi*, 541 U.S. 401, 414 (2004) (re-affirming that the government defendant has the burden to prove that its position was substantially justified); *Younger v. Sec'y of Health and Human*

In *Pierce v. Underwood*,⁹⁰ the Supreme Court explained that the appeal courts review the district courts' finding of substantial justification for abuse of discretion.⁹¹ "Substantially justified" does not mean "justified to a high degree, but rather justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person."⁹² The Veterans Court has held that the prevailing party needs only to *allege* the lack of substantial justification.⁹³ The burden then shifts to the Secretary to demonstrate that this position was substantially justified.⁹⁴

*i. Substantial Justification in Both
Administrative and Litigation Stages*

When the party alleges that the Government's position was not "substantially justified," then the burden shifts to the government to show that its position was "substantially justified at both the administrative and litigation stages of the matter."⁹⁵ If the Veterans Court finds that the government's position was unreasonable at either the administrative or litigation stage, then it will usually find their position was not substantially justified, despite the conduct in the other forum.⁹⁶ The administrative stage refers to the reason the claim was denied prior to certification of the appeal to the Veterans Court.⁹⁷ The litigation stage refers to the appeal at the Veterans Court level, but does not include statements made during settlement negotiations.⁹⁸

Servs., 910 F.2d 319 (6th Cir. 1990) (per curiam).

⁹⁰ 487 U.S. 552.

⁹¹ *Id.* at 562, 570-71.

⁹² *Id.* at 565 (internal quotation marks omitted).

⁹³ *Groves v. Shinseki*, 23 Vet. App. 90, 93 (2009).

⁹⁴ *Id.*

⁹⁵ *Gordon v. Peake*, 22 Vet. App. 265, 268 (2008).

⁹⁶ *See, e.g., Moore v. Gober*, 10 Vet. App. 436 (1997).

⁹⁷ *See id.* at 439-40.

⁹⁸ *See Olney v. Brown*, 7 Vet. App. 160, 163 (1994) (holding that to allow settlement negotiation statements to weigh into a determination of substantial justification would be in opposition to the public policy of encouraging settlement).

When interpreting 28 U.S.C.A. § 2412(d)(2)(B), the U.S. Supreme Court found that for the government’s position to be substantially justified it must have a “reasonable basis both in law and fact.”⁹⁹ The Supreme Court stated that the government’s position could be justified even if it was not correct, and the position could be substantially justified if a reasonable person could think it was correct, but it still must have a reasonable basis in law and fact.¹⁰⁰ The standard for determining whether the government’s position was “reasonable” is made by looking at when the government adopted its position and what the law was at that time, not at the time the EAJA application was filed.¹⁰¹

The Veterans Court has held that when determining whether the government’s position had a reasonable basis in law and fact, it looks to the totality of the claim, to include prior precedent, the VA’s position, the VA’s policy, and the merits of the claim.¹⁰²

During the administrative process, the Veterans Court has held that the government’s position was not “substantially justified” where the Board had a case of first impression and there was no judicial precedent contrary to their position. Importantly, “[a] lack of judicial precedent adverse to the government’s position does not preclude a fee award under the EAJA.”¹⁰³ However, more recently, the Veterans Court has held in cases of first impression, the government’s position is “more likely to be considered substantially justified [for the purposes of the EAJA] than [in] those [cases] where the Court determines that the Secretary ignored existing law.”¹⁰⁴

⁹⁹ *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see also* *Stillwell v. Brown*, 6 Vet. App. 291, 301-03 (1994).

¹⁰⁰ *See Pierce*, 487 U.S. at 565.

¹⁰¹ *Bowey v. West*, 218 F.3d 1373, 1377 (Fed. Cir. 2000); *Vaughn v. Gober*, 14 Vet. App. 92, 95 (2000).

¹⁰² *See Stillwell*, 6 Vet. App. 291, 302 (1994).

¹⁰³ *See Felton v. Brown*, 7 Vet. App. 276, 281 (1994) (citing *Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1459 (9th Cir. 1988)).

¹⁰⁴ *Hart v. Shinseki*, 23 Vet. App. 9, 11 (2009); *Bonny v. Principi*, 18 Vet. App. 218, 221-22 (2004).

The Veterans Court also held that during the administrative process, on the issue of reasonableness, when there has been a remand from the Veterans Court or from a stipulation from the parties, the Veterans Court has refused to consider the reasonableness of the agency's positions on specific issues not explicitly raised in the remand.¹⁰⁵ This has even applied to alleged Board errors that were previously raised in the briefs or motions that were filed with the Veterans Court.¹⁰⁶

With regard to the issue of "substantial justification" during the litigation stage, the Veterans Court has also made an exception for cases of first impression. The Veterans Court has held on issues of first impression where the VA has made a good faith argument, the argument can be substantially justified, even if the Veterans Court ultimately rejects it.¹⁰⁷ However, the Veterans Court has yet to provide a *per se* rule that the government's position is automatically substantially justified when it involves a case of first impression.¹⁰⁸

Also at the litigation stage, the Veterans Court considers whether there was a change in case law, or other authority, while the appeal was pending.¹⁰⁹ The Secretary has an "ethical obligation to advise the Court of [a] change in law" ¹¹⁰ There is a further obligation to advise the Veterans Court of significant supplemental authority, even after briefs are filed.¹¹¹ The Secretary's position is not "substantially justified" where he learns of any intervening case law, or any favorable development to the appellant and fails to bring it to the Veterans Court's attention.¹¹²

¹⁰⁵ See *Dillon v. Brown*, 8 Vet. App. 165, 168 (1995).

¹⁰⁶ See *id.*

¹⁰⁷ See *Snyder v. Shinseki*, 22 Vet. App. 373, 377 (2009).

¹⁰⁸ See *Swiney v. Gober*, 14 Vet. App. 65, 71 (2000).

¹⁰⁹ See *White v. Nicholson*, 412 F.3d 1314, 1317 (Fed. Cir. 2005).

¹¹⁰ See *Coleman v. Nicholson*, 21 Vet. App. 386, 389 (2007).

¹¹¹ *Id.* at 389-90 (citing U.S. Vet. App. R. 30(b)).

¹¹² See *id.*; see also *Uttieri v. Brown*, 7 Vet. App. 415, 417 (1995); *Penny v. Brown*, 7 Vet. App. 348, 351 (1995); *accord Pierre v. West*, 12 Vet. App. 92, 96-97 (1998) (holding that when law changes to be favorable to the appellant after the appeal is filed,

*ii. The Government Is Not Substantially Justified
If It Does Not Provide Adequate Reasons and Bases Remands*

An attorney may collect fees under the EAJA even when the Board is correct in its analysis of the facts and the law. In order for a party to be awarded fees and expenses under the EAJA, they must show that the Government's position was not "substantially justified."¹¹³ Approximately half of the JMRs that are filed with the Veterans Court come from a "reasons and bases" error at the Board level.¹¹⁴ A "reasons and bases" error means the Board failed to provide adequate "reasons and bases," or explanation, for its findings of fact and conclusions of law.¹¹⁵ This means the remands are granted from the Veterans Court even when there is no substantive error made at the Board level. The Veterans Court considers the Government position to not be substantially justified in this situation.

When the Court finds that the Board erred for lack of "reasons and bases," the remedy is to vacate the Board decision and remand for further review unless the lack of explanation is harmless error.¹¹⁶ A "reasons and bases" error by the Board is a violation of 38 U.S.C. § 7104(d), which requires a "written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record."¹¹⁷ In

but before the Secretary takes a litigation position, the Secretary's duty to report this change is not heightened).

¹¹³ See 28 U.S.C. § 2412(d)(1)(A) (2006).

¹¹⁴ See generally Letter to Senator Charles E. Grassley, *supra* note 9.

¹¹⁵ Gilbert v. Derwinski, 1 Vet. App. 49, 56 (1990) (requiring the Board to "identify those findings it deems crucial to its decision and account for the evidence which it finds to be persuasive"); see also 38 U.S.C. § 7104(d)(1).

¹¹⁶ Duenas v. Principi, 18 Vet. App. 512, 519 (2004) (holding that the Board's lack of explanation why the VA had not assisted the claimant by providing him with a medical examination was held to be a harmless error because there was no reasonable possibility that the examination would substantiate the claim).

¹¹⁷ 38 U.S.C. § 7104(d)(1).

Moore v. Derwinski,¹¹⁸ the Court explained the Board's duty to provide "reasons and bases":

In making its statement of findings, "the Board must identify those findings it deems crucial to its decision and account for the evidence, which it finds to be persuasive or unpersuasive." In providing its "reasons or bases", the Board must include in its decisions "the precise basis for that decision . . . [and] the Board's response to the various arguments advanced by the claimant." This must include an "analysis of the credibility or probative value of the evidence submitted by and on behalf of the veteran in support of [his or her] claim [and] a statement of the reasons or bases for the implicit rejection of this evidence by the Board."¹¹⁹

The Veterans Court remands Board decisions that do not contain sufficient reasons and bases in support of the Board's findings.¹²⁰ When on remand for reasons and bases, the Board is to simply better explain the same decision that was previously made. Most of these reasons and bases remands only provide an increased explanation of why the claim was previously denied or correct a non-substantive procedural error and do not ultimately result in additional benefits being granted to the veteran.¹²¹ One of the most prevalent reasons and bases errors requires the Board to provide more explanation for finding unfavorable evidence to the veteran more probative than the favorable evidence.¹²²

¹¹⁸ 1 Vet. App. 401 (1991).

¹¹⁹ *Id.* at 404 (quoting *Gilbert v. Derwinski*, 1 Vet. App. 49, 56-58 (1990)) (internal citations omitted).

¹²⁰ *See, e.g.*, *Sanders v. Principi*, 17 Vet. App. 232, 235 (2003); *Simington v. West*, 11 Vet. App. 41, 45 (1998); *Mitchem v. Brown*, 9 Vet. App. 138, 140 (1996).

¹²¹ *See* Letter to Senator Charles E. Grassley, *supra* note 9.

¹²² *See, e.g.*, *Gilbert*, 1 Vet. App. at 59 (holding that where there is evidence contrary to the Board's decision and evidence in support of the Board's decision, the opinion must provide reasons and bases); *see also* *Scott v. Principi*, 3 Vet. App. 352, 355-56 (1992) (requiring remand when the Board failed to explain how VA income statements submitted by the

In other words, the Board must provide the reason to support its decision that certain evidence is not as credible or not as probative. The Veterans Court has vacated and remanded many cases when the Board simply failed to state whether lay evidence presented was credible or probative.¹²³

When examining a reasons and bases remand in the context of the EAJA, the discussion must shift to whether the government's position was "substantially justified" as required.¹²⁴ The Veterans Court has found that, when the Board has a defect in the articulation of their decision, the VA's position was found to be not "substantially justified."¹²⁵ The Veterans Court held that a reasons and bases error equates to having no "reasonable basis in law or fact."¹²⁶ This liberal interpretation of the substantial justification requirement allows for the award of attorneys fees, even when the Board is correct in its analysis of laws and facts.¹²⁷ This is contrary to the original intent of the EAJA requirements.¹²⁸ In addition, fees may also be sought for the time spent seeking EAJA fees, regardless of whether there is a finding that the Government was substantially justified in litigating over fees.¹²⁹

Veteran were more probative than other evidence submitted by the appellant).

¹²³ See, e.g., *Pierce v. Principi*, 18 Vet. App. 440, 444-45, 447 (2004); *Moran v. Principi*, 17 Vet. App. 149, 154-55 (2003). Other common reasons and bases errors include instances in the consideration of certain medical opinions and the elevated duty to explain findings where the veteran's medical records were destroyed. See, e.g., *Norris v. West*, 11 Vet. App. 219, 225 (1998) (remand ordered when Board discounted a medical statement as not probative without further discussion); *Myore v. Brown*, 9 Vet. App. 498, 505 (1996) (Board's decision lacked bases for rejecting medical examiner's finding); see also *Russo v. Brown*, 9 Vet. App. 46, 52 (1996).

¹²⁴ *Thompson v. Principi*, 16 Vet. App. 467, 469-71 (2002).

¹²⁵ *Id.* at 470.

¹²⁶ *Id.* at 470-71.

¹²⁷ See Letter to Senator Charles E. Grassley, *supra* note 9.

¹²⁸ See Judith E. Kramer, *Equal Access To Justice Act Amendments of 1996: A New Avenue for Recovering Fees from the Government*, 51 Admin. L. Rev. 363, 388 (1999) (noting that, in contrast to the prior version of EAJA, "the 1996 amendments to EAJA created the potential for expanded liability of federal agencies"); see also EAJA, Pub. L. No. 99-80, 99 Stat. 103 (1985).

¹²⁹ See Letter to Senator Charles E. Grassley, *supra* note 9.

IV. SSA'S SOCIAL SECURITY DISABILITY INSURANCE (SSDI) CLAIMS PROCESS

Similar to the VA claims process where a veteran can file for benefits, a person can file a claim with SSA for SSDI if he or she is unable to work.¹³⁰ If SSA denies the request for benefits the party may file a request for reconsideration.¹³¹ “An adverse determination on reconsideration may be appealed to an administrative law judge [(ALJ)].”¹³² Further review can be obtained from the SSA’s Appeals Council if the ALJ denies the benefits sought.¹³³ Finally, the party may appeal the final adverse determination to the federal district court if unsuccessful at the administrative proceedings.¹³⁴ “A court may affirm, reverse, or modify the Secretary of Health and Human Services’ determination.”¹³⁵

Like the VA, the SSDI process is nonadversarial.¹³⁶ The VA benefits system is actually more “pro-claimant” in light of the nature of the claim and Congress’ response to the public sentiment to honor veterans.¹³⁷ Unlike the VA, SSA decisions are *directly* appealed to the United States District Court, an Article III court.¹³⁸ At the Veterans Court, an Article I court, review is different from review in an Article III court by dramatically limiting the Veterans Court’s ability to issue a decision on the merits. “[T]he full procedural history of a claim before the [Veterans Court] can span decades.”¹³⁹ “In contrast, there is

¹³⁰ See Alison M. MacDonald & Victor Williams, *In Whose Interests? Evaluating Attorneys’ Fee Awards and Contingent-Fee Agreements in Social Security Disability Benefits Cases*, 47 ADMIN. L. REV. 115, 124-25 (1995).

¹³¹ *Id.* at 125.

¹³² *Id.*

¹³³ *Id.* at 125-26.

¹³⁴ *Id.* at 126.

¹³⁵ *Id.*; see also SOC. SEC. ADVISORY BD., DISABILITY DECISION MAKING: DATA AND MATERIALS, at 109 (May 2006), available at <http://www.ssab.gov/documents/chartbook.pdf> [hereinafter *Disability Decision Making*].

¹³⁶ *Sims v. Apfel*, 530 U.S. 103, 111 (2000).

¹³⁷ See generally *Heckler v. Day*, 467 U.S. 104, 106-07 (1984).

¹³⁸ *Disability Decision Making*, *supra* note 135, at 109.

¹³⁹ *Ridgway*, *supra* note 12, at 128.

nothing to indicate that many cases in Article III courts persist for decades, and there are clear mechanisms in those courts for resolving any disputes as to the record.”¹⁴⁰

Although the Supreme Court in *Henderson v. Shinseki*¹⁴¹ noted that the Veterans Court’s scope of review is similar to that of an Article III court reviewing an agency action under the Administrative Procedure Act (APA),¹⁴² the Supreme Court also recognized the difference between cases reviewed by Article III courts versus Article I tribunals as “a unique administrative scheme.”¹⁴³ Yet, it appears that attorneys’ fees are collected and paid without consideration of the limited review by an Article I tribunal.¹⁴⁴

V. ATTORNEY FEES UNDER SSA PROCEEDINGS

An attorney may agree to be paid either in a fee-for-service basis or based on a contingency arrangement.¹⁴⁵ An attorney may also receive fees for work at the judicial level through two statutory mechanisms—the Social Security Act¹⁴⁶ and the EAJA.¹⁴⁷ When fees are allowed under both Acts, the attorney must refund to the claimant the amount of the smaller fee when the attorney receives fees for the same work under both the Social Security Act and the EAJA.¹⁴⁸ The EAJA is viewed as augmenting rather than supplanting the fee provisions of the Social Security Act.¹⁴⁹

¹⁴⁰ *Id.* at 131.

¹⁴¹ 131 S. Ct. 1197, 1200 (2011).

¹⁴² *See id.* at 1201 n.2.

¹⁴³ *Id.* at 1204. Article I courts and Article III courts can be distinguished by their scope of jurisdiction; Article I courts are granted only limited or special jurisdiction, whereas Article III courts enjoy much broader “general jurisdiction.”

¹⁴⁴ *See generally id.* at 1199 (stating “[t]he contrast between ordinary civil litigation—which provided the context in *Bowles*—and the system Congress created for veterans is dramatic”).

¹⁴⁵ *See* SSA § 206(a)(2)(A), 42 U.S.C. § 406 (2006).

¹⁴⁶ SSA § 206, 42 U.S.C. § 406; SSA § 1631(d)(1)(C)(i), 42 U.S.C. § 1383.

¹⁴⁷ 5 U.S.C. § 504; *see also* 28 U.S.C. § 2412(a)(1).

¹⁴⁸ MARTIN ON SOCIAL SECURITY TREATISE-PART 2, at § T500, <http://www.law.cornell.edu/socsec/martin/treatise.htm#JD2socsect000> (last visited Sept. 3, 2011).

¹⁴⁹ *Id.*

Specifically, the Social Security Act states, in part:

The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. . . . The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based.¹⁵⁰

EAJA fees are unavailable under 28 U.S.C. § 2412(d) for administrative procedural remands under sentence six in

¹⁵⁰ 42 U.S.C. 405(g) (2006); *see Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002).

42 U.S.C. § 405(g) of the Social Security Act.¹⁵¹ A “sentence six” remand may only be ordered in two situations: 1) where the Commissioner of Social Security requests a remand before answering the complaint; *or* 2) where new, material evidence is adduced that was for good cause not presented before the agency.¹⁵² Hence, “sentence six” remands do not constitute final judgments.¹⁵³ However, the court retains jurisdiction of the case until the administrative actions are complete.¹⁵⁴ The party may file for EAJA fees only after the administrative action is complete and the court has entered a final judgment and a finding in favor of the claimant.¹⁵⁵

However, a “sentence four” remand is “essentially a determination that the agency erred in some respect in reaching a decision to deny benefits.”¹⁵⁶ A “sentence four” remand becomes a final judgment for the purposes of entitlement to attorneys’ fees under the EAJA, 28 U.S.C. §2412 (d). In other words, the claimant is considered a “prevailing party” for a “sentence four” remand, but not a “sentence six” remand.¹⁵⁷

¹⁵¹ Pub. L. 96-481, § 206, as amended by Pub. L. 99-80, § 3, 99 Stat. 186 (1985) (not codified in the U.S. Code), provided that:

(b) Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1) [section 406(b) of Title 42, The Public Health and Welfare]) shall not prevent an award of fees and other expenses under section 2412(d) of title 28, United States Code [subsection (d) of this section]. Section 206(b)(2) of the Social Security Act [section 406(b)(2) of Title 42] shall not apply with respect to any such award but only if, where claimant’s attorney receives fees for the same work under both section 206(b) of the Act [section 406(b) of Title 42] and section 2412(d) of title 28, United States Code [subsection (d) of this section], the claimant’s attorney refunds to the claimant the amount of the smaller fee.

¹⁵² *Akopyan*, 296 F.3d at 854.

¹⁵³ *Id.* at 855.

¹⁵⁴ Eric Buchanan, *EAJA Fees in Social Security Cases: What Social Security Practitioners Need to Know*, <http://www.buchanandisability.com/helpful-resourcesandarticles/EAJA-fees/> (last visited Sept. 3, 2011).

¹⁵⁵ *Id.*

¹⁵⁶ *Akopyan*, 296 F.3d at 854.

¹⁵⁷ *Id.*

In *Melkonyan v. Sullivan*,¹⁵⁸ the Supreme Court held that there are only two types of remands authorized under 42 U.S.C. § 405(g), “sentence four” and “sentence six.”¹⁵⁹ A court decision entered pursuant to the authority of sentence four is a final judgment which ends the case, while an order entered pursuant to sentence six is not a “final order” because the court retains jurisdiction during the remand until further administrative actions are complete and the court enters a final judgment.¹⁶⁰ However, the court may remand a case to the Commissioner under sentence six for “good cause” before the Commissioner files his answer or at any time upon a showing of new and material evidence for which there was good cause for failure to incorporate the evidence earlier.¹⁶¹ The Court also explained that its previous decision in *Sullivan v. Hudson*,¹⁶² “stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative level.”¹⁶³

VI. SOLUTIONS

The authors are aware that multiple problems have been raised in regards with the current EAJA practices. The following four solutions are offered as a suggestion to address some of the issues raised above.

¹⁵⁸ 501 U.S. 89 (1991).

¹⁵⁹ *Id.* at 98.

¹⁶⁰ *Id.* at 102.

¹⁶¹ *Id.*

¹⁶² 490 U.S. 877 (1989).

¹⁶³ *Melkonyan*, 501 U.S. at 97.

A. Solution 1: Implement Regulations Similar to the Social Security Administrative Act to Define Remands and Supplement EAJA Provisions

The first solution proposed is to implement regulations to define remands in two types equivalent to “sentence four” and “sentence six” and compensate attorneys for only “sentence four” remands after review of the case on the merits by the Veterans Court. The Veterans Court should be required to designate the type of remand when it issues an order to implement the provisions of the JMR and vacate the Board decision. The Veterans Court should also be required to track the different types of remands it issues publicly. These steps will limit the number of remands that are eligible for EAJA fees and limit the monetary incentive for a JMR. JMRs do not ultimately resolve any aspect of the litigation, but act as an avenue for further development. They provide an opportunity for the veteran and his attorney to introduce new evidence into the record, which could ultimately lead to an award of benefits. JMRs are the VA equivalent of a “sentence six” remand and do not meet the *Buckhannon* criteria for EAJA fees.

Solution 1	Define Remands and Supplement EAJA Provisions
Logic	<ul style="list-style-type: none"> • More clearly defines the court proceedings • Clarifies that the bulk of JMRs are noncompensable for the purposes of the EAJA • Narrow in scope (i.e., modifies only the VA tribunal system) • Fewer payment of attorneys fees for economic incentive JMRs • No direct change in attorney fee structure • Minimal period of adjustment
Practicality	Implement regulations that define a sentence four and a sentence six remand
Possible Consequences of Implementation	<ul style="list-style-type: none"> • Potential to be ineffective as Veterans Court participation is required • Relies on Veterans Court to implement and categorize correctly • Additional administrative procedures for the Veterans Court • Warrants a larger number of staff at the Veterans Court to litigate the claims • Warrants a larger number of staff for the VA to oppose these claims • No change in remand rate • No change in backlog of cases • Minor resistance to passage, except by attorneys and/or veterans groups • Could discourage settlement agreements

B. Solution 2: Narrow Definition of “Prevailing Party”

A second solution would be to narrow the definition of “prevailing party” under 28 U.S.C. § 2412. A voluntary return of jurisdiction to the agency is insufficient to confer “prevailing party” status under the *Buckhannon* standard set forth by the U.S. Supreme Court. The Secretary has proposed a similar solution to only allow an EAJA application to be considered where, after a final disposition by the Veterans Court or VA, a party obtains “a monetary or other benefit.”¹⁶⁴

Language similar to the language in effect for recovery of fees under a contingency fee agreement should be utilized. As discussed previously, a contingency fee agreement is dependent upon the case being resolved in a manner favorable to the claimant.¹⁶⁵ The case will be found to be “in a manner favorable to the claimant” where “all or any part of the relief sought is granted.”¹⁶⁶

The “prevailing party” language should be amended to permit an EAJA application to be awarded only where there has been some relief granted to the veteran. This is not limited to a monetary award, as a benefit to the veteran could be a change in his eligibility status. The purpose of this would be to award attorneys EAJA fees only where there has been an actual benefit obtained for the veteran. This would not affect the attorneys’ ability to collect fees under a contingency fee agreement with the veteran.

However, a jurisdiction problem arises with this solution. Currently the Veterans Court can grant or deny an EAJA application because it has jurisdiction over the matter.¹⁶⁷ If an

¹⁶⁴ See Brief for the Respondent in Opposition at app., *Henderson v. Shinseki*, 131 S. Ct. 1197 (2010) (No. 09-1036) (Appendix: Letter from Eric K. Shinseki, Sec’y of the Dep’t of Veterans Affairs to the Honorable Nancy Pelosi, Speaker of the House of Representatives (May 26, 2010)) [hereinafter Letter to the Honorable Nancy Pelosi], available at <http://www.justice.gov/osg/briefs/2009/0responses/2009-1036.resp.pdf>.

¹⁶⁵ See 38 U.S.C. § 5904(d) (2006).

¹⁶⁶ *Id.* § 5904(d)(2)(B).

¹⁶⁷ 28 U.S.C. § 2412.

EAJA award could not be determined until a final decision by the Board or VA was made, the Veterans Court would no longer have jurisdiction over the matter. Another possible solution is to require the EAJA application be filed within 30 days of the Veterans Court final disposition and for the attorney to submit an addendum after a final disposition has been made indicating their EAJA application is ready to be processed. In effect, this would codify the *Buckhannon* standard through legislation as opposed to maintaining simply a judicial precedent.

Solution 2	Amend the EAJA to Narrow Definition of “Prevailing Party”
Logic	<ul style="list-style-type: none"> • Requires Veterans Court to follow the <i>Buckhannon</i> standard • Clear direction to Veterans Court on compensation • No change in Veterans Court proceedings or process • Directly modifies problems with fees • Fewer payment of attorneys fees for “incentive” JMRs • No increase in the number of staff at the Veterans Court • No period for adjustment
Practicality	Amending the EAJA
Possible Consequences of Implementation	<ul style="list-style-type: none"> • No improvement with backlog • Change in current fee structure • Broad in scope (i.e., applies to all court systems) • Additional work for the Veterans Court • No change in remand rate • Loss of incentive to represent veterans due to potential inability to be paid

**C. Solution 3: Replace “Reasons and Bases”
with “Plausible Statement” Requirement**

A third solution, with regard to the problem of reasons and bases remands, would be to eliminate the “reasons and bases” requirement and replace with a “plausible statement” requirement. As discussed, reasons and bases does not mean that the government was not substantially justified in its position. A Veterans Court judge once stated, “no other federal court awards EAJA fees when an agency fails to appropriately articulate reasons for its administrative decision.”¹⁶⁸

A Bill proposed by the Secretary called for a replacement of the current “reasons and bases” requirement of 38 U.S.C. § 7104(d)(1) which requires each decision of the Board to include “a plausible statement of the reasons for the Board’s ultimate findings of fact and conclusions of law.”¹⁶⁹ The Veterans Court is not to function as a fact finder but rather to consider whether the Board’s findings are “clearly erroneous” in light of the entire record.

More importantly, the Veterans Court is not relinquishing jurisdiction over the case and will issue a final judgment after further development by the agency.

¹⁶⁸ Cullens v. Gober, 14 Vet. App. 234, 251 (2001) (Holdaway, J. dissenting).

¹⁶⁹ Veterans Benefit Programs Improvement Act of 2010, at § 207 Section-by-Section Analysis; see Letter to the Honorable Nancy Pelosi, *supra* note 164 (containing draft of Veterans Benefits Improvement Act of 2010, § 206).

Solution 3	Replace “Reasons and Bases” With “Plausible Statement” Requirement
Logic	<ul style="list-style-type: none"> • Clear direction to Veterans Court on compensation • Directly modifies problems with fees • Fewer payments of attorneys fees for “incentive” JMRs • No increase in the number of staff at the Veterans Court • No period for adjustment • Narrow in scope (i.e., modifies only the VA tribunal system)
Practicality	Amend 38 U.S.C. § 7104(d)(1)
Possible Consequences of Implementation	<ul style="list-style-type: none"> • No improvement with backlog • Change in current fee structure • No change in remand rate to Board, only in payment of EAJA fees • Potential decrease in number of attorneys willing to represent veterans

D. Solution 4: Amend the Veterans Judicial Review Act of 1988 (VJRA) from “Clearly Erroneous” to “Substantial Evidence” Standard of Review

A final solution involves changing a standard of review the Veterans Court applies to board decisions. The VA made final determinations related to veterans’ benefits prior to the passage of the VJRA.¹⁷⁰ The VJRA established the Veterans Court (Article I Court) with exclusive jurisdiction over VA administrative benefits determinations.¹⁷¹ It also codified and

¹⁷⁰ See Pub. L. No. 100-687, 102 Stat. 4105 (1988).

¹⁷¹ *Id.* § 301; see also 38 U.S.C. § 7252(a) (2006).

expanded VA rules, and permitted attorneys to charge fees for services to represent clients after the Board rendered a final decision in a case.¹⁷²

The Veterans Court standard of review of cases is categorized into: “de novo,” “clearly erroneous,” and “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁷³ In application, however, the Veterans Court has “struggled with the appropriate level of deference to give agency interpretations.”¹⁷⁴ The Veterans Court has described the standard of judicial review for Board determinations as “an exceedingly murky area of our jurisprudence”¹⁷⁵ As a result, the remand rate at the Veterans Court is higher than an Article III court. Moreover, the Veterans Court rarely uses the harmless error doctrine and remands many cases that should have been affirmed because the errors involved were harmless.¹⁷⁶ As a matter of policy a remand is just a step closer to an outcome.

A possible solution would be to restructure the Veterans Court by amending the VJRA and clarify its scope of power for judicial review (i.e., the “substantial evidence” standard) enabling the Veterans Court to decide more cases on the merits.

¹⁷² Pub. L. No. 100-687, § 104.

¹⁷³ *McLendon v. Nicholson*, 20 Vet. App. 79, 83 (2006).

¹⁷⁴ Linda D. Jellum, *The United States Court of Appeals for Veterans Claims: Has It Mastered Chevron’s Step Zero?*, 3 VETERANS L. REV. 67, 109 (2011). “De Novo” is when “a reviewing court makes an original appraisal of all evidence to decide whether or not it believes that judgment should be entered for the plaintiff.” Lee Will Berry IV, *Standards of the Standards of Review*, 3 VETERANS L. REV. 263, 268 (2011). “Clearly erroneous” is “when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Id.* at 270. “Arbitrary and capricious” is where the Veterans Court does not substitute its judgment for that of the agency. *See id.* at 274. A Board decision will be upheld if premised upon a rational basis and supported by appropriate and relevant articulated factors. *Id.*

¹⁷⁵ *Butts v. Brown*, 5 Vet. App. 532, 542 (1993) (Steinburg, J. concurring).

¹⁷⁶ *See Battling the Backlog, Part II: Challenges Facing the U.S. Court of Appeals for Veterans Claims*: Hearing Before the Committee on Veterans Affairs, S. Hrg. 109-694 (2006) (statement of James P. Terry, Chairman of the Board), http://www.veteranslawlibrary.com/files/Senate_Hearing_Transcripts/SHrg109-694.pdf.

Other agencies utilize a “substantial evidence” standard of review under the APA. The Veterans Court does not apply this standard because the VJRA specifically substituted a “clearly erroneous” standard of review instead of the “substantial evidence” standard of review.¹⁷⁷ The Veterans Court should also employ the harmless error doctrine to limit remands and therefore fees in cases where remand orders do not resolve any aspect of the litigation.¹⁷⁸

Solution 4	Change Standard from Clearly Erroneous to Substantial Evidence
Logic	<ul style="list-style-type: none"> • Decreases backlog by allowing the Veterans Court to decide more cases on the merits • Narrow in scope (i.e., modifies only the VA tribunal system) • Decreased payment of EAJA fees for “harmless error” remands • More timely decisions • No direct change in attorney fee structure
Practicality	Amend the VJRA
Possible Consequences of Implementation	<ul style="list-style-type: none"> • May require an increase in the number of judges at the Veterans Court • May temporarily increase the Veterans Court backlog • Attorneys would be limited in providing additional development by obtaining a remand • Requires a period of adjustment • May change the character of the Veterans Court (i.e., perceived as less pro-claimant) • Possible resistance to amendments

¹⁷⁷ Roberson v. Principi, 17 Vet. App. 135, 146 (2003); Berry, *supra* note 174, at 272.

¹⁷⁸ See Shinseki v. Sanders, 556 U.S. 396, 129 S. Ct. 1696, 1704 (2009) (finding that normal harmless error rules should apply in most cases in which there is a notice error).

CONCLUSION

In fiscal year 2005, the Veterans Court remands constituted 53% of claims decided before the Court (641 of 1210).¹⁷⁹ In fiscal year 2006, remands constituted 40% (847 of 2079) of claims decided before the Veterans Court.¹⁸⁰ In fiscal year 2007, 30% of Board decisions appealed to the Veterans Court were not dismissed on procedural grounds, but remanded by agreement of the Secretary (1,079 of 3,143).¹⁸¹ In fiscal year 2009, remands constituted 37% of the claims decided (1758 of 4379).¹⁸²

Because the Veterans Court has indicated that most JMRs will warrant an award of EAJA fees, the VA generally does not contest EAJA awards when a case is remanded.¹⁸³ This is done to minimize the cost to the agency. If the VA contests an EAJA award, the appellant may obtain additional attorneys' fees for the time spent litigating the EAJA claim.¹⁸⁴ The current practice hurts the VA's ability to efficiently process claims and reduce case backlog. Additionally, a related concern is the hardship experienced by those veterans not receiving benefits while their appeals are pending final adjudication and whose claims are instead remanded for an administrative or procedural error of no harm.

¹⁷⁹ Ridgway, *supra* note 12, at 153.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² See Letter to Senator Charles E. Grassley, *supra* note 9 (citing to the Veterans Court's Annual Reports).

¹⁸³ See Veterans Benefit Programs Improvement Act of 2010, at § 207 Section-by-Section Analysis (“[i]n FY 2008, for example, the Veterans Court granted 2,433 applications for EAJA fees and expenses and denied only 16 applications. However, during the same period, the Court reversed the Board’s decision and granted benefits to claimants in only 14 cases.”).

¹⁸⁴ See generally *Wagner v. Shinseki* 640 F.3d 1255 (Fed. Cir. 2011); see also 28 U.S.C. 2412(d)(1)(A) (2006).

The intent of this article is not to discourage lawyers from representing veterans before the agency and judicial system, but to reform the current EAJA practice so that the focus is obtaining benefits for veterans and reducing the incentive of keeping claims in a never-ending appellate process. EAJA fees are paid directly from agency funding.¹⁸⁵ Congress' intent was that administrative agencies should "have to pay for their overregulatory mistakes themselves. . . [and that] with this in mind perhaps the agencies [would] make few such mistakes."¹⁸⁶ Congress believed that government agencies, motivated by a desire to stay within their operating budgets, would have an incentive to avoid issuing the undesirable type of regulation that could generate EAJA liability.¹⁸⁷

However, this well-meaning intent does not reflect the reality of the constrained VA system with unrestricted veteran claims potential. The end result is a gain for attorneys with no added benefit flowing to the veterans.¹⁸⁸ Veterans claims have increased in number and complexity with our nation's current military engagements, its resulting casualties, and with the aging of the existing veteran population. This situation will continue to worsen with more funds being diverted to pay for representation that is not tied to any tangible benefit for veterans.

¹⁸⁵ See 28 U.S.C. 2412(d)(4).

¹⁸⁶ See 126 CONG. REC. H28653 (daily ed. Oct. 1, 1980) (statement of Rep. Heckler).

¹⁸⁷ See Gregory C. Sisk, *The Essentials of the Equal Access To Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 225 (1994).

¹⁸⁸ As of 2009, the VA's backlog approached the one million claim mark (936,930 claims as of July 2009). U.S. DEP'T OF VETERANS AFFAIRS, MONDAY MORNING WORK REPORT, (July 25, 2009), <http://www.vba.va.gov/REPORTS/mmwr/2009/072709.xls>.