

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

HARRY A. JOHNSON,)
)
 Appellant,)
)
 vs.) **Vet. App. No. 15-1477**
)
 ROBERT A. MCDONALD,)
 Secretary of Veterans Affairs,)
)
 Appellee.)

**MOTION FOR AWARD OF REASONABLE ATTORNEYS FEES UNDER
28 U.S.C. § 2412 AND DECLARATION IN SUPPORT OF MOTION**

Comes now, appellant HARRY A. JOHNSON, through counsel, and files this motion for an award of reasonable attorneys fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (2012).

There has been a resolution in this action. On June 7, 2016, the United States Court of Appeals for Veterans' Claims (Court) issued a Memorandum Opinion that remanded a March 19, 2015, Board of Veterans' Appeals (Board) decision that denied service connection for a skin disorder, chronic obstructive pulmonary disease (COPD), an anxiety disorder, a sleep disorder, and a higher rating for service-connected posttraumatic stress disorder (PTSD). The Court found the Board committed administrative error by providing inadequate reasons and bases for its decision, as well as failing to meet its duty to assist and relying upon an inadequate medical record.

Pursuant to 28 U.S.C. § 2412(d), appellant seeks reasonable attorneys fees in the amount of \$5,529.39 based on an expenditure of 29.8 hours of time billed at the rate of \$185.55 per hour for attorney time, the amount allowable by law including a statutory increase for the cost of living.

Appellant's legal counsel is not seeking reimbursement for photocopying and other miscellaneous expenses incurred in this action. The total amount of fees requested is \$5,529.39.

The prerequisites for an award of attorneys and expenses pursuant to 28 U.S.C. § 2412 (2009) have been met, and are as follows:

- 1) Appellant is a prevailing party. *Shalala v. Schaefer*, 113 S.Ct. 2625 (1993);
- 2) The underlying action was a civil action. The term "civil action" includes proceedings seeking judicial review of administrative agency decisions. It did not sound in tort, there is no statute which prohibits or provides for such awards;
- 3) This Court has jurisdiction. 38 U.S.C. § 7252(a) (2009);
- 4) The position of the United States was not substantially justified as set forth in the Memorandum Opinion;
- 5) No special circumstances exist to make the award unjust and this application is timely filed;
- 6) Appellant has submitted a declaration of net worth when the appeal was filed. Appellant did not have a net worth in excess of \$2,000,000

at such time;

- 7) The “United States” includes any agency and any official thereof acting in his official capacity, including the Secretary of Veterans Affairs;
- 8) The “position of the United States” for the purposes of deciding substantial justification means both the position taken by the United States in the civil action, and the action or the failure to act, by the agency against whom the civil action is based, and position was not justified;
- 9) No portion of time expended herein by appellant’s legal counsel has unreasonably protracted the proceedings; and
- 10) Appellant is qualified and eligible to receive attorneys fees and expenses pursuant to EAJA in this case. All of the provision and prerequisites under the statute and governing case law have been met.

WHEREFORE, Appellant respectfully requests the Court award attorneys fees in the amount of \$5,529.39.

Respectfully submitted,

HARRY A. JOHNSON, Appellant

By: /s/Perry A. Pirsch,
Perry A. Pirsch, Esq.
BERRY LAW FIRM, PC
2650 N. 48th Street
Lincoln NE 68504
(402) 466-8444
(402) 466-1793 / Fax
Email: perry@jsberrylaw.com

BILLING RECORDS & REPORT [Attorney Time – Hours]

Re: HARRY A. JOHNSON, Appellant

USCAVC Case No. 15-1477

Preface:

Following a summary of issues memorandum brief, brief, and reply brief, on June 7, 2016, the Court issued a Memorandum Opinion that remanded a March 19, 2015 Board decision that denied service connection for a skin disorder, COPD, an anxiety disorder, a sleep disorder, and a higher rating for a service-connected PTSD. The Court found the Board committed administrative error by providing inadequate reasons and bases for its decision, as well as failing to meet its duty to assist and relying upon an inadequate medical record.

All work done on the appeal as highlighted below was integral to the claim which is on appeal and was remanded.

DATE	SERVICES PERFORMED (By Perry Pirsch, unless otherwise indicated.)	HRS
3/6/15	Review Board decision and skim client file and records for determination to appeal.	1.4
4/21/15	Receive notice of Appeal, etc.	0.1
4/22/15	Notice of Docketing for BVA's decision w/in 30 days; RBA w/in 60 days	0.1
5/12/15	Entry of Appearance for Brandon A Jonas, Esq., OGC.	0.1
5/18/15	BVA decision transmittal/Copy of Board Decision.	0.1
6/18/15	Appearance of Anthony D Ortiz, Esq., for OGC.	0.1
6/22/15	RBA Notice. Calendar tentative brief date.	0.1
7/14/15	Review and calendar briefing schedule order.	0.1
7/30/15	Calendar Ct. Conference and schedule for issues briefing. Email to law clerk.	0.1
8/11/15	Open SOI template and being review/outline Board decision and RBA. [2008 pages]	2.7
8/12/15	Continue RBA review.	4.0
8/12/15	Complete SOI draft. [6/7 time for general provisions and claims remanded.]	3.5
8/13/15	Final review/revision SOI brief. Check citations.	1.4
8/20/15	Review email from OGC and reply.	0.1
8/27/15	Prepare for conference: review Board decision and SOI and start conference memo.	1.2
8/27/15	Conference held. Remand on knee only for scrivener's error. Finish conference memo and email attorneys.	0.4

9/24/15	Review Board decision, SOI and conference memo in preparation for brief.	1.2
9/24/15	Conversion of SOI to brief. Review and insert propositions of law. [6/7 time for general provisions and claims remanded.]	5.2
9/24/15	Review and revise brief draft. Create table of contents. Check citations. MIDPOINT.	1.4
10/1/15	Review and/or revise brief letter.	0.1
11/23/15	Review emails from OGC and reply. M to extend time to file Appellee brief.	0.1
11/24/15	Clerk's order.	0.1
1/19/16	Skim Board decision, review Appellant brief, and Appellee brief for determination whether to draft reply brief.	1.3
1/19/16	Outline Secretary's brief and draft reply. [6/7 time for general provisions and claims remanded.]	2.0
1/19/16	Final review and revision of reply brief. Create TOC. Check citations.	0.8
2/2/16	Email to clerk re ROP.	0.1
2/17/16	Assigned to Judge Pietsch.	0.1
6/7/16	Read and outline key provisions of Memorandum Decision and save for client file. Email to office VA staff re decision. Calendar for EAJA. Review letter draft to client re Memo Decision.	0.5
6/29/16	Review Judgment. Check calendar for EAJA.	0.1
8/8/16	Review docket, emails, timesheet documents, activity log, and correspondence. Prepare EAJA.	1.3

Total Hours: 29.8 hours.

Issues / Claims Being Remanded:

Due to administrative error, on June 7, 2016, the Court issued a Memorandum Opinion that remanded a March 19, 2015, Board decision that denied service connection for a skin disorder, COPD, an anxiety disorder, a sleep disorder, and denied a higher rating for service-connected PTSD.

Billing General Case Management:

In this appeal, a portion of the hours spent in prosecuting the appeal are “general case management” hours. That is, time spent on tasks inherent to prosecuting an appeal regardless of the number of claims remanded compared to the number of claims appealed. These hours include review of records, preparation of documents and pleadings, *inter alia*. Although not directly related to a claim which was remanded, such time is billable time. See, *Elczyn v. Brown*, 7 Vet. App. 170 (1994) (The time spent for general case management is inextricably linked to the preparation of an entire case. There is no basis or fair mechanism for equitably apportioning the time spent for general case management into billable and non-billable hours.)

Time Spent on the Issue Remanded:

The time spent in prosecuting this appeal was related to the issue remanded.

The Billing Formula Employed Herein:

A. The Hourly Rate:

The law provides effective for appeals filed after March 29, 1996, the hourly rate for EAJA purposes is \$125. This base amount is adjusted annually to reflect cost of living changes relative to 1996. The statutory formula provides the base hourly rate (\$125) is multiplied by the Consumer Price Index (CPI) for the appropriate mid-point date. The sum is then divided by \$151.70, which is the Midwest CPI for March 1996.

B. The Mid-Point Date:

The mid-point date is one of three dates:

- (1). The date the appeal was filed;
- (2). The date the summary of issues was filed, or;
- (3). The date the brief was filed.

See *Elczyn v. Brown*, 7 Vet. App. 170 (1994) (The mid-point date should be the date of the appellant's principle brief, motion, or petition filed with the Court, which provides, "the capstone of the litigation process."); *Apodackis v. Nicholson*, 19 Vet. App. 91 (2005) (The midpoint of the litigation is the middle of the month where a majority of the work was performed.).

In this case, the appropriate mid-point date is September 2015 – the date appellant's brief on the merits was served.

C. Consumer Price Index (CPI):

This Court has held the cost of living adjustment is determined by reference to the **CPI-All Index** in the region where the work is performed. *Elczyn v. Brown*, 7 Vet. App. 170 (1994). In this appeal, the work was performed in Nebraska. Accordingly, the midwest urban region – in which Nebraska is grouped – is the appropriate region of the **CPI-All Index**.

The CPI Rate for the mid-point is 225.184. See, Bureau of Labor Statistics, CPI Tables for the midwest urban. See, *Elczyn v. Brown*, the rate is for the *All-Items Index*. See, <http://www.bls.gov/cpi/tables.htm>.

D. Hourly Rate For This Appeal:

The statutory formula results in the following calculations.

\$125.00 (Base Amount)
(multiplied by)
225.184 (Midwest CPI in September 2015 - the midpoint date)
(divided by)
\$151.70 (Midwest CPI in March, 1996)

\$185.55 (Adjusted Rate for attorney time.)

Conclusion

Applying the statutory rate of \$185.55 to the total time expended as detailed above results in \$5,529.39 – the amount sought herein.

Respectfully submitted,

HARRY A. JOHNSON, Appellant

By: /s/ Perry A. Pirsch
Perry A. Pirsch, Esq.
BERRY LAW FIRM, PC
2650 N. 48th Street
Lincoln NE 68504
(402) 466-8444
perry@jsberrylaw.com

CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the foregoing was electronically served with the following:

Anthony D. Ortiz, Esq.
Office of the General Counsel
Department of Veterans Affairs
810 Vermont Ave., NW
Washington DC 20420

on August 9, 2016.

By: /s/ Perry A. Pirsch
Perry A. Pirsch, Esq.