

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

EMILIO ESTEVEZ

Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

Vet. App. No. 20-8637

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

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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, Emilio Estevez (“Mr. Estevez”), applies for an award of reasonable attorneys’ fees and expenses in the amount of **\$10,845.81**.

PROCEDURAL HISTORY

Mr. Estevez filed a timely Notice of Appeal (“NOA”) with the United States Court of Appeals for Veterans Claims (“Court”), through counsel, on December 18, 2020, appealing a July 30, 2020 Board of Veterans’ Appeals (“BVA” or “Board”) decision that denied Mr. Estevez’s claim for a higher, increased rating of his right shoulder condition, denied entitlement to a rating in excess of 10 percent for a skin disability prior to February 8, 2016 and to a rating in excess of 60 percent thereafter, and granted a 20 percent rating for the veteran’s left knee disability from May 18, 2013 denying a rating in excess of 20 percent thereafter. Additionally, the Board granted

service connection of the veteran's right knee arthritis. Record Before the Agency ("RBA") 5-30. Review of the 5,673-page RBA began after receipt of the file on February 6, 2021. On March 11, 2021 the Court issued an order scheduling a pre-briefing conference on April 8, 2021. The pre-briefing conference was held as scheduled on April 8, 2021.

On June 24, 2021 Mr. Estevez's counsel submitted Appellant's Brief to which the Secretary responded on October 7, 2021. Appellant's Reply Brief was submitted on December 6, 2021 as was Appellant's motion for review by a panel. The Court granted Appellant's motion for a panel on February 14, 2022. Two weeks later the case was stayed pending this Court's decision in *Walleman v. McDonough*, 35 Vet. App. 295 (2022). Thereafter, on July 14, 2022 this Court ordered oral argument to take place on Thursday, October 6, 2022.

Oral argument was held as scheduled on October 6, 2022. On May 19, 2023 the Court affirmed the portion of the Board's decision which denied an evaluation greater than 20 percent of Mr. Estevez's right shoulder condition but set aside those portions of the Board's decision which denied an evaluation greater than 20 percent of the left knee disability and greater than 10 percent of skin condition prior to February 8, 2016. The Court issued judgment on June 12, 2023. Mr. Estevez filed notice of appeal to the U.S. Court of Appeals for the Federal Circuit however on December 18, 2023 this Court received an Order from the Federal Circuit that Mr. Estevez's appeal at the Federal

Circuit had been dismissed. This Court issued its Mandate on December 19, 2023 effective December 18, 2023.

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 held the Board had erred in denying an evaluation greater than 20 percent of the left knee disability and greater than 10 percent of skin condition prior to February 8, 2016. *See Zuberi v. Nicholson*, 19 Vet. App. 541 (2006); *See also Sumner v. Principi*, 15 Vet. App. 256 (2001) (*en banc*).

The Court has set forth a three-part test to determine prevailing-party status under the EAJA: “(1) the remand was necessitated by or predicated upon administrative error, (2) the remanding court did not retain jurisdiction, and (3) the language in the remand order clearly called for further agency proceedings, which leaves the possibility of attaining a favorable merits determination.” *Blue v. Wilkie*, 30 Vet. App. 61, 67 (2018) (citing *Dover v. McDonald*, 818 F.3d 1316 (Fed. Cir. 2016)). Here, Mr. Estevez is a prevailing party because the Court held remand was necessary due to the Board’s error. The Court did not retain jurisdiction over this appeal, and the Court’s decision in this matter calls for further agency proceedings. Specifically, “The Court will set aside the portions of the Board

decision denying evaluations greater than 20% for a left knee disability for the entire period on appeal and greater than 10% for lichen planus prior to February 8, 2016, and remand those matters for readjudication consistent with this decision.” *Decision of the Court, May 19, 2023*, at 2. This leaves open the possibility of a favorable determination on the merits. *Blue, supra*. Therefore, Appellant is a prevailing party.

Additionally, Mr. Estevez 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).

As noted previously, despite the Secretary's arguments to the contrary, the Court found the Board's decision was not substantially justified. As to the left knee condition "the Court concludes that remand is warranted because the Board did not provide adequate reasons or bases for denying a higher left knee evaluation for either period on appeal.." *Decision of the Court, May 19, 2023* at 17. Additionally, as to the veteran's skin condition the Court held "As we have said before, the Board errs when it reflexively assigns the date of a VA examination as the date of an increased evaluation; instead, the Board must analyze the examination report alongside the other lay and medical evidence of record to determine when an increase in disability actually occurred." *Id.* at 20. The Court continued "The Board's failure to do so here rendered inadequate its reasons or bases for denying a higher lichen planus evaluation for the period before February 8, 2016." *Id.* at 21. 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 sought are listed below in this section. (No costs were incurred by Mr. Estevez and thus Mr. Estevez seeks no reimbursement of costs.) The hourly rate for attorneys' fees was calculated according to 28 U.S.C. §2412(d)(2)(A). The statute establishes a base rate of \$125 per hour, which is augmented based on the increase in the cost of living since enactment of the statute in March 1996. Such increase was calculated in this case using the Consumer Price Index for All Urban Consumers

(“CPI-U”) a customary practice in these cases. *See Mannino v. West*, 12 Vet. App. 242 (1999). In calculating the appropriate rate, as each attorney and paralegal who worked on this case teleworks, the CPI-U for the region in which the attorney or paralegal resides was utilized for the month in which the bulk of work was done by either the attorney or paralegal.¹ *See Speigner v. Wilkie*, No. 16-2811(E), 2019 U.S. App. Vet. Claims LEXIS 309 (Vet. App. Feb. 28, 2019) (CPI-U for a teleworking attorney should correspond to the location of the attorney’s residence). The lead counsel resides in the Washington-Arlington-Alexandria, DC-VA-MD-WV region for which the CPI-U was 275.822 in June 2021.² The formula commonly used to calculate the cost-of-living adjustment is: $\$125 \times (275.822 / 151.7)$ (June 2021 CPI-U / March 1996 CPI-U). *See Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004). This calculation results in a potential hourly rate of \$227.30 for the lead counsel.

¹ For attorney Kenneth H. Dojaquez the September 2022 CPI-U for the South Region was utilized. For attorney Kent Eiler the September 2022 CPI-U for the Midwest Region was utilized, and for paralegal Marissa Blackwelder the December 2020 CPI-U for the South Region was utilized as that was the time those individuals did the bulk of their work in this case.

² The paralegal in this matter worked and resided in the Columbia, SC area during the time in which she worked on this matter. The prevailing market rate for work done by paralegals in the Washington-Arlington-Alexandria, DC-VA-MD-WV area, in December 2020, was \$180.00 thus the hourly rate in this application was adjusted downward comparing the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV area (268.700) with the South Region (250.693) which encompasses Columbia, SC in December 2020 resulting in an hourly rate of \$167.93.

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 and (2) considered and eliminated all time that is excessive or redundant.” *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005).

<u>NAME</u>	<u>RATE</u>	<u>HOURS</u>	<u>FEE AMOUNT</u>
Kenneth H. Dojaquez (2011 law graduate)	\$237.02	1.5	\$355.53
Kent A. Eiler (2006 law graduate)	\$227.87	22.4	\$5,104.28
John D. Niles (2008 law graduate)	\$227.30	23.4	\$5,318.82
Marissa Blackwelder (paralegal)	\$167.93	0.4	\$67.18

An itemization of expenses for which reimbursement is sought is as follows:

<u>Nature of Expenses</u>	<u>Amount</u>
Costs	\$ 0.00
TOTAL:	\$ 10,845.81

WHEREFORE, Appellant respectfully requests that the Court award attorneys' fees in the total amount of **\$10,845.81**.

Date: January 17, 2024

Respectfully submitted,

/s/ Kent A. Eiler

Kent A. Eiler

John D. Niles

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Counsel for Appellant

EXHIBIT A

ATTORNEY HOURS
EMILIO ESTEVEZ, 20-8637

Date: 12/15/2022 0.2 Paralegal: Marissa Blackwelder
Draft fee agreement and declaration of financial hardship.

Date: 12/18/2022 0.2 Paralegal: Marissa Blackwelder
Finalize and file Notice of Appeal, Notice of Appearance for John Niles as lead counsel, fee agreement, and declaration of financial hardship..

Date: 2/25/2021 0.8 Attorney: John Niles
Analyze Record Before the Agency ("RBA") for legibility and completeness (0.7).
Draft Response to RBA accepting it as legible and complete (0.1).

Date: 3/11/2021 2.8 Attorney: John Niles
Draft Rule 33 Summary of Issues ("SOI"), section pertaining to knee rating (1.5); section relating to shoulder rating (1.3) (eliminated in billing discretion); section relating to skin-condition effective date for rating (0.9). Prepare RBA excerpts to accompany SOI (0.3). Draft certificate of service (0.1).

Date: 6/22/2021 2.8 Attorney: John Niles
Draft Initial Brief, Statement of the Issues (0.6); Statement of the Case (1.0); Statement of Facts (2.5); Summary of the Argument (0.4).

Date: 6/23/2021 5.2 Attorney: John Niles
Draft Initial Brief, Argument, Part I (knee rating), Board error, from start to application of law to facts (3.0); same section, application of law to facts (1.2); error's prejudice (1.0); Argument, Part II (shoulder rating) (2.8)(eliminated 2.8 hours in billing discretion).

Date: 6/24/2021 3.2 Attorney: John Niles
Draft Initial Brief, Part III (skin-condition effective date for rating) (1.8); Conclusion (0.1); Table of Authorities (1.3).

Date: 7/15/2021 0.8 Attorney: John Niles
Draft Notice of Supplemental Authority (Tadlock)

Date:	12/6/2021	4.8	Attorney:	John Niles
Draft Reply Brief, Preliminary Statement (0.1); Section I (knee rating) (2.6); Section II (shoulder rating, but for note 1) (2.5) (eliminated in exercise of billing discretion); Section II (note 1, including review of cases cited (1.8) (eliminated in exercise of billing discretion); Section III (effective date for rating) (1.4); Conclusion (0.1); Table of Authorities (0.6).				
Date:	12/6/2021	2.3	Attorney:	John Niles
Draft Motion for Initial Review by Panel.				
Date:	12/10/2021	0.5	Attorney:	John Niles
Analyze Record of Proceeding and draft response to same.				
Date:	12/16/2021	0.2	Attorney:	John Niles
Draft Notice of Related Case.				
Date:	9/1/2022	1.8	Attorney:	Kent Eiler
Initial Case file review in preparation of Oral Argument.				
Date:	9/1/2022	1.8	Attorney:	Kent Eiler
Initial Case file review in preparation of Oral Argument.				
Date:	9/1/2022	2.0	Attorney:	Kent Eiler
Initial Case file review in preparation of Oral Argument (con't)				
Date:	9/4/2022	1.7	Attorney:	Kent Eiler
Oral Argument prep				
Date:	9/5/2022	1.4	Attorney:	Kent Eiler
Oral Argument prep con't				
Date:	9/5/2022	1.8	Attorney:	Kent Eiler
Oral Argument prep con't				
Date:	9/6/2022	0.8	Attorney:	Kent Eiler
Oral Argument prep w/co-counsel				
Date:	9/13/2022	1.5	Attorney:	Kent Eiler
Additional Oral Argument Prep				

Date:	9/20/2022	0.9	Attorney:	Kent Eiler
Additional Oral Argument Prep (con't)				
Date:	9/27/2022	1.5	Attorney:	Kenny Dojaquez
Oral argument prep				
Date:	9/27/2022	1.5	Attorney:	John Niles
oral argument moot				
Date:	9/27/2022	1.9	Attorney:	Kent Eiler
oral argument moot				
Date:	9/29/2022	0.4	Attorney:	Kent Eiler
Pre-Oral Argument via Webex				
Date:	10/4/22	2.0	Attorney:	Kent Eiler
Final Brief/Case File Review ahead of oral arguments				
Date:	10/5/22	1.6	Attorney:	Kent Eiler
Final Brief/Case File Review ahead/moot ahead of oral argument				
Date:	10/6/22	1.9	Attorney:	Kent Eiler
Oral Argument; oral argument debrief				
Date:	5/19/23	1.0	Attorney:	Kent Eiler
Review of CAVC devison and case file (0.8); confer w/co-counsel (0.2)				
Date:	1/17/24	1.7	Attorney:	Kent Eiler
Drafting and editing EAJA Petition				

CERTIFICATION

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

Date: January 17, 2024

Respectfully submitted,

/s/ Kent A. Eiler

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