

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

GLEN ALLEN CHAPMAN, )  
 )  
 Appellant, )  
 )  
 v. ) Vet. App. No. 15-3035  
 )  
 ROBERT A. McDONALD, )  
 Secretary of Veterans Affairs, )  
 )  
 Appellee. )

**TABLE OF CONTENTS FOR APPELLANT'S APPLICATION  
FOR AWARD OF REASONABLE ATTORNEYS' FEES AND  
EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)**

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**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

GLEN ALLEN CHAPMAN,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 15-3035
	)	
ROBERT A. McDONALD,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**APPELLANT'S APPLICATION FOR AWARD OF  
REASONABLE ATTORNEYS' FEES AND EXPENSES  
PURSUANT TO 28 U.S.C. § 2412(d)**

Pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), and U.S. Vet. App. R. 39, Appellant, GLEN ALLEN CHAPMAN, applies for an award of reasonable attorneys’ fees and expenses in the amount of **\$11,236.14**.

**PROCEDURAL HISTORY**

On June 22, 2015<sup>14</sup>, the Board of Veterans’ Appeals (“Board” or “BVA”) issued a decision that denied Appellant’s claim for entitlement to service connection for a “lung condition.” Appellant filed a timely Notice of Appeal to this Court.

On 8 October 2015 the Secretary sent Appellant’s counsel the Record Before the Agency (RBA), which consisted of a 3,277 page electronic “pdf” file. This Honorable Court issued an order to file brief within 60 days and an order setting a Rule 33 Staffing Conference. On or around 1 December 2015, Appellant’s counsel prepared a Rule 33 Summary of the Issues and submitted it to the court and opposing counsel. On December

14, 2015, the conference was held. The parties were unable to reach an agreement and we proceeded to brief the appeal.

On 13 January 16, Appellant filed his 27 page brief. The brief argued three issues; (1) whether the Board of Veterans Appeals erroneously concluded that presumptive service connection under 38 USC § 1117 (Persian Gulf War) did not apply, (2) whether the Board of Veterans Appeals Reasons or Bases for denying appellant service connection under the Persian Gulf War presumption of 38 USC § 1117 are adequate, and (3) whether the Board of Veterans Appeals was clearly erroneous in relying on an inadequate unsupported negative medical opinion to deny appellant service connection under the one year presumption of 38 CFR § 3.309. With regard to issue one, Appellant argued that (a) the BVA erred in finding Appellant's to be a diagnosed illness, and argued in the alternative that (b) even if he was diagnosed with sarcoidosis, he still qualifies for service connection under 38 USC § 1117.

Opposing counsel asked for an extension of time in which to file his brief, which was granted. Opposing counsel then filed his brief on or about 28 April 2016. In the brief, the Secretary argued that the BVA had adequate Reasons or Bases, and argued that Appellant articulated no valid basis for disturbing the Board's decision.

Appellant's counsel filed a reply on 3 May 2016. The 8 page reply focused on the Secretary's arguments and pointed out the flaws with the Secretary's reasoning.

On 29 November 2016, Chief Judge Davis issued a Memorandum Decision. The decision analyzed Appellant's first issue. Although agreeing with the Secretary that Appellant did have a diagnosed illness, the judge turned to the second part of the argument

and agreed that the BVA's statement of reasons or bases for denying Appellant a presumptive service connection under 38 USC § 1117 was inadequate. The court set aside the BVA's decision and remanded it back for further proceedings.

## **ARGUMENT**

### **I. APPELLANT IS A PREVAILING PARTY AND ELIGIBLE TO RECEIVE AN AWARD.**

To obtain "prevailing party" status, a party need only to have obtained success "on any significant issue in litigation which achieve[d] some of the benefit ... sought in bringing the suit." *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993). Appellant is a prevailing party entitled to an award of fees and costs because the Court granted the parties' JMR, which was predicated on administrative error by the Board. *See also Zuberi v. Nicholson*, 19 Vet. App. 541 (2006); *Sumner v. Principi*, 15 Vet. App. 256 (2001) (*en banc*).

Appellant is a party eligible to receive an award of reasonable fees and expenses because his net worth did not exceed \$2 million at the time this civil action was filed. As an officer of the Court, the undersigned counsel hereby states that Appellant's net worth did not exceed \$2 million at the time this civil action was filed and Appellant did not own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7 million and which had more than 500 employees. *See Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996).

### **II. THE POSITION OF THE SECRETARY OF VETERANS AFFAIRS WAS NOT SUBSTANTIALLY JUSTIFIED.**

The Secretary can defeat Appellant's application for fees and costs only by demonstrating that the government's position was substantially justified. *See Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The U.S. Supreme Court has held that for the position of the government to be substantially justified, it must have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *accord, Beta Sys. v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

In this case, the Secretary's administrative position was not substantially justified. As described more fully in the "Procedural History," *supra*, the Court vacated and remanded the Board's decision because of errors the BVA made in adjudicating Appellant's claim. Specifically, the Court concluded that BVA's statement of reasons or bases for denying Appellant a presumptive service connection under 38 USC § 1117 was inadequate because it did not apply the definition of "a medically unexplained chronic multisymptom illness that is defined by a cluster of signs or symptoms" and conflated this prong of the presumption with the "undiagnosed illness" prong of the presumption. In litigation, the Secretary took the same position that the BVA took during the claim adjudication process. These errors had no reasonable basis in fact or in law.

### **III. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES.**

An itemized statement of the services rendered is attached to this application as Exhibit A, and the reasonable fees and expenses for which Appellant seeks compensation are listed below in this section. Included in Exhibit A is a certification that counsel has

“(1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all counsel and (2) considered and eliminated all time that is excessive or redundant.” *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005).

Appellant seeks attorneys’ fees at the following rates for representation in the Court of Appeals for Veterans Claims.<sup>1</sup>

<u>Name</u>	<u>Rate</u>	<u>Hours</u>	<u>Fee Amount</u>
Luke D. Wilson (2006 law graduate)	\$188.21	59.7	\$ 11,236.14
<b>TOTAL:</b>			<b>\$ 11,236.14</b>

WHEREFORE, Appellant respectfully requests that the Court award attorneys’ fees and expenses in the total amount of **\$11,236.14**

Respectfully submitted,

/s/ Luke D. Wilson  
**LUKE D. WILSON**

Counsel for Appellant

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<sup>1</sup> A rate in excess of \$125 per hour for counsel for Appellant in this case is justified based

**EXHIBIT A**

## ITEMIZATION OF HOURS WORKED

DATE	HOURS	DESCRIPTION	STAFF
3 Aug 15	1.5	Initial Meeting with Client	Attorney: Luke Wilson
3 Aug 15	1.3	Review BVA opinion	Attorney: Luke Wilson
17 Aug 15	0.4	Review Court notices	Attorney: Luke Wilson
17 Aug 15	2.5	Begin to review 3,277 page Record Before the Agency	Attorney: Luke Wilson
17 Aug 15	1.6	Legal research: Adequacy of doctor's conclusions at C and P	Attorney: Luke Wilson
30 Oct 15	6.3	Continue reviewing 3,277 page RBA	Attorney: Luke Wilson
31 Oct 15	4.2	Continue reviewing 3,277 page RBA	Attorney: Luke Wilson
2 Nov 15	3.2	Initial Legal research into potential issues to raise on appeal	Attorney: Luke Wilson
6 Nov 15	1.2	Meeting with private doctor regarding conclusions of the C and P doctor	Attorney: Luke Wilson
8 Nov 15	1.8	Conference with Client re RBA and the path ahead	Attorney: Luke Wilson
18 Nov 15	3.3	Additional legal research re issues to raise on appeal: Persian Gulf War Presumption prongs	Attorney: Luke Wilson
29 Nov 15	9.5	Draft Rule 33 conference memo and perform additional legal research into the Persian Gulf War Presumption	Attorney: Luke Wilson
30 Nov 15	0.8	Compile exhibits from RBA for Rule 33 memo	Attorney: Luke Wilson
30 Nov 15	0.2	File Conference memo	Attorney: Luke Wilson
9 Dec 15	0.3	Call to OGC counsel re scheduling conference	Attorney: Luke Wilson
14 Dec 15	1.0	Final preparation for conference: review of Rule 33 memo and supporting documents	Attorney: Luke Wilson
14 Dec 15	0.3	Rule 33 conference	Attorney: Luke Wilson
4 Jan 16	0.5	Formatting draft 1 of the appellate brief	Attorney: Luke Wilson
5 Jan 16	2.3	Additional legal research regarding Reasons and Bases violations	Attorney: Luke Wilson
6 Jan 16	1.1	Continue legal research regarding	Attorney: Luke Wilson
12 Jan 16	7.0	Drafting appellate brief and additional legal	Attorney: Luke

		research regarding standards of review	Wilson
13 Jan 16	1.0	Final edits to brief	Attorney: Luke Wilson
3 May 16	0.8	Review Response of the Secretary	Attorney: Luke Wilson
3 May 16	7.2	Draft Reply brief	Attorney: Luke Wilson
8 Aug 16	0.4	Conference with Client regarding status of case	Attorney: Luke Wilson
<b>TOTAL HOURS:</b>			
	59.7	///	///

**CERTIFICATION**

I have reviewed the billing statement and I am satisfied that it accurately reflects the work performed by all counsel and I have considered and eliminated all time that is excessive or redundant.

Date: 30 November 2016

/s/ Luke D. Wilson  
LUKE D. WILSON

**EXHIBIT B**

## Databases, Tables & Calculators by Subject

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Change Output Options: From:  To:  **GO**  
 include graphs  include annual averages

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Data extracted on: November 29, 2016 (5:14:52 PM)

### Consumer Price Index - All Urban Consumers

**Series Id:** CUUR0300SA0  
 Not Seasonally Adjusted  
**Area:** South urban  
**Item:** All items  
**Base Period:** 1982=84=100

Download: [xlsx](#)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
1996	151.1	151.5	152.4	153.2	153.5	154.0	154.0	154.1	154.5	154.9	155.1	155.1	153.6	152.6	154.6
1997	155.7	156.1	156.5	156.7	156.6	157.0	157.0	157.1	157.5	157.8	157.8	157.3	156.9	156.4	157.4
1998	157.6	157.8	158.2	158.5	158.8	159.1	159.3	159.5	159.5	159.8	159.6	159.6	158.9	158.3	159.6
1999	159.9	160.0	160.6	161.5	161.6	161.7	162.2	162.6	163.2	163.6	163.5	163.6	162.0	160.9	163.1
2000	164.1	164.8	166.5	166.7	166.7	167.5	168.0	168.0	168.5	168.5	168.6	168.4	167.2	166.1	168.3
2001	169.3	170.2	170.6	171.4	171.7	172.2	171.6	171.5	172.2	171.7	171.0	170.3	171.1	170.9	171.4
2002	170.6	171.0	172.1	173.1	173.2	173.5	173.6	173.8	174.2	174.9	174.9	174.6	173.3	172.3	174.3
2003	175.1	176.4	177.5	177.4	176.8	177.2	177.3	177.9	178.3	178.1	177.5	177.5	177.3	176.7	177.8
2004	178.2	179.1	180.1	180.9	182.0	182.9	182.6	182.6	182.8	183.7	183.7	183.3	181.8	180.5	183.1
2005	183.6	184.7	185.9	187.3	187.3	187.8	188.5	189.4	192.0	192.5	190.7	190.1	188.3	186.1	190.5
2006	191.5	191.8	192.8	194.7	195.5	196.3	197.0	197.1	195.8	194.7	194.3	194.8	194.7	193.8	195.6
2007	195.021	195.950	197.904	199.618	200.804	201.675	201.571	201.041	201.697	202.155	203.437	203.457	200.361	198.495	202.226
2008	204.510	205.060	206.676	208.085	210.006	212.324	213.304	212.387	212.650	210.108	205.559	203.501	208.681	207.777	209.585
2009	204.288	205.343	206.001	206.657	207.265	209.343	208.819	209.000	208.912	209.292	209.738	209.476	207.845	206.483	209.206
2010	210.056	210.020	211.216	211.528	211.423	211.232	210.988	211.308	211.775	212.026	211.996	212.488	211.338	210.913	211.764
2011	213.589	214.735	217.214	218.820	219.820	219.318	219.682	220.471	220.371	219.969	219.961	219.469	218.618	217.249	219.987
2012	220.497	221.802	223.314	224.275	223.356	223.004	222.667	223.919	225.052	224.504	223.404	223.109	223.242	222.708	223.776
2013	223.933	225.874	226.628	226.202	226.289	227.148	227.548	227.837	227.876	227.420	226.811	227.082	226.721	226.012	227.429
2014	227.673	228.664	230.095	231.346	231.762	232.269	232.013	231.611	231.762	231.131	229.845	228.451	230.552	230.302	230.802
2015	226.855	227.944	229.337	229.957	230.886	232.026	231.719	231.260	230.913	230.860	230.422	229.581	230.147	229.501	230.793
2016	229.469	229.646	230.977	231.975	232.906	233.838	233.292	233.561	234.069	234.337				231.469	

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**EXHIBIT C**

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Year	Adjustmt Factor**	Paralegal/ Law Clerk	Years Out of Law School *				
			1-3	4-7	8-10	11-19	20 +
6/01/16- 5/31/17	1.0369	\$187	\$343	\$421	\$608	\$685	\$826
6/01/15- 5/31/16	1.0089	\$180	\$331	\$406	\$586	\$661	\$796
6/01/14- 5/31/15	1.0235	\$179	\$328	\$402	\$581	\$655	\$789
6/01/13- 5/31/14	1.0244	\$175	\$320	\$393	\$567	\$640	\$771
6/01/12- 5/31/13	1.0258	\$170	\$312	\$383	\$554	\$625	\$753
6/01/11- 5/31/12	1.0352	\$166	\$305	\$374	\$540	\$609	\$734
6/01/10- 5/31/11	1.0337	\$161	\$294	\$361	\$522	\$589	\$709
6/01/09- 5/31/10	1.0220	\$155	\$285	\$349	\$505	\$569	\$686
6/01/08- 5/31/09	1.0399	\$152	\$279	\$342	\$494	\$557	\$671
6/01/07-5/31/08	1.0516	\$146	\$268	\$329	\$475	\$536	\$645
6/01/06-5/31/07	1.0256	\$139	\$255	\$313	\$452	\$509	\$614
6/1/05-5/31/06	1.0427	\$136	\$249	\$305	\$441	\$497	\$598
6/1/04-5/31/05	1.0455	\$130	\$239	\$293	\$423	\$476	\$574
6/1/03-6/1/04	1.0507	\$124	\$228	\$280	\$405	\$456	\$549
6/1/02-5/31/03	1.0727	\$118	\$217	\$267	\$385	\$434	\$522
6/1/01-5/31/02	1.0407	\$110	\$203	\$249	\$359	\$404	\$487
6/1/00-5/31/01	1.0529	\$106	\$195	\$239	\$345	\$388	\$468
6/1/99-5/31/00	1.0491	\$101	\$185	\$227	\$328	\$369	\$444
6/1/98-5/31/99	1.0439	\$96	\$176	\$216	\$312	\$352	\$424
6/1/97-5/31/98	1.0419	\$92	\$169	\$207	\$299	\$337	\$406
6/1/96-5/31/97	1.0396	\$88	\$162	\$198	\$287	\$323	\$389
6/1/95-5/31/96	1.032	\$85	\$155	\$191	\$276	\$311	\$375
6/1/94-5/31/95	1.0237	\$82	\$151	\$185	\$267	\$301	\$363

