

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

EVERETT EMERSON,  
Appellant,

v.

Docket No. 14-2968

ROBERT A. MCDONALD,  
Secretary of Veterans Affairs,  
Appellee.

**APPELLANT’S APPLICATION FOR ATTORNEY FEES PURSUANT  
TO THE EQUAL ACCESS TO JUSTICE ACT AND  
MEMORANDUM IN SUPPORT**

Appellant moves for \$15,047.88 in attorney’s fees plus costs of \$1,513.47, for a total award of \$16,561.35 U.S.C. §2412(d)(1)(A).

Appellant was a prevailing party, appellee’s position in this case was not substantially justified, and the appellant’s net worth at the time the appeal was filed did not exceed \$2 million. An itemized statement detailing the time and expenses for which reimbursement is sought is attached. Appellant meets all the criteria under the statute, and the Court should award fees and costs as requested.

**MEMORANDUM IN SUPPORT**

To obtain an award of fees under the Equal Access to Justice Act, appellant must be a prevailing party, appellant must show he is eligible for the award, and appellant must allege that the position of the government was not substantially justified, *Bazalo v. Brown*, 9 Vet. App. 304 (1996). Appellant meets all three criteria, and therefore the Court should award fees.

A “prevailing party” is one who obtains some relief on the merits, *Buckhannon*

*Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Resources*, 532 U.S. 598, 603 (2001). Relief on the merits for EAJA purposes includes the securing of a remand to an agency where the remand requires further agency proceedings because of alleged agency error. *Former Employees of Motorola Ceramic Products v. U.S.*, 336 F.3d 1360, 1366 (Fed. Cir. 2003). The EAJA statute directs the prevailing party inquiry to fees/expenses incurred “in any civil action . . . , including proceedings for judicial review of an agency action . . .”. Therefore, the party “prevails” by obtaining the remand which meets the requirements of *Motorola*, and whether or not the party ultimately prevails on remand on the merits of his benefits claim is wholly irrelevant. *Kelly v. Nicholson*, 463 F.3d 1349, 1354 (Fed. Cir. 2006).

The CAVC’s August 10, 2016 Opinion was reduced to judgment on September 1, 2016. The decision set aside and remanded the Board’s May 12, 2014 decision. The relief granted is premised on agency error on the grounds stated in the Court’s decision.

Therefore, the appellant meets the first requirement for a fee award.

Second, appellant must establish that his net worth at the time of filing the appeal did not exceed \$2 million. Attached to this motion is the affidavit of the appellant, certifying that she meets this criteria.

Third, appellee’s position on this claim was not substantially justified as stated in the Court’s decision. See, also, *Kelly, supra*, 463 F.3d at 1355.

Based on the above, and on the pleadings in this case, an award of fees is proper. Attached is counsel’s statement itemizing the services and expenses for which

reimbursement is sought.

Respectfully submitted,

/s/ Sandra E. Booth

Sandra E. Booth

Counsel for Appellant

3620 North High Street, Suite 310

Columbus, Ohio 43214

Telephone: (614) 784-9451

Facsimile: (614) 784-9458

[sbooth@columbus.rr.com](mailto:sbooth@columbus.rr.com)

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

EVERETT EMERSON,  
Appellant,

v.

Docket No. 14-2968

**ROBERT A. MCDONALD,**  
Secretary of Veterans Affairs,

Appellee.

**DECLARATION OF SANDRA E. BOOTH, ESQ.**

I, Sandra E. Booth, make the following declaration in support of appellant's application for an award of attorney fees, costs, and other expenses in connection with the above-captioned appeal filed with the U.S. Court of Appeals for Veterans Claims.

1. I was the attorney of record for the appellant in the proceedings before the U.S. Court of Appeals for Veterans Claims. Exhibit A contains an itemization of services for which reimbursement is sought.

2. According to data provided by the U.S. Department of Labor, Bureau of Labor Statistics, as of April, 2015, the date the principal brief was filed and therefore the approximate mid-point of the case according to VAGC policy as represented by VAGC counsel in recent EAJA cases, the Midwest CPI-U was 223.797; the base year Midwest CPI (March, 1996) was 151.7; for an increase of 47.5%. Applying this increase to the \$125.00 hourly rate provided by the Equal Access to Justice Act, applicable to appeals filed after March 29, 1996, the current hourly rate would be \$184.41.

3. Applying the rate computed to the time expended by counsel for Appellant for

which reimbursement is sought (81.60 hours), Appellant seeks a total fee of \$15,047.88.

4. For costs and expenses expended by counsel for appellant, appellant seeks a total reimbursement of \$1,513.47. The total of fees and expenses is \$16,561.35.

5. The undersigned states that the information set forth above is true and correct.

Respectfully submitted,

/s/ Sandra E. Booth

Sandra E. Booth

Counsel for Appellant

3620 North High Street, Suite 310

Columbus, Ohio 43214

Telephone: (614) 784-9451

Facsimile: (614) 784-9458

[sbooth@columbus.rr.com](mailto:sbooth@columbus.rr.com)

Sandra E. Booth  
Attorney At Law  
3620 North High Street, Suite 310  
Columbus, OH 43214

Invoice submitted to:  
Everett Emerson

November 22, 2016

Invoice #10179

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
5/16/2014 Review emails with attachments as forwarded by agency rep, calendar for follow up review for potential CAVC appeal	0.20 184.41/hr	36.88
9/6/2014 Preliminary review of BVA decision and miscellaneous evidence as forwarded by agency representative; determine to accept case for CAVC appeal	1.40 184.41/hr	258.17
9/8/2014 Review file; email to agency representative with instructions for vet to call my office if he desires to pursue CAVC appeal	0.10 184.41/hr	18.44
9/9/2014 Draft, file notice of appeal, notice of appearance; review emails from court re notice of docketing, etc., calendar for follow up	0.10 184.41/hr	18.44
9/18/2014 Review notice of BVA filing and transmittal; note to file	184.41/hr	NO CHARGE
9/23/2014 Review documents received from client; sign off; instructions re filing	0.10 184.41/hr	18.44
11/6/2014 Review, calendar, RBA notice (combined with 12/1/14 entry)	184.41/hr	NO CHARGE
11/15/2014 Review Board decision in detail; analysis re the Board's rating decision; review legal brief submitted to BVA by agency representative; identify potential errors regarding the rating issue, and evidence to particularly look for in the file review	1.00 184.41/hr	184.41
Review RBA 25 - 61	1.40 184.41/hr	258.17

	<u>Hrs/Rate</u>	<u>Amount</u>
11/15/2014 Review RBA 62 - 119	1.20 184.41/hr	221.29
Review RBA 120 - 173	0.50 184.41/hr	92.21
Review RBA 174 - 278	1.30 184.41/hr	239.73
Review RBA 278 - 318	0.30 184.41/hr	55.32
Review RBA 319 - 354	0.20 184.41/hr	36.88
Review RBA 355 - 489	1.00 184.41/hr	184.41
12/1/2014 Review, calendar notice to file appellants brief (Combined with 12/19/14 entry)	184.41/hr	NO CHARGE
12/19/2014 Review court order re Rule 33; calendar; review file re work to be done, calendar for completion	0.10 184.41/hr	18.44
12/26/2014 Identify administrative developments in the 2000 vs. 2010 claims; analysis of record to confirm nature of evidence before the agency in 2000, and identify which evidence is new as of 2010 claim; review record regarding evidence of the veteran's participation in combat and when that evidence became available; review re potential due process issue in initial claim (1.2 hours)	184.41/hr	NO CHARGE
12/30/2014 Attention to outline re earlier effective date issue; draft Rule 33 regarding the EED issue	0.50 184.41/hr	92.21
Review Board decision regarding denial of rating higher than 50%; attention to identification of evidence which the Board relied upon, compare to the source evidence for accuracy; attention to identification of evidence relevant to the rating which the Board did not discuss; review the BVA testimony of the veteran and his wife; analysis re inadequacy of the Board's reasons or bases; review DC 9440; review Vasquez-Claudio and cases which cite to it	2.20 184.41/hr	405.70
Attention to Rule 33 statement regarding higher rating issue; Identify all medical opinions and treatment records pertinent to the PTSD rating issue; attention to the <i>Vasquez-Claudio</i> analysis in light of factual framework of this case and the Board's findings, lack of findings	1.70 184.41/hr	313.50
12/31/2014 Draft Rule 33 statement re higher rating issue; review Rule 33; finalize and serve on OGC and CLS	0.90 184.41/hr	165.97
1/5/2015 Exchange of emails with Mr. Klein and CLS re rescheduling the Rule 33 due to Calendar conflict	0.20 184.41/hr	36.88

	<u>Hrs/Rate</u>	<u>Amount</u>
1/6/2015 Draft, file motion to reschedule Rule 33 conference (Combined with 1/5/15 entry)	184.41/hr	NO CHARGE
1/7/2015 Review court's order granting motion to reschedule (Combined with 1/5/16 entry)	184.41/hr	NO CHARGE
1/21/2015 Review Rule 33 statement; review BVA decision; email to opposing counsel to inquire about the position of the Secretary and whether any additional information is needed re RBA cites, etc.; review his reply; participate in the conference	1.00 184.41/hr	184.41
2/4/2015 Initial draft of the statement of the issues; draft jurisdictional statement	0.50 184.41/hr	92.21
Review notes; attention to review of all evidence before the VARO in 2003 and analysis re specific evidence pertinent to the earlier effective inquiry; draft statement of facts re earlier effective date; chronicle and review all evidence added to the record since 2010 as pertains to earlier effective date; attention to review of adjudicative actions to assess whether, how, agency considered the new evidence	1.80 184.41/hr	331.94
2/5/2015 Review notes of rule 33 conference pertaining to the Secretary's stated defense against remand at that time; identify areas for additional research	0.60 184.41/hr	110.65
2/14/2015 Review Rule 33 analysis re higher rating appeal; Review notes re summary of the claim file evidence pertinent to higher rating	0.60 184.41/hr	110.65
Attention to drafting statement of facts pertinent to the PTSD rating criteria	1.90 184.41/hr	350.38
2/17/2015 Email to OGC re extension of time to file appellant's brief	184.41/hr	NO CHARGE
2/19/2015 Draft, file motion for extension of time to file principal brief	184.41/hr	NO CHARGE
2/22/2015 Prepare outline of the summary of the legal argument	0.60 184.41/hr	110.65
Review, analysis re Section 3.156(c); Review Federal Register re Secretary's interpretation of Section 3.156(c), purpose thereof; analysis re specific administrative deficiency in Mr. Emerson's claim; review <del>Mayhue</del> decision; attention to drafting argument	1.50 184.41/hr	276.62
2/27/2015 Review, analysis re combat presumption at 38 U.S.C. §1154(b) in light of Secretary's stressor corroboration, 38 C.F.R. §3.304(f) and regulatory recognition of its limited reach in light of Section 1154(b); partial draft of legal argument	0.80 184.41/hr	147.53
Marshall evidence pertinent to the veteran's combat status; revise argument	0.50 184.41/hr	92.21



	<u>Hrs/Rate</u>	<u>Amount</u>
4/2/2015 Review <i>Dennis</i> decision, shepherdize; review, shepherdize <i>Vazquez-Claudio</i> re framework for analysis of PTSD rating; review facts and draft argument regarding inadequacy of the Board's reasons or bases, error in failing to review the veteran's rating in light of the correct legal test	2.10 184.41/hr	387.26
4/6/2015 Draft conclusion; review summary of the argument; revise statement of the issues; review and final revisions of principal brief; final review; instructions re completion of the table of contents, etc., and filing	0.80 184.41/hr	147.53
6/4/2015 Review, reply to email from Mr. Klein re Secretary's motion for extension of time (combined with 6/5/15)	184.41/hr	NO CHARGE
6/5/2015 Review Secretary's motion and Court's order; re-calendar for follow up	0.10 184.41/hr	18.44
7/21/2015 Preliminary review of Secretary's reply; identify issues which are in dispute; review Secretary's abandonment argument; calendar for follow up	0.40 184.41/hr	73.76
Review the Secretary's statement of the facts, compare to the record citations, identify errors/omissions to be addressed in reply; extended review of the Secretary's characterization of submissions by appellant's representative before the agency, identify matters to be addressed in reply brief	1.20 184.41/hr	221.29
Review record re Secretary's legal argument that appellant's arguments were not raised below; review record as cited by the Secretary; analysis re thrust of the Secretary's argument, and draft outline for reply, identify additional research to be done with respect to reply	1.10 184.41/hr	202.85
8/3/2015 Email to Attorney Klein re extension of time to file reply brief; draft and file motion	184.41/hr	NO CHARGE
8/31/2015 Review case law cited by the Secretary regarding earlier effective date argument <i>Carter, Sims, Fugere, Massie, Ledford</i> ; analysis in light of the Secretary's argument and why the cited cases and facts of record do not support the Secretary's arguments; attention to drafting reply with respect to the case law cited by the Secretary	1.80 184.41/hr	331.94
Review briefs to identify factual matters not in dispute; review case law regarding liberal reading requirement and Board's duty thereunder vs the Board's duty where the record is fully developed and Board has no duty to address a particular theory	2.10 184.41/hr	387.26
9/1/2015 Analysis re VAOGC's interpretation of Section 3.156(c) and how it affects effective date decisions; Legal research regarding Section 3.156(c), attention to partial review of the case law interpreting 3.156(c)	0.90 184.41/hr	165.97
Attention to additions to, revisions of, earlier effective date argument; draft reply regarding Secretary's assertion that Section 3.156(c) was not raised below so no BVA error in failing to consider it	1.40 184.41/hr	258.17

	<u>Hrs/Rate</u>	<u>Amount</u>
9/1/2015 List Secretary's recitation of facts, as listed in his legal argument re the rating which appear inaccurate, list for follow up comparison against the facts of record; review Secretary's assertion that appellants brief omits context of the veterans statement in the BVA hearing, review the BVA hearing transcript, compare to the Boards analysis of the same evidence	2.10 184.41/hr	387.26
9/16/2015 Research re case law construing shall and will as mandatory language; review case law regarding argument with respect to the mandatory language as trigger to Secretary's duty to reconsider the claim upon receipt of evidence within meaning of Section 3.156(c)	1.30 184.41/hr	239.73
Draft reply to Secretary's argument that Section 3.156(c) does not apply as a matter of law; review Secretary's CUE argument, draft reply as to why it is without merit	0.90 184.41/hr	165.97
Analysis re Secretary's legal argument on the higher rating issue; review <i>Newhouse</i> and <i>Johnson</i> as cited by the Secretary in his brief, analysis re error in the Secretary's reliance on those cases under the facts of Mr. Emerson's appeal	1.00 184.41/hr	184.41
9/17/2015 Draft reply arguments re the higher rating issue	1.80 184.41/hr	331.94
Review, finalize reply brief; instructions to paralegal re preparation of Table of contents, etc, and instructions re filing	0.90 184.41/hr	165.97
9/22/2015 Review record of proceedings	0.50 184.41/hr	92.21
10/5/2015 Review court notice re assignment to Judge Bartley (combined with entry of 11/30/15)	184.41/hr	NO CHARGE
11/30/2015 Review notice of submission of case to a panel for decision; pull briefs and review re potential issues; notice to agency representative re status	0.40 184.41/hr	73.76
1/19/2016 Consult with other vet attorneys regarding the Section 3.156(c) issue as the issue which the panel may be interested in; review replies; analysis regarding issues presented, Secretary's defenses, with respect to matters which may be of issue to the panel	1.00 184.41/hr	184.41
2/1/2016 Review Court order for oral argument; review calendar; instructions re airplane/hotel reservations	0.20 184.41/hr	36.88
Westlaw research - pull all Section 3.156(c) decisions for review, analysis as to whether, how, they affect the issue in Mr. Emerson's case	2.30 184.41/hr	424.14
2/4/2016 Email to Mr. Klein regarding his position on a motion for clarification; review his reply; re-send inquiry to Attorney Sullivan; review his reply	0.10 184.41/hr	18.44
Review briefs; analysis re potential issues which may arise; review case law re sufficiency of the pleading in light of the fact that the veteran was represented by an attorney before the agency	1.00 184.41/hr	184.41

	<u>Hrs/Rate</u>	<u>Amount</u>
2/5/2016 analysis, drafting regarding motion for clarification of issues for oral argument; review same; instructions re filing	0.50 184.41/hr	92.21
2/9/2016 Review Attorney Morris entry of appearance	184.41/hr	NO CHARGE
2/15/2016 Follow up research re Section 3.156(c); review prior versions of the reg as compared to Secretary's stated reasons for amendments; analysis of other paragraphs of Section 3.156 with respect to how to reconcile with Mr. Emerson's view of the correct interpretation	1.50 184.41/hr	276.62
2/18/2016 Legal research re Secretary's argument that the Board was not required to consider the veterans newly submitted service personnel records in light of Section 3.156(c) because that ground was not articulated. Review sympathetic reading case law	1.10 184.41/hr	202.85
Analysis re <i>Stowers</i> case, its similarity on the issue to the instant case; attention to the regulatory language draft, file notice of supplemental authority	1.30 184.41/hr	239.73
Legal research; review <i>Routen</i> and <i>Spencer</i> , and case law citing those cases, re effect of change in the law as a new basis for entitlement and distinct from prior claim	0.90 184.41/hr	165.97
2/19/2016 Oral argument preparation; legal research re whether the decision on a new theory is a reconsideration of the initial claim which was denied on a different legal theory; legal research re other matters pertinent to the Courts clarification order	2.10 184.41/hr	387.26
Review re Federal Register comments on 3.156(c) amendments	0.50 184.41/hr	92.21
2/25/2016 Oral argument preparation; review case law re 3.156(c); distinguish from Mr. Emerson's circumstances	2.00 184.41/hr	368.82
Consult with agency representative re how, where, she found the new personnel records not previously considered	0.20 184.41/hr	36.88
Review briefs and file; prepare a chronology of significant events, when evidence was submitted; review re other issues which need to be tracked down prior to argument	0.90 184.41/hr	165.97
2/26/2016 Review CAVC order regarding matters which the parties should be prepared to discuss; legal research re the will reconsider the claim language; analysis as to how to respond to the same at argument; analysis re particular point of error, that the veteran did not get the benefit of the reconsideration to which he was entitled by 3.156(c)	184.41/hr	NO CHARGE
2/28/2016 Review <i>Gardner</i> brief in Docket No. 14-0493, re 3.156 argument presented	0.50 184.41/hr	92.21

		<u>Hrs/Rate</u>	<u>Amount</u>
2/29/2016	Legal research re issue of whether a change in the law during the pendency of the claim require requires readjudication of entire claim in light of that change	1.00 184.41/hr	184.41
	Draft, file second notice of supplemental authority	0.50 184.41/hr	92.21
3/4/2016	Review Ms. Raders email regarding pre-oral argument briefing; review the CAVC's oral arguments guide	0.20 184.41/hr	36.88
3/7/2016	Travel from Port Columbus International Airport to Washington Reagan International Airport; travel to hotel	3.50 184.41/hr	645.44
	Review oral argument notes; analysis re issues which I may have missed that will be pertinent to the court's inquiries	2.00 184.41/hr	368.82
	Supplemental research regarding potential issues to be raised at oral argument; shepherdize case law regarding updates	1.00 184.41/hr	184.41
3/8/2016	Review case law as cited by the parties in their briefs	1.50 184.41/hr	276.62
	Review briefs; review oral argument notes	1.00 184.41/hr	184.41
	Travel to court for argument; attend pre-oral argument conference in Mr. Block's office; participate in oral argument; return travel to hotel	3.00 184.41/hr	553.23
	Review Court's order to the Secretary regarding status of agency adjudication of the veterans CUE request; review Board's decision remanding CUE	0.10 184.41/hr	18.44
3/9/2016	Travel from hotel in Washington DC to Washington Reagan airport; travel from Washington DC to Port Columbus International Airport to office	3.50 184.41/hr	645.44
	Review Secretary's response to the Courts 3/8/16 order (Combined with 3/8/16 entry)	184.41/hr	NO CHARGE
8/10/2016	Review Court's decision; telephone conference with Mr. Emerson regarding the decision; forward decision to agency representative for her follow up below	1.00 184.41/hr	184.41
9/1/2016	Review court's judgment, calendar for follow up (combined with 11/15/14 entry)	184.41/hr	NO CHARGE
11/3/2016	Attention to preparation of EAJA application	2.10 184.41/hr	387.26
	For professional services rendered	81.50	\$15,029.45

Additional Charges :

	<u>Amount</u>
Copies @ .10 pg	48.90
Postage	5.84
Travel Expenses	686.48
Westlaw reduced by 75%	772.25
Total costs	<u>\$1,513.47</u>
Total amount of this bill	<u>\$16,542.92</u>

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

Everett Emerson,  
Appellant,

v.

Robert A. McDonald,  
Secretary of Veterans Affairs  
Appellee.

**DECLARATION OF NET WORTH**

I, Everett Emerson a resident of Carter County, City of Wilson, OK, declare that in September, 2014, at the time my appeal to the U.S. Court of Appeals for Veterans Claims was filed, my estate, including all properties, monies, and possessions, combined to a net worth of less than Two Million Dollars (\$2,000,000.00).

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Everett L. Emerson  
Name

9-15-14  
DATE