

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

JOSE F. RIVERA-COLON,)	
)	
Appellant,)	
)	
v.)	Vet.App.No. 19-6129
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	

**APPELLANT'S APPLICATION FOR AN AWARD OF REASONABLE
ATTORNEY FEES AND EXPENSES UNDER 28 U.S.C. § 2412(d)**

Pursuant to the Equal Access to Justice Act (EAJA), the Appellant, Jose F. Rivera-Colon, moves the Court for an award of reasonable attorney fees in the amount of \$23,275.51.

In order to be eligible for an award of attorney's fees under EAJA, a claimant must demonstrate (1) that he or she is a prevailing party; (2) that he or she is eligible to receive an award; and (3) that the position of the United States was not substantially justified. *Bazalo v. Brown*, 9 Vet.App. 304, 308 (1996). Additionally, the claimant must provide an itemized statement from the claimant's attorney as to the services provided. *Id.*

Here, the Appellant satisfies all the requirements. First, the Appellant is a prevailing party. A prevailing party includes one who obtains relief in the form of a remand predicated on administrative error. *Zuberi v. Nicholson*, 19 Vet.App. 541, 546 (2006). In this case, the appellant is a prevailing party because the Court, in its April 11, 2022, precedential decision, found that the Board erred by failing to define a key term used to describe impairment under 38 C.F.R. § 4.114, diagnostic code (DC) 7307 for gastritis, which frustrated judicial review. The Court determined that the Board failed to provide an adequate statement of its reasons or bases to support its implicit

finding that the Appellant's gastritis symptoms were not exceptional. Accordingly, the Court remanded the gastritis claim to the Board for further development, if necessary, and readjudication consistent with the Court's decision.

Second, the Appellant is eligible to receive an EAJA award. A showing of eligibility may be made by stating in the application that the Appellant's net worth at the time the appeal was filed did not exceed \$2 million. *Bazalo*, 9 Vet.App. at 309. The undersigned counsel hereby states that the Appellant's net worth did not exceed \$2 million at the time this action was filed. Furthermore, the Appellant is not a business entity.

Third, the government's position in this case was not substantially justified. There was not a reasonable basis in law supporting the Board's decision. *See Stillwell v. Brown*, 6 Vet.App. 291, 302 (1994) ("[A] position can be justified even though it is not correct, and . . . it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.") (internal quotations omitted).

Lastly, the undersigned counsel has attached the billing statement describing the request for \$23,275.51 in fees. *See Exhibit A*. It is based in part on 83.2 hours of work the undersigned counsel completed for the Appellant, which was performed at a rate of \$210.96 per hour (\$125 per hour plus a cost-of-living adjustment from March 1996, using the CPI-U for the South urban region and April 2021, the date closest to the date the Appellant drafted his brief, as the midpoint). Kenneth M. Carpenter, who served as co-counsel to Appellant's counsel, worked 26 hours at a rate of \$220.14, which is detailed in his declaration. *See Exhibit B*.

Respectfully submitted,

FOR THE APPELLANT:

May 31, 2022

Date

/s/Javier Centonzo

JAVIER CENTONZIO

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EXHIBIT A
Jose F. Rivera-Colon
Docket 19-6129

12/15/19 - 3
RBA review (legibility & completeness)

12/16/19 – 3
RBA review (legibility & completeness)

12/16/19 - 2.8
RBA review (legibility & completeness)

12/17/19 – 2.1
RBA review (legibility & completeness)

12/17/19 - .6
Reviewed Board's decision and noted issues

2/3/20 - 3
Reviewed RBA (content), 1-748

2/4/20 – 2.8
Reviewed RBA (content), 749-1537

2/4/20 - 3
Reviewed RBA (content), 1538-2345

2/6/20 – 3
Reviewed RBA (content), 2346-3174

2/6/20 – 2.4
Reviewed RBA (content), 3175-3723

2/10/20 - 3
Reviewed RBA (content), 3724-4588

2/11/20 - 3
Reviewed RBA (content), 4589-5393

2/11/20 – 2.9
Reviewed RBA (content), 5394-6201

2/13/20 - 3
Reviewed RBA (content), 6202-7045

2/16/20 – 2.9

Reviewed RBA (content), 7046-7811

2/16/20 - 3

Reviewed RBA (content), 7812-8631

2/18/20 – 2.8

Reviewed RBA (content), 8632-9356

2/20/20 – 2

Reviewed RBA (content), 9357-9915

2/20/20 – 2.9

Reviewed RBA (content), 9916-10638

2/23/20 – 3

Reviewed RBA (content), 10639-end

3/26/20 – .8

Researched and identified case law and statutes relevant to matter based on issues identified in BVA decision

3/31/20 – 2.6

Drafted Summary of Issues for Rule 33 Conference

4/1/20 - .1

Prepared supplemental materials

4/1/20 - .2

Final edits to Summary of Issues, filed

4/1/20 - .2

Prepared and filed certification of service

4/15/20 - .4

Prepared for staff conference

4/15/20 - .3

Staff conference held

4/12/21 – 3

Began drafting appellant's brief, table of contents, course of proceedings, relevant facts, statement of issues, and conducted additional research

4/13/21 – 2.9

Continued drafting appellant's brief

4/15/21 – 1.8

Final edits to appellant’s brief, filed

5/23/21 – 1.2

Reviewed appellee’s brief

6/14/21 - .4

Reviewed Record of Proceedings for completeness

9/5/21 - .6

Reviewed Court’s Order regarding supplemental briefing and took notes for research of issues identified

9/7/21 – 3

Research on issues identified in Court’s supplemental briefing order

9/7/21 – 2

Continued research on issues identified in Court’s supplemental briefing order

9/15/21 – 1.8

Reviewed and made edits to co-counsel, Kenneth Carpenter’s supplemental brief

9/20/21 - .6

Review final draft of co-counsel’s supplemental brief and provided notes and edits

10/7/21 – 1.2

Reviewed Secretary’s response to supplemental briefing Order and made notes for co-counsel

10/10/21 – 2.1

Researched caselaw related to issues identified in Secretary’s supplemental brief in preparation for oral argument

10/12/21 – 2

Prepared for and participated in oral argument as second chair

4/11/22 - .6

Read Decision

5/31/22 – 1.2

Drafted EAJA application

Fees for Attorney Javier Centonzo \$17,551.87 (83.2 hours of work at \$210.96 per hour)

Fees for Attorney Kenneth Carpenter \$5,723.64 (26 hours of work at \$220.14 per hour)

TOTAL FEES: \$23,275.51

There were no costs associated with this representation.

Total amount of bill: \$23,275.51

I, Javier Centonzio, under penalty of perjury, affirm that the above is a true and accurate accounting of the time spent on the case of Jose F. Rivera-Colon, Docket No. 19-6129. In the exercise of billing judgment, I omitted time spent on administrative tasks, and time that appeared duplicative.

Exhibit B

**DECLARATION OF APPELLANT’S CO-COUNSEL,
KENNETH M. CARPENTER**

In support of Appellant’s application for attorney’s fees under 28 U.S.C. § 2412(d), I Kenneth M. Carpenter hereby declare as follows:

1. I am an attorney licensed to practice in the State of Kansas, and I am admitted to practice before the United States Court of Appeals for Veterans Claims.
2. I have represented Jose F. Rivera-Colon in the matter of Rivera-Colon v. McDonough, Vet.App. No. 19-6129 pro bono without charge.
3. The following is a statement of the service rendered and expenses incurred in my representation of the Appellant in this appeal.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Kenneth M. Carpenter
Kenneth M. Carpenter

May 28, 2022
Date

Attorney Time, Costs and Other Expenses

Below is Mr. Carpenter’s itemized time and expenses for the work performed on behalf of Mr. Rivera-Colon which totals \$ 5,723.64.

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
9/09/21	Prepared and submitted Entry of Appearance	n/a	
9/10/21	Reviewed Court’s September 2, 2021 Supplemental briefing order	1.00	
9/11/21	Reviewed Board decision and the briefs of the parties.	3.00	
9/13/21	Review supplemental memorandum submitted in Crowell v. Shulkin, Vet App No. 16-3151; Long v. Wilkie, Vet App No. 16-1537; and Morgan v. Wilkie, Vet App No. 17–0098 and made notes on issues presented.	3.00	
9/15/21	Reviewed and made notes on this Court’s decisions in Long and Morgan		
9/17/21	Analyzed 38 C.F.R. § 4.114, DC 7307	2.00	
9/20/21	Wrote initial draft of response to this Court’s September 2, 2021 request for additional briefing	4.00	
9/21/21	Made final revisions and filed Appellant’s Response to Court’s September 2, 2021 Supplemental Briefing order.	2.00	
9/21/21	Received, reviewed and made noted on the Secretary’s response to Court’s September 2, 2021 Supplemental Briefing order.	2.00	
10/07/21	Received, reviewed and made notes on the Secretary’s response to Court’s September 29, 2021 order directing the Secretary to respond to Mr. Rivera-Colon’s argument.	2.00	
10/11/21	Prepared for Oral argument	4.00	
10/12/21	Prepared and presented oral argument	<u>3.00</u>	
	Total Hours	26.00	

26 hours x \$220.14 per hour = \$ 5,723.64 for work performed by Kenneth M. Carpenter

Total Attorney Fee Requested: \$ 5,723.64

Expenses

UPS:	\$.00
Postage:		.00
<u>Copying:</u>		<u>.00</u>
Total Expenses:	\$.00

Total attorney fee & expenses: \$

According to the U.S. Department of Labor Bureau of Labor Statistics, the National Consumer Price Index for all Urban Consumers in the South Urban Region, as of March 29, 1996, the base year CPI-U was 151.7; as of October 2021 was 267.160, a .7611 % increase. Applying this increase to the \$ 125.00 hourly rate provided by the Equal Access to Justice Act, the current hourly rate would be \$ 220.14.

Applying the rate computed above to the total time expended by co-counsel for Appellant, Appellant seeks a total attorney fee of \$ 5,723.64.

The lawyer has reviewed the itemization to correctly categorize each entry. The lawyer has also reviewed the itemization to exercise “billing judgment” by determining whether the activity or expense might be an overhead expense or, for any other reason, not properly billable. However, the lawyer will be grateful to have brought to his attention any mistakes which might remain.

For costs and expenses expended by counsel for Appellant, Appellant seeks a total reimbursement of \$ 5,723.64 for a total attorney fee.

I declare and state under penalty of perjury under the laws of the United States of America that the information set forth in this declaration is true and correct.

/s/Kenneth M. Carpenter
Kenneth M. Carpenter
CARPENTER, CHARTERED
Co-Counsel for Jose F. Rivera-Colon