

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CLIFTON R. GOFORTH,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 22-2879
)	
DENIS MCDONOUGH,)	
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

CLIFTON R. GOFORTH,

Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

Vet. App. No. 22-2879

**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, Clifton R. Goforth (“Mr. Goforth”), applies for an award of reasonable attorneys’ fees and expenses in the amount of **\$14,091.85.**

PROCEDURAL HISTORY

Mr. Goforth filed a timely Notice of Appeal (“NOA”) with the United States Court of Appeals for Veterans Claims (“Court”), through counsel, on May 13, 2022, appealing a January 18, 2022 Board of Veterans’ Appeals (“BVA” or “Board”) decision that denied Mr. Goforth’s claim for entitlement to Special Monthly Compensation (“SMC”) based on Mr. Goforth’s need for regular aid and attendance. Record Before the Agency (“RBA”) 5-12. Review of the 11,284-page RBA began after receipt of the file on July 11, 2022. Four days later the Court issued an order scheduling a pre-briefing conference on August 12, 2022. The pre-briefing conference was held as scheduled.

On October 27, 2022 Mr. Goforth's counsel submitted Appellant's Brief and the Secretary responded on February 10, 2023. Appellant's Reply Brief was submitted on April 10, 2023. Twelve days later on April 22, 2023 the Appellant filed his motion for initial review by a panel. The Court ordered additional briefing from the parties on July 17, 2023. Following the parties additional brief the Court granted Appellant's motion for initial review by a panel on August 24, 2023.

The Court initially scheduled oral argument for November 28, 2023. Following the Secretary's unopposed motion to reschedule the oral argument the Court rescheduled oral argument to Tuesday, January 9, 2024. On January 2, 2024 the Secretary filed an unopposed motion to postpone the January 9, 2024 argument as the parties were negotiating a joint resolution of the case. On January 3, 2024 the parties filed a joint motion for remand. The Court cancelled oral argument in its January 8, 2024 order granting relief sought by Appellant, setting aside the January 18, 2022 Board decision and remanding the issue of entitlement to SMC based on Mr. Goforth's need for regular aid and attendance denied by the Board for further development and adjudication. The January 8, 2024 order was the Mandate of the Court.

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’ joint motion for partial remand which was predicated on administrative error by the Board. *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. Goforth is a prevailing party because the Secretary conceded, and the Court held, remand was necessary due to administrative error by the Board. The Court did not retain jurisdiction over this appeal, and the Court’s decision in this matter calls for further agency proceedings. Specifically, the Board must 1) Correctly interpret 38 U.S.C. § 1114(l) in determining Mr. Goforth’s entitlement to SMC; 2) correctly apply 38 C.F.R. § 3.352 absent the overly restrictive interpretation it applied in the decision on appeal; and 3) the Board must obtain an addendum opinion from the February 2020 examiner if it chooses to continue to rely on her medical opinion. This leaves open the possibility of a favorable determination on the merits. *Blue, supra*. Therefore, Appellant is a prevailing party.

Additionally, Mr. Goforth 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, the Secretary conceded the Board's decision was not substantially justified. "The parties agree that vacatur and remand are required because the Board erred by misinterpreting a statute—38 U.S.C. § 1114(l)—and a regulation—38 C.F.R. § 3.352(a)—when it denied entitlement to SMC based on the need for regular

aid and attendance.” *Joint Motion for Partial Remand* at 2. 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. Goforth as Mr. Goforth’s counsel was able to cancel hotel and travel expenses in connection with the cancelled oral argument in this case prior to incurring costs and thus Mr. Goforth 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 from the month in which the bulk of work was done by the particular attorney or paralegal in the present appeal.¹ *See Speigner v. Wilkie*, No. 16-

¹ For attorney John D. Niles the October 2022 CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV Region was utilized and for paralegal Karen Hiers the April 2022 CPI-U for the South Region was utilized as that was the time those individuals did the bulk of their work in this case.

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 Midwest region for which the CPI-U was 281.927 in April 2023.² The formula commonly used to calculate the cost-of-living adjustment is: $\$125 \times (281.927 / 151.7)$ (April 2023 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 \$232.30 for the lead counsel.

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>
Kent A. Eiler (2006 law graduate)	\$232.30	29.9	\$6,945.77
John D. Niles (2008 law graduate)	\$246.59	28.7	\$7,077.13
Karen Hiers (paralegal)	\$172.39	0.4	\$68.95

² The paralegal in this matter worked and resided in the Gulfport, MS 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 April 2022, 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 (292.227) with the South Region (279.879) which encompasses Gulfport, MS, in April 2022 resulting in an hourly rate of \$172.39.

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

<u>Nature of Expenses</u>	<u>Amount</u>
Costs	\$ 0.00
TOTAL:	\$ 14,091.85

WHEREFORE, Appellant respectfully requests that the Court award attorneys' fees in the total amount of **\$14,091.85**.

Date: February 7, 2024

Respectfully submitted,

/s/ Kent A. Eiler

Kent A. Eiler

John D. Niles

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Counsel for Appellant

EXHIBIT A

**ATTORNEY HOURS
CLIFTON R. GOFORTH, 22-2879**

Date: 1/26/22 0.4 Attorney: John Niles
Initial case file review; draft memo with issues to raise on appeal

Date: 4/8/22 0.3 Paralegal: Karen Hiers
Draft fee agreement, consent to release form for Record Before the Agency and declaration of financial hardship

Date: 5/13/22 0.2 Attorney: John Niles
Drafted Notice of Appearance and Notice of Appeal; filed same (0.0)

Date: 5/18/22 0.1 Paralegal: Karen Hiers
Finalize Fee Agreement for filing

Date: 7/11/22 3.5 Attorney: John Niles
Analyze RBA for legibility and completeness: pages 4,933-8,430 (1.5); pages 8,431-11,284 (2.0).

Date: 7/12/22 3.1 Attorney: John Niles
Analyze RBA for legibility and completeness, outlining facts pertinent to issue on appeal: pages 1-4,932 (3.0) [additional 1.0 hours eliminated in the exercise of billing judgment]; draft notice of acceptance of RBA

Date: 7/29/22 3.6 Attorney: John Niles
Draft Summary of the Issues ("SOI"), legal argument (1.5); description of pertinent facts, with RBA citations (1.8). Draft Certificate of Service (0.1). Correspond with client regarding settlement authority (0.2).

Date: 8/16/22 0.0 Attorney: John Niles
Draft Motion for Extension of Time to File Initial Brief [0.2 eliminated in the exercise of billing judgment].

Date: 10/25/22 4.9 Attorney: John Niles
Draft Initial Brief, Statement of the Issues (1.5). Statement of the Case (0.2). Statement of Facts (to Dr. Mangold opinion) (2.0). Statement of Facts (from Dr. Mangold opinion to end) (1.2).

Date: 10/26/22 5.9 Attorney: John Niles
 Draft Initial Brief, Summary of Argument (0.5). Argument, Part I (0.5). Argument, Part II.A, principal error (2.5). Argument, Part II.A, error's prejudice (1.5). Argument, Part II.A, argument in the alternative (reasons or bases; error) (0.5); that error's prejudice (0.4).

Date: 10/27/22 3.4 Attorney: John Niles
 Draft Initial Brief, Argument, Part II.B, error (0.6). Error's prejudice (0.3). Argument, II.C, error (0.3). Error's prejudice (0.2). Argument, Part II.D, error (0.5). Error's prejudice (0.2). Conclusion (0.1). Table of Authorities (1.1). Certificate of Service (0.1).
 [Additional 0.6 hours, attempts to file through CM/ECF and technical problems therein, eliminated in the exercise of billing judgment.]

Date: 1/26/23 0.1 Attorney: Kent Eiler
 Drafted Notice of Appearance; filed same (0.0)

Date: 2/22/23 0.7 Attorney: Kent Eiler
 Confer w/opposing counsel via email (0.1); initial case file review

Date: 3/29/23 1.2 Attorney: Kent Eiler
 Case file review; case file review in anticipation of drafting reply brief

Date: 3/29/23 1.1 Attorney: Kent Eiler
 Case file review in anticipation of drafting reply brief (con't)

Date: 3/30/23 1.8 Attorney: Kent Eiler
 Case file review (0.2); outlining of initial brief

Date: 3/31/23 2.0 Attorney: Kent Eiler
 Drafted Reply Brief

Date: 3/31/23 1.8 Attorney: Kent Eiler
 Drafted Reply Brief (con't)

Date: 4/1/23 1.7 Attorney: Kent Eiler
 Drafted Reply Brief (con't) (Arguments II & III)

Date: 4/1/23 2.0 Attorney: Kent Eiler
 Drafted remainder of Reply Brief; initial revisions (3.5, 1.5 eliminated)

Date:	4/8/23	2.0	Attorney:	John Niles
	Reviewed and revised Reply Brief to increase persuasive value			
Date:	4/10/23	1.6	Attorney:	Kent Eiler
	Drafted TOA (0.7); final review and revisions (0.9)			
Date:	4/16/23	1.0	Attorney:	Kent Eiler
	Drafted Motion for initial panel review			
Date:	4/16/23	1.1	Attorney:	Kent Eiler
	Drafted Motion for initial panel review (con't)			
Date:	4/17/23	2.0	Attorney:	Kent Eiler
	Drafted remainder of Motion for initial panel review; revised motion for initial panel review (3.0, 1.0 eliminated in exercise of billing discretion)			
Date:	5/1/23	0.6	Attorney:	Kent Eiler
	Reviewed ROP; drafted response to ROP			
Date:	8/11/23	0.6	Attorney:	Kent Eiler
	Case file review in preparation for drafting Reply to Sect'y's response to motion for initial panel review			
Date:	8/11/23	0.8	Attorney:	Kent Eiler
	Case file review (con't) (0.5); began drafting Appellant's Response (0.3)			
Date:	8/12/23	1.9	Attorney:	Kent Eiler
	Drafting Appellant's Response (con't)			
Date:	8/13/23	1.1	Attorney:	Kent Eiler
	Drafting remainder of Appellant's Response			
Date:	8/15/23	1.0	Attorney:	Kent Eiler
	Final revisions to Appellant's Response			
Date:	9/14/23	0.1	Attorney:	Kent Eiler
	Email correspondence w/co-counsel			

Date:	9/14/23	0.1	Attorney:	John Niles
Email correspondence w/co-counsel				
Date:	12/7/23	0.4	Attorney:	Kent Eiler
Travel arrangements for upcoming Oral Argument				
Date:	12/21/23	0.6	Attorney:	Kent Eiler
Review/consideration of offer of remand				
Date:	12/22/23	0.5	Attorney:	John Niles
Analyze proposed terms of joint motion for remand and correspond with Mr. Eiler regarding same (0.4); analyze Mr. Eiler's draft response and correspond with Mr. Eiler regarding same (0.1).				
Date:	12/22/23	0.5	Attorney:	Kent Eiler
Review/consideration of offer of remand (con't)				
Date:	12/29/23	0.7	Attorney:	Kent Eiler
Case file review; draft revisions to proposed joint motion for remand				
Date:	1/1/24	0.7	Attorney:	John Niles
Analyze draft JMR and recommend revisions to same				
Date:	1/2/24	0.1	Attorney:	John Niles
Email correspondence w/co-counsel re: JMR				
Date:	1/2/24	0.5	Attorney:	Kent Eiler
additional revisions to proposed joint motion for remand				
Date:	1/2/24	0.2	Attorney:	Kent Eiler
additional revisions to proposed joint motion for remand (con't)				
Date:	1/3/24	0.8	Attorney:	John Niles
Analyze revised draft JMR and recommend additional revisions to same				
Date:	1/3/24	0.8	Attorney:	Kent Eiler
final revisions to proposed joint motion for remand				

Date: 1/4/24 0.4 Attorney: Kent Eiler
Cancellation of travel, hotel arrangements, calendar of oral argument

Date: 2/6/24 0.7 Attorney: Kent Eiler
Drafted EAJA Petition

Date: 2/7/24 0.9 Attorney: Kent Eiler
Drafted remainder of 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: February 7, 2024

Respectfully submitted,

/s/ Kent A. Eiler

Kent A. Eiler

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