

UNITED STATES COURT OF APPEALS
FOR VETERANS' CLAIMS

GORDON ALEX GRAHAM,

Appellant,

v.

ERIC K. SHINSEKI,

SECRETARY OF VETERANS AFFAIRS,

Appellee.

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Docket No. 12-1980

APPELLANT'S
APPLICATION FOR
ATTORNEY'S FEES AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)

CERTIFICATE OF ELECTRONIC SERVICE

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APPELLANT'S
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Pursuant to the Equal Access to Justice Act (E.A.J.A.), 28 U.S.C. § 2412(d) and U.S. Vet. R. 39, Appellant Gordon A. Graham applies for an award of reasonable attorney's fees and expenses in the amount of \$ 4,733.43.

PROCEDURAL HISTORY

An Order of the Court dated April 23, 2012, granted the joint motion for partial remand which also became the mandate of the Court.

This case was docketed on June 28, 2012. Counsel for the Appellant appeared on July 4, 2012. The case was set for a Rule 33 conference and a summary of issues was prepared by counsel for the appellant. A Rule 33 conference was held on October 24, 2012. A resolution could not be reached at that time and it was decided to proceed with briefing and review the matter at a later time. The Appellant proceeded to file his opening brief on January 8, 2013. Counsel for the Secretary reviewed the brief and after a telephonic conference a Joint Motion for Partial Remand (JMPR) was agreed upon. That motion was filed on April 2, 2013, and granted on April 23, 2013, by an order which also became the mandate of the Court.

The Appellant, by and through his counsel, Robert P. Walsh, moves the Court for an award of reasonable attorney's fees and expenses. Appellant seeks an award for briefing, indexing and reviewing the record, and the time and cost associated with the case from May 25, 2012, until May 21, 2013.

Expenses are \$ 1,532.50 in this matter. Attorney fees for the Mr. Walsh are \$ 3,200.93.

In support of this application Mr. Graham demonstrates that: 1) he is entitled to and award of attorney's fees and expenses under E.A.J.A. subsection (d); and 2) an award of \$ 4,733.43 is both reasonable and appropriate.

SUMMARY OF PROCEEDINGS

In the decision on appeal, dated May 17, 2012, the Board of Veterans' Appeals (BVA or Board), denied the Appellant an effective date prior to February 23, 2007, for his service connected hepatitis type C. [Record Before the Agency (R.) at 6].

The Appellant abandoned his claim for an effective date prior to March 31, 1994, for tinnitus.

The Joint Motion for Partial Remand was predicated upon the failure of the Board to provide adequate reasons and bases under 38 U.S.C. § 7104 (d)(1) to facilitate judicial review and inform the Appellant of the basis for the denial of the earlier effective date.

See 38 U.S.C. § 7104; *e.g. Majeed v. Principi*, 16 Vet. App. 421, 431 (2002); *Gilbert v. Derwinski*, 1 Vet. App. 49, 56 (1990). Here, the Board's statement of reasons or bases for its finding that the November 1994 Regional Office (RO) decision became final was inadequate insofar as the Board failed to discuss whether the January 1995 Statement of the Case (SOC) was "complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans' Appeals." See 38 C.F.R. § 19.29.

In support of its determination that the November 1994 RO decision denying entitlement to VA benefits based on service connection for hepatitis C became final, the Board explained that although Appellant submitted a timely notice of disagreement (NOD) in December 1994, an SOC was issued in January 1995 which included a letter notifying Appellant "that if VA did not hear from him in 60 days, it would be assumed that he did not intend to complete his appeal, and VA would close the record." [R. at 9; *see* R. at 3374 (3373-3384)]. The Board additionally explained that following the issuance of the SOC, "there was no communication or correspondence from [Appellant] which, even liberally, could be interpreted as an appeal of the November 1994 rating decision, or a claim, or application to reopen the previously denied claim of service connection for hepatitis until he submitted a claim to reopen in February 2007." *Id.* As such, the Board concluded that because Appellant "never submitted any unadjudicated formal petition to reopen the claim for service connection for hepatitis C subsequent to the January 1995 [SOC] and prior to February 23, 2007, [and] nor is there any prior communication in the record

that could be considered an informal claim for VA compensation for the same . . . February 23, 2007, is the earliest possible effective date.” [R. at 10].

The Board failed to provide an adequate discussion of the finding that the November 1994 RO decision became final. It is not supported by an adequate statement of reasons or bases because the Board failed to explain how the January 1995 SOC comports with that portion of 38 C.F.R. § 19.29 which provides that the SOC must be “complete enough to allow the appellant to present written and/or oral arguments before the [BVA].” In this regard, a review of the January 1995 SOC reveals that Appellant was informed that VA was “reviewing the additional records that you submitted with your appeal and we will notify you of our decision as soon as it is reached.” [See R. at 3383]. Given that some of the records submitted by Appellant with his December 1994 NOD pertained to the hepatitis C claim, (R. at 3385-3391), it is unclear how the SOC clearly conveyed that the denial of that claim was final.

The parties agreed that the Board’s finding that the November 1994 RO decision was final is not supported by adequate reasons or bases. *See Tucker v. West*, 11 Vet. App. 369, 374 (1998) (“Where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate, a remand is the appropriate remedy.”).

ARGUMENT

I. THE APPELLANT IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEY'S FEES AND EXPENSES PURSUANT TO E.A.J.A. SUBSECTION (d).

There are three basic statutory requirements that a party must satisfy in order to be eligible for an award of attorney's fees under E.A.J.A. subsection(d). They are: 1) the party must have been a "prevailing party and be eligible to receive an award under this subsection"; 2) the position of the United States must not have been "substantially justified"; and 3) there must be no "special circumstances" which would make an award unjust. If these requirements are met, the Court "shall award" reasonable fees and expenses. *Gavette v. Office of Personnel Management*, 808 F.2d 1456 (Fed. Cir. 1986) (*en banc*). As we demonstrate in this section, appellant has satisfied each of these requirements.

A. Appellant Is A Prevailing Party.

A party prevails with respect to the E.A.J.A. if they "succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citations omitted), *Shalala v. Schaefer*, 113 S. Ct. 2625, 2632 (1993).

The Order granting the Joint Motion for Partial Remand obtained the relief sought by the Appellant on the major issue on appeal. He sought an effective date prior to February 23, 2007, for the grant of service connected disability benefits for his hepatitis type C.

This was the most significant relief sought by Mr. Graham and he is clearly a prevailing party.

B. Appellant Is A Person Eligible To Receive
An Award Under Subsection (d).

In order to be eligible to file a petition for fees under subsection (d), a prevailing party must not be:

(a) an individual whose net worth exceeded \$2,000,000.00 at the time the litigation began, nor

(b) a business or entity whose net worth exceeded \$7,000,000.00 and which had more than 500 employees at the time the litigation began.

Mr. Graham is disabled. During all times relevant to this litigation Mr. Graham's income and net worth have been below the statutory limits. His net worth is below \$2,000,000.00. See the declaration of the Appellant attached and marked as Exhibit 'A'.

C. The Position Of The Government
Was Not Substantially Justified.

In order to be considered "substantially justified" under the E.A.J.A., the government must show that its position was "justified to a degree that could satisfy a reasonable person", *i.e.*, has a "reasonable basis both in law and fact." *Pierce v. Underwood*, 108 S.Ct. 2541, 2550 (1988). The burden is on the Secretary to demonstrate that his position was substantially justified. *Brewer v. American Battle Monument Comm'n*, 814 F. 2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994).

In order to determine whether the Government's position was substantially justified, the court is "instructed to look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact." *Chi v. United States*, 948 F.2d 711 (Fed. Cir. 1991) (emphasis added). The "overall" position is that taken by the government "both prior to and during litigation." *Id.* at 715. Thus, in order to prevail on "substantial justification" in this case, the government must demonstrate that the agency action leading to the litigation (*i.e.*, the denial of Appellant's claim for an earlier effective date for his hepatitis type C) as well as the decision of the Board under review were "overall"

reasonable.

In this case it is clear that the Board's position was unreasonable. The Board failed to provide an adequate discussion of the finding that the November 1994 RO decision became final. It is not supported by an adequate statement of reasons or bases because the Board failed to explain how the January 1995 SOC comports with that portion of 38 C.F.R. § 19.29 which provides that the SOC must be "complete enough to allow the appellant to present written and/or oral arguments before the [BVA]." In this regard, a review of the January 1995 SOC reveals that Appellant was informed that VA was "reviewing the additional records that you submitted with your appeal and we will notify you of our decision as soon as it is reached." [See R. at 3383]. Given that some of the records submitted by Appellant with his December 1994 NOD pertained to the hepatitis C claim, (R. at 3385-3391), it is unclear how the SOC clearly conveyed that the denial of that claim was final. The Joint Motion for Partial Remand is predicated upon the failure of the Board to provide adequate reasons and bases under 38 U.S.C. § 7104(d)(1) to facilitate judicial review and inform the Appellant of the basis for the denial of benefits.

The Appellant reasonably raised the hepatitis C claim and bolstered it with additional evidence submitted with the December 1994 NOD.

See *Tucker v. West*, 11 Vet. App. 369, 374(1998), JMPR at 4. Therefore, remand is required for the Board to provide an adequate discussion of the continuing efforts of the Appellant to have the appropriate effective date assigned for his hepatitis type C.

The failure of the Board to follow the relevant statutes and regulations along with the controlling precedent decisions governing the adjudication of claims has been the direct cause of this appeal and the resulting expense and inconvenience to the Appellant. These are the expenses and fees for which the E.A.J.A. is meant to compensate.

D. No Special Circumstances Make An
Award Unjust In This Appeal.

Not only is the Secretary's position without "substantial justification," but he also cannot meet his heavy burden to prove that "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). See *Devine v. Sutermeister*, 733 F.2d 892, 895 (Fed. Cir. 1984). Courts narrowly construe this "special circumstances" exception so as not to interfere with the Congressional purpose in passing the E.A.J.A., *i.e.*, to insure that litigants have access to the courts when suing the Government. In this case no facts are present which would fall within the definition of "special circumstances."

II. THE COURT SHOULD AWARD APPELLANT REASONABLE ATTORNEY FEES AND EXPENSES OF \$ 4,733.43.

The E.A.J.A. provides that a court "shall" award fees and other expenses" when the other prerequisites of the statute have been met. 28 U.S.C. § 2412(d)(1)(A). The statute defines "fees and other expenses" to include "reasonable attorney fees." 28 U.S.C. § 2412 (d)(2)(A).

When Congress has authorized the award of "reasonable" attorney fees, the amount to be awarded is based on the "lodestar" the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. See *Hensley v. Eckerhart*, 461 U.S. at 433; *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982).

A. The Hours Reasonably Expended.

One attorney expended time on this appeal. A total of 17.5 hours were expended on this appeal. See Exhibit B, attached.

B. The Reasonable Hourly Rate.

The billing rate of \$ 250.00 per hour was used in this appeal. This was the standard billing rate of the attorney for federal matters at the time the fee agreement was executed. The current rate is \$250.00 per hour and is supported by the data provided by the State Bar of Michigan. This rate was also in use at that time for matters before the U.S. Merit Systems Protection Board, The Employees Compensation Appeal Board, U.S. Equal Employment Opportunity Commission and the Social Security Administration.

1. The Prevailing Market Rate for the Kind
and Quality of Services Furnished.

To the best of his knowledge counsel for the Appellant is one of very few attorneys actively practicing and accepting cases before the U.S. Court of Appeals for Veterans Claims in this State. His standard rate for federal administrative law matters was \$250.00 per hour at the time this case was accepted. His office rate for Federal Court of Appeals cases is now \$350.00 per hour. The rate for other general practitioners in this county now averages over \$250.00 per hour for family law and general legal services. This is based on a survey conducted by the State Bar of Michigan.

1. A. The Statutory Rate Adjusted for Inflation by the
Consumer Price Index.

The October 1, 1981, statutory rate was increased from \$ 75.00 per hour to \$ 125.00 per hour for cases commenced on or after March 26, 1996. The statutory rate of \$ 125.00 per hour was adjusted by use of the consumer price index calculator of the U.S. Department of Labor.¹ The calculation was based on work performed in 2012. This calculation resulted in an hourly rate of **\$ 182.91**, which was used in calculating the fee in this case.

2. Distinctive Knowledge and Specialized Publications
Are Required To Practice Before This Court.

To practice effectively before this court a significant investment in specialized publications must be made. In addition, background and insight into medical terms and concepts along with an understanding of the V.A. claims adjudication process is essential.

¹ U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index Calculator, www.bls.gov CPI Inflation Calculator \$ 125.00 in 1996 adjusted to 2012.

3. Appellant's Counsel, Robert P. Walsh, Has The
Distinctive Knowledge and Library Resources To
Practice Before This Court.

Mr. Robert P. Walsh is a former VA staff attorney. He has been admitted to practice before the Court since his return to the U.S. from Kuwait in November of 1994. Mr. Walsh is one of very few attorneys in Michigan admitted to the bar of this court that actively accepts cases. Mr. Walsh has made a substantial investment in library resources and time in an effort to assist the veterans in this geographical region. The factual matters in dispute before the court are often similar to those encountered before the Social Security Administration in disability appeals. Mr. Walsh also practices in that area.

C. Expenses.

Under the E.A.J.A. subsection (d), the Court "shall" award a prevailing party, a reasonable attorney fee "and other expenses" 28 U.S.C. § 2412(d)(1)(A). *Patterson v. Apfel*, 99 F. Supp. 2d 1212, 1215, (C.D. Cal. 2000) quoting *Bullfrog Films, Inc. v. Catto*, 815 F. Supp. 338, 344 (C.D. Cal. 1993), states that "As the prevailing party in this litigation, plaintiff is entitled to an award of costs and expenses under the EAJA. . . all reasonable and necessary expenses incurred in a case, which are customarily charged to a client, are recoverable under the EAJA."

Appellant seeks expenses for an index to the RBA prepared by Becker-Gallagher Legal Publishing, 3,715 page RBA, 1,598 documents, 137 pages, \$ 1,482.50, and the \$ 50.00 filing fee for a total of \$ **1,532.50** litigation expenses in this appeal.

D. Summary of Fees and Expenses.

In sum, appellant submits that \$ 4,733.43 constitutes a reasonable award of attorney fees and expenses incurred in this appeal, calculated as follows:

Total time: 17.5 hours x \$182.91 = \$ 3,200.93

Total expenses: \$ 1,532.50

Total EAJA application \$ 4,733.43

Exhibit 'B', attached to this application, contains a detailed accounting of the time and expenses associated with this appeal.

CONCLUSION

For the foregoing reasons, the Court should award reasonable attorney fees, expenses, and costs in the amount of \$ **4,733.43**.

Appendix:

Exhibit A. Affidavit: Declaration of net worth of Appellant.

Exhibit B. Itemized and verified statement of fees and expenses.

/S/ Robert P. Walsh
ROBERT P. WALSH, Esq.
Counsel for Appellant

ORIGINAL ON FILE

STATE OF MICHIGAN)
) ss.
COUNTY OF CALHOUN)

Being first duly sworn to before me this 21st day of May, 2013, Robert P. Walsh, Counsel for Appellant, deposes and says that the expenses and time set forth above represent the full and final accounting of charges in this matter.

/s/ SHAWN L. KEQUOM ORIGINAL ON FILE
Shawn L. Kequom, Notary Public
Calhoun County, Michigan
My Commission Expires: 08/16/2018

CERTIFICATE OF ELECTRONIC SERVICE

I, Robert P. Walsh, hereby certify that I have

1. Filed this document using the Electronic Filing System of the U.S. Court of Appeals for Veterans Claims which will automatically send it to counsel for the Appellee,

Emily Purcell, Esq.
Office of General Counsel (027B)
Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Telephone (202) 632-6981
Telecopier (202) 632-7122
E-mail: emily.purcell@va.gov

and;

2. I have mailed a copy of this document to the Appellant by first class mail to his address of record.

/S/ Robert P. Walsh
Robert P. Walsh
Attorney for Claimant-Appellant

Date: May 21, 2013

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Two West Michigan Avenue
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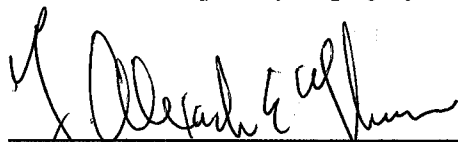
END OF EXHIBIT

SWORN DECLARATION OF GORDON ALEX GRAHAM

Gordon Alex Graham, Appellant, being first duly cautioned and sworn, deposes and says that:

1. I am the named Appellant in this action, CAVC docket number 12-1980.
2. This declaration is based upon my personal knowledge.
3. At the time this civil action was filed my personal net worth did not exceed \$ 2,000,000.00 (two million dollars); nor did I own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$ 7,000,000.00 (seven million dollars) and which had more than 500 employees.
4. That the conditions set forth in paragraph 3, above have remained true throughout the pendency of this civil action and are true today.

I declare under penalty of perjury that the foregoing is true and correct.



Gordon Alex Graham, Appellant
14910 125TH Street KP N
Gig Harbor, Washington 98329
Telephone (253) 884-3079

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

Subscribed and sworn to before me this 16th day of April, 2013, by Gordon Alex Graham, Appellant.



Notary Public

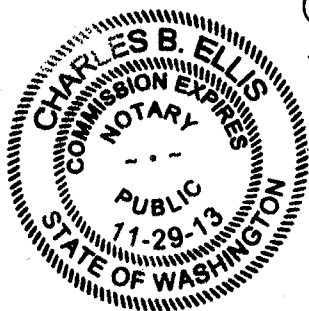


Exhibit 'A'

END OF EXHIBIT

**ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF
REASONABLE FEES AND EXPENSES**

Graham, Gordon A. v. Shinseki
CAVC Docket Number 12-1980

Below are the itemized expenses and time accounting for this matter:

	<u>DATE</u>	<u>ITEM</u>	<u>TIME</u>
1.	05/25/2012	Discuss CAVC appeal and issues with Mr. Graham.	.50
2.	06/10/2012	Prepare Fee Agreement and Appearance.	1.00
3.	06/19/2012	Fee agreement and VA 21-22a completed.	.50
4.	06/24/2012	File Notice of Appeal.	.50
5.	07/04/2012	File Appearance, fee agreement, letter to clerk w/fee.	.50
6.	07/09/2012	Filing fee, \$ 50.00.	.00
7.	09/30/2012	Review RBA.	2.00
8.	10/09/2012	Prepare and file Rule 33 summary and certificate of service.	2.00
9.	10/24/2012	Rule 33 conference and review with client.	1.00
10.	10/24/2012	Submit RBA to Becker-Gallagher Legal Publishing for Preparation of an index.	.25
11.	11/15/2012	Complete research and prepare first draft of brief.	3.25
12.	01/07/2013	Complete Opening Brief.	2.25
13.	01/08/2013	File Opening Brief.	.25
14.	03/04/2013	Discuss Stay with OGC and client.	.25
15.	04/02/2013	Review JMPR w. OGC and with client.	.50
Page 1 sub total			<u>14.75 h.</u>

EAJA EXHIBIT 'B'

Graham, Gordon A. v. Shinseki
CAVC Docket Number 12-1980

	<u>DATE</u>	<u>ITEM</u>	<u>TIME</u>
16.	05/21/2013	Prepare Mot. for EAJA.	1.50
17.	05/21/2013	Prepare time accounting.	1.00
18.	04/02/2012	File Mot. For EAJA.	.25
Page 2 sub total			<u>2.75 h.</u>
Total time			<u>17.50 h.</u> <u>=====</u>

EXPENSES

19.	09/12/2012	137 page Index to RBA prepared by Becker-Gallagher Legal Publishing, 3,715 page RBA, 1,598 documents, 137 hours x \$ 10.00 and 1.5 hours x \$ 75.00.	\$ 1,482.50
20.	07/09/2012	Filing fee	<u>\$ 50.00</u>
Total expense			<u>\$ 1,532.50</u> <u>=====</u>
Total time: 17.5 hours x \$ 182.91 =			<u>\$ 3,200.93</u> <u>=====</u>
Total EAJA application			<u>\$ 4,733.43</u> <u>=====</u>

Wherefore, Appellant respectfully requests that the Court award attorney fees and expenses in the total amount of **\$ 4,733.43** in this matter.

/S/ Robert P. Walsh

ORIGINAL ON FILE

Robert P. Walsh
Counsel for Appellant

EAJA EXHIBIT 'B'

Graham, Gordon A. v. Shinseki
CAVC Docket Number 12-1980

STATE OF MICHIGAN)
) ss.
COUNTY OF CALHOUN)

Being first duly sworn to before me this 21st day of May, 2013, Robert P. Walsh, Counsel for Appellant, deposes and says that the time set forth above represents the full and final accounting of charges in this matter.

/S/ Shawn L. Kequom

ORIGINAL ON FILE

Shawn L. Kequom, Notary Public
Calhoun County, Michigan
My Commission Expires: 08/16/2018

EAJA EXHIBIT 'B'

END OF EXHIBIT