**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

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| JOHN EAKIN<br><br>Plaintiff,<br><br>v.<br><br>AMERICAN BATTLE MONUMENTS COMMISSION, et al.<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | Civ. A. No. SA:12-cv-1002-FB-HJB |

**DEFENDANTS' OPPOSITION TO**
**PLAINTIFF'S MOTION FOR RECOVERY OF COSTS**

Defendants United States Department of Defense, *et al.*, oppose Plaintiff's Motion for Recovery of Costs (ECF 122), through which Mr. Eakin seeks to recover expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1). ECF 122 at 1. Mr. Eakin, *pro se*, seeks miscellaneous costs as well as "legal research" and "expert witness" expenses. ECF 122-1. As explained below, Mr. Eakin's motion should be denied, because, under EAJA, 1) he is not a "prevailing party"; 2) the defendants' position was substantially justified; and 3) with one exception, the expenses and costs that he seeks are not recoverable under EAJA.

I. Introduction

As the Supreme Court has held, "[t]he EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States." Ardestani v. INS, 502 U.S. 129, 137 (1991). *See also* Resolution Trust Corp. v. Gaudet, 192 F.3d 485, 487 (5th Cir. 1999).

Under 28 U.S.C. § 2412(d)(1), a party is entitled to fees under EAJA if four separate requirements are met: 1) it is the prevailing party, 2) it files a timely fee application, 3) the position of the government was not substantially justified, and 4) no special circumstances make an award unjust. Milton v. Shalala, 17 F.3d 812, 813 n.1 (5th Cir. 1994). If one of the requirements has not been met, no further analysis is necessary. Id.

II. Plaintiff Eakin is Not a Prevailing Party

To receive prevailing-party status, a plaintiff "must (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement." Walker v. City of Mesquite, Tex., 313 F.3d 246, 249 (5th Cir. 2002) (*citing* Farrar v. Hobby, 506 U.S. 103, 111-12); see also Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598, 604 (2001) (Supreme Court precedents, taken together, establish that only "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.").

Here, Mr. Eakin cannot meet any of the three prongs established by the Fifth Circuit, much less, as required, meet *all* of them. At no point in this case did Mr. Eakin obtain an enforceable judgment or consent decree in his favor, or any other actual relief on the merits from the Court. Rather, the Court dismissed Mr. Eakin's claims. ECF 120. The Court dismissed his claims related to the identification of PVT Kelder as moot, and his remaining claims were dismissed on standing grounds. Id. As the Court did not rule for Mr. Eakin on any issue, nothing in the litigation materially affected the legal relationship between the parties, except to the extent that the Court found, on the merits, in favor of *defendants'* jurisdictional defenses.

Finally, any arguably relevant modification in defendants' behavior occurred not at the time of judgment, as required by the "prevailing-party" test, but rather in July 2014, when defendants decided to exhume the remains.

Mr. Eakin bases his claim to "prevailing-party" status on the fact that defendants' actions, in exhuming and identifying PVT Kelder's remains, partially mooted the case (the remainder was dismissed on the merits). Although Mr. Eakin cites *Buckhannon*, *supra*, in his motion, however, he does not cite the principle for which that case stands. In fact, *Buckhannon* vitiated any basis on which Mr. Eakin could be found to be a prevailing party. In *Buckhannon*, the Supreme Court squarely rejected the so-called "catalyst theory," under which certain Courts of Appeals had found that attorney's fees were appropriate if the plaintiff's lawsuit had caused the defendant to alter its conduct such as to moot the case.[1] 532 U.S. at 604-05.

As the Fifth Circuit explained recently, the *Buckhannon* Court "emphasized that there must be a 'judicial imprimatur on the change' in the legal relationship between the parties. . . . That meant that private settlements and a defendant's voluntary change in conduct no longer satisfied the prevailing-party test." Davis v. Abbott, 781 F.3d 207, 214 (2015) (quoting Buckhannon, 532 U.S. at 605) (citation omitted). The *Davis* Court reversed the District Court's finding that the plaintiffs prevailed where the defendant's conduct "remedied, (and therefore mooted)," plaintiffs' claims. "In the end," the Court wrote, "Plaintiffs failed to achieve judicially-sanctioned relief that sufficiently addressed the merits of any of their claims. Plaintiffs were therefore not prevailing parties . . . ." Id. at 218-19; *see also* Klamath Siskiyou Wildlands

[1] In any event, defendants do not concede that the lawsuit was a "catalyst" in defendants' decision to exhume the remains. The record makes clear that defendants had not made a final determination on Mr. Eakin's request for disinterment at the time his case was filed and were continuing to evaluate the request. In the summer of 2014, the Secretary of the Army (not a named party) determined to exhume all ten graves associated with Common Grave 717, from which PVT Kelder's remains were identified.

v. United States Bur. of Land Mgmt., 589 F.3d 1027, 1033-34 (9th Cir. 2009) (environmental organizations are not "prevailing parties" for EAJA purposes where the BLM moots the case by withdrawing its challenged decision to conduct a timber sale); Thomas v. National Science Foundation, 330 F.3d 486, 493 (D.C. Cir. 2003) (case mooted by act of Congress); Brickwood Contractors, Inc. v. United States, 288 F.3d 1371, 1380 (Fed. Cir. 2002) (case mooted by defendant's voluntary conduct).

Finally, a court cannot make the plaintiff into a prevailing party just by entering an order directing the defendant to do the very thing promised. "Holding otherwise would expose a backdoor through which claimants could circumvent *Buckhannon* by obtaining attorney's fees for what are, in essence, 'catalyst theory' cases." Rice Servs. Ltd. v. United States, 405 F.3d 1017, 1028 (Fed. Cir. 2005); *see also* Smith v. Fitchburg Pub. Schs., 401 F.3d 16, 27 (1st Cir. 2005) (an order that "memorialized the voluntary concessions made by [the defendant]" lacks the necessary judicial imprimatur because it only "requir[ed] [the defendant] to follow through with what [it] had already voluntarily promised to do").

Defendants undertook the exhumation and identification voluntarily and in furtherance of their discretionary authority under the Missing Service Personnel Act, 10 U.S.C. § 1501, *et seq.* To the extent that the identification of PVT Kelder qualifies as relief that Mr. Eakin sought in his Amended Complaint, there was no "judicial imprimatur" on that relief sufficient to make Mr. Eakin a prevailing party. The dismissal of the Amended Complaint, over Mr. Eakin's objections, did not materially alter the relationship between the parties, nor did the claimed relief – the decision to disinter - modify the defendant's behavior in a way that directly benefitted the plaintiff "at the time of the judgment or settlement." Accordingly, Mr. Eakin is not a "prevailing party" and his motion for costs and fees should be denied.

III. The Defendants' Position Was Substantially Justified

EAJA does not provide for attorney's fees, even to prevailing parties, if "the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). EAJA does not define the term "substantially justified." In *Pierce v. Underwood*, however, the Supreme Court explained that "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." *Pierce v. Underwood*, 487 U.S. at 565 (1988).

A party seeking an award of EAJA fees must "allege" in the party's application "that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d)(1)(B). This "no-substantial-justification-allegation requirement" is not a hollow requirement. It was intended "to ward off irresponsible litigation, *i.e.*, unreasonable or capricious fee-shifting demands." *Scarborough v. Principi*, 541 U.S. 401, 414 (2004).

In his Application (ECF 122-2), Mr. Eakin alleges that a statement by a defendant, to the effect that the case for disinterring X-816 did not meet defendants' guidelines for disinterment, was not substantially justified. Mr. Eakin alleges that the statement was not justified because it was allegedly contradicted by reports "of Defendant's investigators which recommended disinterment and were withheld from the Court." Mr. Eakin further asserts that "[u]ltimately, remains were identified as those of MIA as alledged [sic] in complaint."

Under EAJA, however, the Court must look to the agency position, not simply the position taken by various agency personnel in internal deliberations. The position which Mr. Eakin alleges was unjustified was never the final agency determination, as defendants repeatedly

pointed out. A claimant for EAJA fees cannot simply cherry pick among agency deliberations to find a preliminary position that he can allege, with 20/20 hindsight, was not justified.[2]

Here, the final agency decision, by the Secretary of the Army, was to exhume the ten graves associated with Common Grave 717, not solely the one proposed by Mr. Eakin. Although Mr. Eakin objected to this decision at the time, this is the same agency decision that he now claims vindicated him. Defendants' decision to exhume all ten graves ultimately led to a greater recovery of PVT Kelder's remains than would have occurred with the single exhumation requested by Mr. Eakin. Defendants' decision was substantially justified.

Moreover, the "position" that Mr. Eakin identifies as "unjustified" ignores the defendants' litigation positions, which have been substantially upheld by this Court. Notably, in dismissing Mr. Eakin's first Complaint, the Court held, in relevant part, that the MSPA precluded review under the Administrative Procedure Act of defendants' decision to disinter. Accordingly, the Court found it lacked jurisdiction to review the very position that Mr. Eakin now claims was not justified. As explained further below, the Court cannot review whether a position under EAJA is "substantially justified" if it lacks jurisdiction to review the position on the merits.

Mr. Eakin does not allege that defendants' positions in moving to dismiss the Amended Complaint (e.g., standing, no jurisdiction) were not substantially justified. In dismissing Mr. Eakin's facial claims, the Court agreed with defendants' position in part. In finding Mr. Eakin's other claims moot, the Court declined to rule on the defendants' other jurisdictional defenses. However, were the Court to reach the question of whether these positions were "substantially

[2] Defendants do not concede that even the preliminary decision to which Mr. Eakin refers was not substantially justified. Reasonable people could, and did, disagree on the strength of the evidence correlating the historical record with the gravesite, on the extent of commingling likely to be found, and on other matters relevant to the decision to disinter.

justified," in order to grant Mr. Eakin's motion, the Court would need to address these defenses on the merits. Section 2412(d) authorizes the award of attorney's fees and expenses to a prevailing party in a civil action by or against the United States "in any court having jurisdiction of [the] action." *See* Smith v. Brady, 972 F.2d 1095, 1097 (9th Cir. 1992) ("[I]f the district court lacked jurisdiction over the underlying suit, it had no authority to award attorney's fees"; reviewing government's standing argument on appeal) (citation and internal quotation marks omitted); Francis E. Heydt Co. v. United States, 948 F.2d 672, 677 (10th Cir. 1991) ("'[A] court must have jurisdiction over an action before it may award fees under the EAJA.'") (*quoting* Montes v. Thornburgh, 919 F.2d 531, 534 (9th Cir. 1990)); Greater Detroit Resource Recovery Auth. v. EPA, 916 F.2d 317, 320 (6th Cir. 1990) (review of EAJA award on appeal requires review of district court jurisdiction); Johns-Manville Corp. v. United States, 893 F.2d 324, 328 (Fed. Cir. 1989); Lane v. United States, 727 F.2d 18, 20-21 (1st Cir.), *cert. denied*, 469 U.S. 829 (1984).

In sum, the position that Mr. Eakin alleges was not substantially justified was not a final agency action nor a position taken in litigation. The final position taken by the agency, which plaintiff now claims was the relief he wanted, and the positions taken in litigation, which the Court has largely upheld, were substantially justified. Accordingly, even were the Court to find Mr. Eakin to be a prevailing party, his EAJA motion should be denied.

## IV. With One Exception, the Costs and Expenses Claimed are Not Documented, or Not Recoverable

Under EAJA, a prevailing party may claim expenses under 28 U.S.C. § 2412(d) and costs under 28 U.S.C. § 2412(a)(1). The former are generally attorney's and expert witness' fees and expenses. *See e.g.* Baldi Bros. Constructors v. United States, 52 Fed. Cl. 78, 86 (2002) (the expenses claimed under 2412(d) must be expenses of attorneys or experts, as opposed to

expenses of the plaintiff). The costs allowed are those enumerated in 28 U.S.C. § 1920. 28 U.S.C. § 2412(a)(1). Section 1920 permits a judge or clerk of any court of the United States to tax the following as costs: (1) fees of the clerk and marshal; (2) fees of the court reporter; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under § 1923; and (6) compensation of interpreters and court appointed experts.

A. Legal Research Costs

The single largest item that Mr. Eakin claims is for "legal research" costs. Plaintiff requests $1500 for these costs; however, he provides no detail concerning the work performed, the number of hours billed, the rate billed, or the qualifications of the person, Kathleen Goodman, performing the work. Section 2412(d)(1)(B) specifically requires the party seeking an award of attorney's fees and expenses to submit "an itemized statement . . . stating the actual time expended and the rate at which fees and other expenses were computed." A court should not award fees or expenses where the claimant has not adequately documented the hours spent. *See generally* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) ("[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly")[3]. Mr. Eakin's request, which simply requests $1500, does not comply with EAJA's express documentation requirements and therefore should be denied on its face.

Mr. Eakin states that he is not claiming attorney's fees, so presumably Ms. Goodman is not an attorney. However, a *pro se* litigant may not recover legal fees, regardless of how those fees are couched, or by whom the legal work is done. See Hexamer v. Foreness, 997 F.2d 93, 94 (5th Cir.1993) (*pro se* litigant not entitled to attorney's fees). Following this principle, courts

[3] Though *Hensley* did not involve the EAJA, the Supreme Court in *INS v. Jean*, 496 U.S. 154, 161 (1990), made clear that the *Hensley* analysis applies to EAJA cases.

have rejected attempts to claim legal fees as "expenses" under EAJA, denying claims for paralegal work by a third-party; for "legal research" done by the litigant himself; and for an attorney-litigant's work he performed as a "legal expert" in his own case. *See* Krecioch v. United States, 316 F.3d 684, 687-88 (7th Cir. 2003) (characterizing claim for paralegal work as "the activities of an attorney" and denying fees to *pro se* litigant); Groves v. Shinseki, 541 F. App'x 981, 985 (Fed. Cir. 2013) (per curiam)(unpublished) (denying claim for *pro se* litigant's own legal research expenses); Kooritzky v. Herman, 178 F.3d 1315, 1322 (D.C. Cir. 1999) (holding that "a lawyer-litigant acting *pro se* may not recover fees for acting as an "expert witness" in his own case, at least, where the "expertise" possessed by the litigant is essentially legal in nature"; to hold otherwise would vitiate the rule against *pro se* litigants recovering attorney's fees); cf. Allen v. United States Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982) (paralegal expenses not recoverable as costs, and recoverable as attorney's fees "only to the extent that the paralegal performs work traditionally done by an attorney").

In sum, plaintiff's legal research costs are not recoverable, both because they lack documentation and because they are in the nature of attorney's fees. This claim should be denied.

B. Expert Witness Expenses

Mr. Eakin's claim for expert witness expenses suffers from the same lack of detail. Mr. Eakin requests $250 for Dr. Senn, but does not provide any documentation or statement from the expert witness to support this claim. As noted above, 28 U.S.C. § 2412(d)(2)(B) requires an "itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed"). Furthermore, under 28 U.S.C. § 2412(d)(2)(A)(i), "no expert witness shall be

compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States."

As Plaintiff has failed to provide the required documentation to support the claimed costs (e.g., hourly rate, what type of expert, work performed, etc.), this cost should be denied. *See e.g. ACE Const., Inc. v. United States*, 81 Fed. Cl. 161, 171-172 (2008) (Plaintiff's claimed expert witness fees reduced from $36,336 to $18,241.40 based on the highest rate that the government paid for any of its experts).

C. Costs

EAJA specifies that, in addition to the attorney's and expert fees and expenses set forth in 28 U.S.C. § 2412(d)(2)(A), a party may recover costs as set forth in 28 U.S.C. § 1920. 28 U.S.C. § 2412 (a)(1). Many of Mr. Eakin's claims are not recoverable under § 1920, however. That section specifies that the following are taxable costs: (1) fees of the clerk and marshal; (2) fees of the court reporter; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under § 1923; and (6) compensation of interpreters and court appointed experts. Thus, the travel costs and postage expenses that Mr. Eakin seeks are not recoverable under § 1920. *See* Carmichael v. United States, 70 Fed. Cl. 81, 86-87 (2006) (non-attorney travel costs not recoverable under EAJA); Baldi Bros. Const. v. U.S., 52 Fed. Cl. 78, 86-87 (2002) (same); Mass. Fair Share v. Law Enforcement Assistance Admin., 776 F.2d 1066, 1069-70 (D.C. Cir. 1985) (denying travel and postage expenses); Harts v. Johanns, No. 05-1066-WEB, 2006 WL 2850289, at *2 (D. Kan. Oct. 4, 2006) (party is not entitled to postage fees under the EAJA, citing Weakley v. Bowen, 803 F.2d 575, 580 (10th Cir.1986)).

Costs of copying are taxable, where the Court can determine that the expenses were reasonable and necessary to the litigation. Here, Mr. Eakin requests copying costs in the amount of $332.59. However, he provides no detail of what was copied, how many copies were made, the purpose of the copies or the cost. Accordingly, this claim should be denied. *See, e.g.*, Standard Commc'ns, Inc. v. United States, 106 Fed. Cl. 165, 176 (2012) ("The absence of entries describing what documents were photocopied, and for what purpose, prohibits the Court from weighing in on the necessity of the photocopying and exemplification charges'" (citation omitted).

In sum, of the costs sought by Mr. Eakin, only the filing fee is both taxable and properly documented. However, as he is not a prevailing party and the position of defendants was substantially justified, this too should be denied under EAJA.

V. Conclusion

For all the reasons set forth herein, Defendants requests that the Court deny Plaintiff's Motion for Recovery of Costs [ECF 122] in its entirety.

DATED: June 8, 2015

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the _8th__ day of June, 2015, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

John Eakin
Plaintiff *pro se*