

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

| | | |
|--------------------------------|---|------------------|
| Karen R. Shorette, |) | |
| Petitioner, |) | |
| |) | |
| v. |) | CAVC No. 22-4698 |
| |) | |
| Denis McDonough, |) | |
| Secretary of Veterans Affairs, |) | |
| Respondent. |) | |
| _____ |) | |

**APPELLANT’S APPLICATION FOR AN AWARD
OF REASONABLE FEES AND EXPENSES**

Petitioner Karen R. Shorette hereby makes application to the Court for an award of reasonable fees and expenses under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d). The reasonable attorney fees requested in this matter are \$12,658.50.

SUMMARY OF THE CASE

Mrs. Shorette, then acting pro se, submitted documents which the Court construed together as a petition for extraordinary relief in the form of a writ of mandamus, which was docketed on August 8, 2022. In her action, Mrs. Shorette complained of abuses of process by the Secretary’s Fiduciary Program and sought the Court’s assistance in resolving several issues, including: her right to be reinstated as her spouse’s VA fiduciary, her right to monthly support of \$3,000.00 from her spouse’s VA benefits, and payment of the funds withheld since her removal as VA fiduciary.

Petitioner retained undersigned counsel in December 2022. In an Order dated January 18, 2023, the Court directed the parties to respond to a number of questions raised by the petition. On February 6, 2023, the Court ordered oral argument, which was held remotely on May 8, 2023.

In an August 24, 2023, Order, the Court granted the petition in part and dismissed the petition in part and ordered the Secretary “to issue an SOC responsive to the petitioner’s November 29, 2018, NOD regarding the appointment of a paid fiduciary and concomitant removal of the veteran’s legal guardian as his fiduciary.” Order (Aug. 24, 2023) at 18-19.¹ In doing so, the Court explicitly stated that it was “satisfied that . . . the circumstances of this case warrant issuance of a writ.” *Id.* at 17.

Because the petitioner, as the veteran’s legal guardian, *is clearly and indisputably entitled* to appeal to the Board the November 1, 2018, decision to appoint a paid fiduciary and remove her as fiduciary, the Court concludes, *as a matter of law*, the she filed an NOD with that decision on November 29, 2018; and because VA *refuses to recognize* her disagreement, the *Court concludes that a writ is necessary* to protect its potential jurisdiction.

Id. at 17 (emphasis supplied).² In resolving the issues presented, “the Court conclude[d], that the petitioner, as the veteran’s legal guardian, steps into the shoes of the veteran and therefore is authorized to act on his behalf in

¹ The Court also denied Mrs. Shorette’s October 3, 2022, motion for an injunction against changes to her benefits.

² Mrs. Shorette is still awaiting action on her NOD.

proceedings before the VA and this Court.” *Id.* at 12. Thus, the Secretary’s refusal to “acknowledge [Petitioner’s] authority to speak for the veteran as his legal guardian” and “that VA failed to comply with [] regulation and serve the petitioner as the veteran’s legal guardian,” *id.* at 15-16, were legal errors. Thus, the Court concluded, “as a matter of law, that [Mrs. Shorette’s] November 29, 2018, letter is an NOD expressing disagreement with VA’s November 1, 2018, decision to appoint a new fiduciary and remove [her] as Mr. Shorette’s fiduciary.” *Id.* at 16 (emphasis supplied).

ARGUMENT

This application is timely and satisfies the requirements for an award of attorney fees and expenses. The fees requested are reasonable, based on conservative billing judgment (including reduction of attorney time expended on the unsuccessful legal argument), and were necessary to achieve the favorable outcome without undue expenditure of resources. No fees are sought.

Timely Application

This application for fees and expenses is timely filed. “An application pursuant to 28 U.S.C. § 2412(d) for award of attorney fees and/or other expenses in a case must be filed with the Clerk not later than 30 days after the Court’s judgment becomes final pursuant to 38 U.S.C. § 7291(a).” Court Rule of Practice and Procedure 39(a). The Court’s judgment was issued on

October 24, 2023, so mandate issued as a matter of law on December 23, 2023 and this application is timely.

Legal Standards for an Award

Mrs. Shorette is eligible for reasonable attorney fees arising from this action because EAJA provides:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

. . . .

(2) For the purposes of this subsection--

(A) “fees and other expenses” includes . . . reasonable attorney fees

. . . .

(D) “position of the United States” means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

. . . .

(F) “court” includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims.

28 U.S.C. § 2412. An award of fees thus requires: (1) that the claimant be a prevailing party; (2) a showing that the claimant is eligible for an award

because his or her net worth does not exceed \$2,000,000; (3) an allegation that the Secretary's position was not substantially justified; and (4) an itemized statement of attorney fees and expenses sought. *Aponte v. Nicholson*, 21 Vet. App. 470, 472 (2007). Mrs. Shorette satisfies all of these conditions.

Prevailing Party

To be a prevailing party, the party must have received "at least some relief on the merits of his claim." *Sumner v. Principi*, 15 Vet. App. 256, 261 (2001) (en banc) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)). Here, Mrs. Shorette was a "prevailing" party because she obtained a Court order granting her substantive relief, denied to her by the Secretary, requiring the Secretary to accept Mrs. Shorette's NOD and, thus, allowing Mrs. Shorette to appeal her dismissal as VA fiduciary for Mr. Shorette. The Court's Order fundamentally changed the legal relationship between the parties and, therefore, Mrs. Shorette is a prevailing party. *See, e.g., Bates v. Nicholson*, 20 Vet. App. 185, 188 (2006) (must meet two criteria to be prevailing party: (1) "be able to point to a resolution . . . that causes a 'material alteration in the legal relationship of the parties'" and (2) "that change in legal status must be 'judicially sanctioned'"). Mrs. Shorette has pointed to the Court's Order altering her legal status so that the Secretary must recognize her authority as the veteran's Guardian.

Eligible Net Worth

In order to qualify as a “party” under EAJA, an applicant must show that his or her “net worth did not exceed \$2,000,000.00 at the time the civil action was filed.” 28 U.S.C. § 2412(d)(2)(B). Mrs. Shorette certified her satisfaction of this requirement on December 15, 2022. *See* Ex. A.

The Secretary Was Not Substantially Justified

The Secretary was not substantially justified in his position regarding refusing to recognize Mrs. Shorette’s authority to appeal the Secretary’s adverse action in removing her as Mr. Shorette’s fiduciary. This Court awards attorney fees to a prevailing party “unless the Court finds that the position of the United States was substantially justified,” or unless other statutory requirements are not met. 28 U.S.C. § 2412(d)(1)(A); *Cycholl v. Principi*, 15 Vet. App. 355, 359 (2001). Because Mrs. Shorette has alleged that the Secretary’s position was not substantially justified, the Secretary “has the burden of proving that [his] position was substantially justified in order to defeat the appellant’s EAJA application.” *Vaughn v. Gober*, 14 Vet. App. 92, 95 (2000). The Secretary cannot carry that burden in this case.

Fees

This application is accompanied by an itemization of the attorney time expended on this appeal. *See* Ex. B. An application for fees is allowable where

it is based on records that are substantially reconstructed and reasonably accurate. *P.P.G. Indus. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1570 (Fed. Cir. 1988). As supported by Exhibit B, this application is for 52.2 hours of attorney time based on contemporaneous time records. This total accurately reflects the attorney time actually expended after the exercise of conservative billing judgment.

Mrs. Shorette engaged undersigned counsel in December 2022 and the bulk of his work on this matter occurred in May 2023. Counsel's usual and customary fees during the period of this litigation varied between \$295.00 and \$350.00 per hour. According to the Bureau of Labor Statistics, the Consumer Price Index-All Urban Consumers, South Urban Area, average was 295.889 for May 2023 and 152.4 for March 1996. *See* Ex. C. Thus, the applicable CPI increased by a factor of 1.94 ($295.889/152.4$) between March 1996 and May 2023. Multiplying the \$125.00 per hour EAJA rate by the CPI factor of 1.94 yields an allowable rate of \$242.50 per hour.

The reasonable attorney fees in this matter are thus calculated by multiplying the 52.2 hours of attorney time expended by \$ 242.50 per hour, which yields \$12,658.50 as the reasonable fee in this matter.

CONCLUSION

The Secretary should pay reasonable attorney fees in the amount of \$12,658.50. Mrs. Shorette respectfully requests that the Court order payment be made within 30 days of the award.

Respectfully submitted,

/s/ Douglas J. Rosinski
Douglas J. Rosinski, Esq.
701 Gervais St., Ste. 150-405
Columbia, SC 29201-3266
Telephone: 803.256.9555
Facsimile: 888.492.3636
djr@djrosinski.com
Counsel to Karen Shorette

Exhibit A to Shorette EAJA Application

DISCLAIMER OF GUARANTEE.

Nothing in this Contract and nothing in Attorney's representations to Client were or were intended to be construed as a promise or guarantee regarding the outcome of Client's matter. Client agrees that no promise or guarantee forms any basis for this Engagement.

SEVERABILITY.

If any part of this Contract is held to be unenforceable, contrary to law, or against public policy by a court or government agency of competent jurisdiction, Client and Attorney agree that all remaining portions of the Contract will remain enforceable.

REVIEW BY COUNSEL.

Attorney has advised Client that he has an absolute right to have this Contract reviewed by another attorney before agreeing to its terms. Attorney also encouraged Client to seek such independent legal advice if there was any portion of the Contract with which Client was unclear or uncertain and to not enter into this Contract and Engagement unless Client fully understood all the terms and conditions.

FEE AWARDS PURSUANT TO EQUAL ACCESS TO JUSTICE ACT.

A. Client authorizes Attorney to pursue an award under the Equal Access to Justice Act ("EAJA") if, in Attorney's opinion, such an award is reasonably available to Client. If, in Attorney's opinion, an EAJA petition is not allowed or likely to be successful, Attorney will not file an EAJA application and will so inform Client.

B. Client certifies that her net worth at the time of signing this agreement is less than two million dollars (\$2,000,000.00).

Karen R. Shorette / Dec. 15, 2022
Karen R. Shorette Date

Exhibit B - Shorette Time Record (22-4698)

| Date | Hours | Description |
|----------|-------|---|
| 12/13/22 | 0.2 | Phoncon w/ K. Carpenter re pending fiduciary case; Review of available information re same |
| 12/15/22 | 0.8 | Phoncon w/ K. Shorette re representation; preparation of engagement documents |
| 12/15/22 | 0.3 | Phoncon w/ C. Smith re appointment to case; court filing re same |
| 12/16/22 | 0.3 | Preparation and submittal of notice of appearance |
| 12/16/22 | 0.5 | Preparation and submittal of Motion for Clarification; contact Secy counsel re same |
| 1/18/23 | 0.6 | Review of Court's Order re questions to parties |
| 2/2/23 | 2.5 | Preparation of outline of response; initial legal research re fiduciary statutes and case law |
| 2/2/23 | 3.0 | Review of available documents re response to court order |
| 2/3/23 | 2.9 | Preparation of initial draft Course of Proceedings and Relevant Facts and Overview sections re Response |
| 2/3/23 | 3.2 | Preparation of initial draft responses to court's questions |
| 2/6/23 | 1.5 | Preparation of initial draft of Judicial Review section and Conclusion |
| 2/6/23 | 2.4 | Review of initial draft; preparation of revised draft Response |
| 2/7/23 | 2.7 | Preparation of Exhibits re Response |
| 2/7/23 | 1.1 | Final review and submittal re Response |
| 2/28/23 | 0.8 | Review of Secy's Response |
| 4/17/23 | 1.1 | Preparation and submittal of Motion for Remote Argument |
| 5/3/23 | 1.5 | Preparation of initial argument outline; CAVC WebEx test |
| 5/4/23 | 3.4 | Review of case law re fiduciary issues; continued preparation of oral argument outline |

Exhibit B - Shorette Time Record (22-4698)

| | | |
|--------------|-------------|---|
| 5/5/23 | 2.9 | Continued development of Oral Argument issues; preparation of revised argument outline |
| 5/5/23 | 3.2 | Additional legal research re fiduciary program requirements, misuse standards; notice requirements for spouse, guardian; appealability of Fiduciary Program decisions |
| 5/8/23 | 2.9 | Preparation of final draft argument outline |
| 5/8/23 | 1.1 | Preparation and submittal of Solze Notice re fiduciary file unavailability |
| 5/8/23 | 2.5 | Review of produced claims file documents |
| 5/9/23 | 3.3 | Final preparations and participation in Oral Argument |
| 7/19/23 | 0.7 | Preparation and submittal of Solze Notice re fiduciary file non-production |
| 8/17/23 | 1.4 | Review of OIG Report on Fiduciary Hub and submittal of Solze Notice re same |
| 8/25/23 | 1.2 | Review of Court Order; phoncon w/ client re same |
| 12/28/23 | 2.5 | Initial preparation of EAJA application; review of Order, time records re same |
| 12/29/23 | 1.7 | Final review of application and Exhibits; submittal re same |
| | | |
| TOTAL | 52.2 | |



Databases, Tables & Calculators by Subject

Change Output Options:

From: 1996 To: 2023

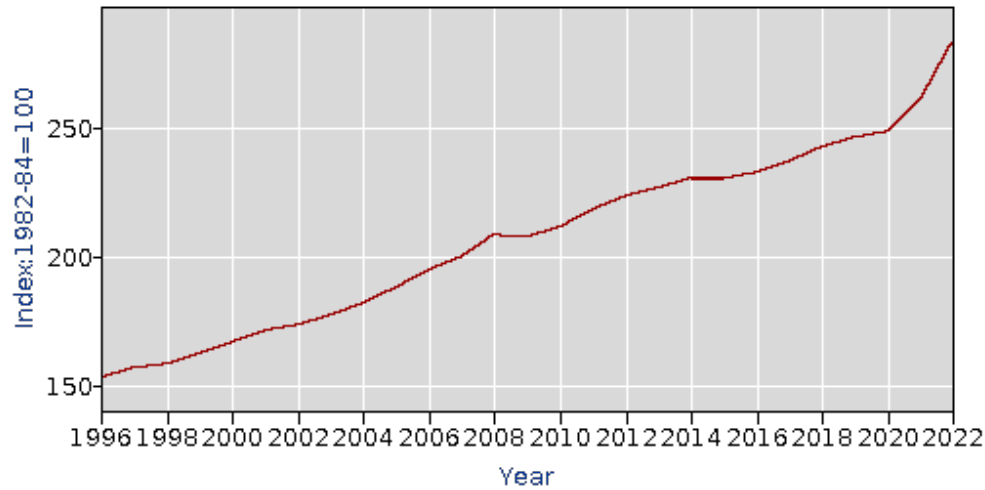
☒ include graphs ☐ include annual averages

[More Formatting Options](#)

Data extracted on: November 19, 2023 (11:17:56 AM)

Consumer Price Index for All Urban Consumers (CPI-U)

Series Id: CUUR0300SA0
Not Seasonally Adjusted
Series Title: All items in South urban, all urban consumers, not seasonally adjusted
Area: South
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 | 234.029 | 234.204 | 232.692 | 231.469 | 233.915 |
| 2017 | 235.492 | 236.052 | 236.154 | 236.728 | 236.774 | 237.346 | 236.942 | 237.892 | 239.649 | 239.067 | 238.861 | 238.512 | 237.456 | 236.424 | 238.487 |
| 2018 | 239.772 | 241.123 | 241.595 | 242.486 | 243.279 | 243.770 | 243.776 | 243.605 | 243.640 | 244.163 | 243.484 | 242.150 | 242.737 | 242.004 | 243.470 |
| 2019 | 242.547 | 243.856 | 245.554 | 246.847 | 246.667 | 246.515 | 247.250 | 246.953 | 246.891 | 247.423 | 247.385 | 247.289 | 246.265 | 245.331 | 247.199 |
| 2020 | 248.005 | 248.412 | 248.136 | 246.254 | 245.696 | 247.223 | 248.619 | 249.639 | 250.193 | 250.542 | 250.255 | 250.693 | 248.639 | 247.288 | 249.990 |
| 2021 | 252.067 | 253.386 | 255.319 | 257.207 | 259.343 | 261.668 | 263.013 | 263.728 | 264.593 | 267.160 | 268.360 | 269.263 | 261.259 | 256.498 | 266.020 |
| 2022 | 271.634 | 274.688 | 278.598 | 279.879 | 283.307 | 287.427 | 287.608 | 287.168 | 287.656 | 288.836 | 288.991 | 288.205 | 283.666 | 279.256 | 288.077 |
| 2023 | 290.438 | 292.285 | 293.358 | 295.315 | 295.889 | 296.789 | 297.279 | 298.975 | 299.657 | 299.394 | | | | 294.012 | |