

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

Ricarte A. Soliben,	)	
Appellant,	)	
	)	
v.	)	
	)	Vet.App. No. 14-3240
DAVID J. SHULKIN, M.D.,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

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

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Secretary of Veterans Affairs,	)	
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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, Ricarte A. Soliben, applies for an award of reasonable attorneys' fees and expenses in the amount of **\$6,340.28.**

**PROCEDURAL HISTORY**

On May 23, 2014, the Board of Veterans' Appeals ("Board" or "BVA") issued a decision that, *inter alia*, denied Appellant's claim for entitlement to a disability rating in excess of 10% for intervertebral disc disorders, status postoperative laminectomy L5-S1 (referred to as back disability) prior to November 18, 2011. Appellant filed a timely Notice of Appeal to this Court on September 23, 2014.

In April 2017, the parties began negotiating a joint disposition of the case. On June 9, 2017, the parties filed the "Joint Motion for Remand" (hereinafter the "Joint Motion" or "JMR") with the Court. In the Joint Motion, the parties agreed

that the Board erred in failing to provide an adequate statement of reasons or bases, in violation of 38 U.S.C. § 7104(d)(1), and failed to discuss relevant evidence as to whether an increased rating in excess of 10% is warranted prior to November 18, 2011.

Specifically, the parties agree that the Board provided an inadequate statement of reasons or bases because it failed to address whether Appellant demonstrated good cause for his failure to report to his Department of Veterans Affairs (VA) examinations scheduled for October 2007, April 2008, June 2009, and November 2009. See 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

The parties explained that the Board found that Appellant's failure to appear to all four scheduled VA examinations resulted in significant difficulty in VA's ability to rate his claim. See 38 C.F.R. § 3.655 (a). The Board recognized that Appellant worked overseas as a private security contractor during the period on appeal. The Board noted that Appellant had a duty to appear to the examinations to assist in developing his claim, and it concluded that his failure to report caused significant difficulty in VA's ability to rate his claim. (JMR at 2).

The parties noted that the record reflects Appellant frequently notified VA that he was not residing in the United States. For example, in October 2007, the VA Medical Center (VAMC) contacted the Regional Office (RO) and stated that it had received an examination request. However, because Appellant was currently working in Afghanistan and would not return until December 2007, the

RO requested that the VAMC cancel the examination. In an April 2008 VA medical record, the examiner stated that Appellant's wife called to indicate that he was in Iraq as a contractor and would not be able to attend the April 2008 VA examination. The examiner indicated that Appellant would need to reschedule a VA examination because he was out of the country. (JMR at 2-3).

The parties agree that because the Board did not determine whether Appellant had shown good cause for failing to attend the scheduled examinations, it did not provide an adequate statement of reasons or bases for its decision. *Allday*, 7 Vet.App. at 527; *Cf. VA Adjudication Procedures Manual* (M21-1), Part III, Subpart iv, 3.A.1.b. (VA's adjudication process to accommodate foreign resident claimants); see *also* M21-1, Part III, Subpart iv, 8.8.f (RO is directed to forward a field examination request directly to the involved embassy or consulate).

Additionally, the parties agree that if the Board determines that good cause was shown for Appellant's failure to report to the VA examinations scheduled for October 2007, April 2008, June 2009, and November 2009, to include consideration of the relevant M21-1 provisions addressing VA's adjudication process to accommodate foreign resident claimants, it should determine whether a retrospective medical opinion is warranted. See *Chotta v. Peake*, 22 Vet.App. 80, 85-87 (2008) (In cases that span a lengthy period, the Secretary must determine whether a retrospective medical opinion "is necessary to make a decision on the claim."); *Swain v. McDonald*, 27 Vet.App. 219, 225 (2015) (The

effective date for an increased rating, indeed, as well as for an initial rating or for staged ratings, is predicated on when the increase in the level of disability can be ascertained.).

Finally, the parties agree that the Board failed to discuss relevant evidence as to whether an increased rating in excess of 10% is warranted prior to November 18, 2011. In the November 2011 VA examination, the examiner diagnosed Appellant with intervertebral disc syndrome (IVDS) and noted that in the past 12 months, he experienced incapacitating episodes that lasted “at least six weeks.” (JMR at 4). Under 38 C.F.R. § 4.71a, Diagnostic Code (DC) 5243, a 60% rating is warranted for IVDS with incapacitating episodes over the previous 12 months that lasted “at least six weeks.” *Id.* The parties agreed that because the examiner’s finding regarding Appellant’s IVDS symptoms is relevant to the time period on appeal, i.e., prior to November 18, 2011, upon remand the Board should address whether this relevant evidence warrants an increased rating. *See Van Valkenburg v. Shinseki*, 23 Vet.App. 113, 117 (2009) (remanding where the Board’s “failure to fully discuss the evidence in the file” that was “relevant and material to” an issue “frustrate[d] judicial appellate review”); *see also Velez v. Shinseki*, 23 Vet.App. 199, 206-07 (2009) (remanding where “[n]othing in the Board’s analysis addressed [a] piece of apparently relevant evidence”). In light of the inadequate statement of reasons or basis and failure to discuss relevant evidence as to whether an increased rating is warranted prior to November 18,

2011, the parties agreed that vacatur and remand are required for further proceedings consistent with the Joint Motion and Order.

On June 12, 2017, the Court ordered that the Joint Motion be granted and remanded pursuant to 38 U.S.C. § 7252(a), “for action consistent with the terms of the joint motion.” The Order was the mandate of the Court, pursuant to U.S. Vet. App. R. 41(b).

## **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’ JMR, which was predicated on administrative error by the Board. *See also Zuberi v. Nicholson*, 19 Vet. App. 541 (2006); *Sumner v. Principi*, 15 Vet. App. 256 (2001) (*en banc*).

Appellant 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).

In this case, the Secretary's administrative position was not substantially justified. As described more fully in the "Procedural History," *supra*, the Court vacated and remanded the Board's decision because the parties agreed that the Board erred by failing to provide an adequate statement of reasons or bases, in violation of 38 U.S.C. § 7104(d)(1), and failed to discuss relevant evidence as to whether an increased rating in excess of 105 is warranted prior to November 18, 2011. These errors, and the other errors made by the Board, 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 and expenses for which Appellant seeks compensation are listed below in this section. Included in Exhibit A is a certification that the lead counsel has “(1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all counsel and (2) considered and eliminated all time that is excessive or redundant.” *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005). In exercising billing judgment, Appellant eliminated 4.2 hours of attorney time and 5.4 of law clerk time from the itemized statement and this fee petition.

Appellant seeks attorneys’ fees at the following rates for representation in the Court of Appeals for Veterans Claims.<sup>1</sup>

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<sup>1</sup> A rate in excess of \$125 per hour for counsel for Appellant in this case is justified based on the increase in the cost of living since the EAJA was amended in March 1996. *See* 28 U.S.C. § 2412(d)(2)(A)(ii). The \$125 attorney fee rate, adjusted for inflation for the Midwest, was \$189.26 in April 2017, the month the petitioner filed his Rule 33 Briefing Conference Memo. *See* Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the Department of Labor’s Consumer Price Index for Urban Consumers (“CPI-U”) in the Midwest adjusted for inflation for March 1996 and by using the CPI-U for the Midwest adjusted for inflation between March 1996 and April 2017. *See* Exhibit B; *Mannino v. West*, 12 Vet. App. 242 (1999). The prevailing market rate for the work done by law clerk Alan Mabey is at least \$125.00 per hour from Feb 1, 2017 to the present. *See Sandoval v. Brown*, 9 Vet. App. 177, 181 (1996); *see also Richlin Security Service Co. v. Chertoff, Secretary of Homeland Security*, 128 S. Ct. 2007 (2008).



<u>Name</u>	<u>Rate</u>	<u>Hours</u>	<u>Fee Amount</u>
Martin D. Parsons (2015 law graduate)	\$189.26	22.5	\$ 4,258.35
Alan Mabee (Law clerk)	\$125.00	16.3	\$ 2,037.50

**TOTAL: \$ 6,295.85**

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

<u>Nature of Expenses</u>	<u>Amount</u>
Photocopying	\$ 12.79
Postage	\$ 18.85
<b>TOTAL:</b>	<b>\$ 44.43</b>

WHEREFORE, Appellant respectfully requests that the Court award attorneys' fees and expenses in the total amount of **\$6,340.28**.

Respectfully submitted,

/s/ Martin D. Parsons  
**Martin D. Parsons, ESQ.**

Counsel for Appellant

## **EXHIBIT A**

**STAFF HOURS**  
**Ricarte A. Soliben, 14-3240**

Date: 2/1/2017 1.5 Staff: Martin D. Parsons  
Review BVA decision and screening memorandum to determine issues to raise on appeal.

Date: 2/2/2017 1.0 Staff: Martin D. Parsons  
Meet with law clerk, Alan Mabee. Discuss case, issues on appeal, and assignments. **[0.5 eliminated in exercise of billing judgment.]**

Date: 2/2/2017 1.0 Staff: Alan Mabee  
Meet with supervising attorney. Discuss matter, issues on appeal, and assignments. **[0.5 eliminated in exercise of billing judgment.]**

Date: 2/2/2017 0.5 Staff: Alan Mabee  
Review BVA decision and screening memorandum to confirm issues to raise on appeal.

Date: 2/4/2017 0.5 Staff: Martin D. Parsons  
Telephone conference with client regarding status of appeal and next steps.

Date: 2/7/2017 2.4 Staff: Martin D. Parsons  
1279-page RBA; review and notate RBA.

Date: 2/13/2017 3.2 Staff: Alan Mabee  
1279-page RBA; review RBA for completeness and legibility. Notate RBA and draft timeline.

Date: 2/28/2017 1.9 Staff: Alan Mabee  
Continue RBA review and drafting of timeline. Submit draft timeline to supervising attorney for review.

Date: 2/28/2017 1.0 Staff: Martin D. Parsons  
Review and notate draft timeline submitted by law clerk.

Date: 2/28/2017 0.9 Staff: Martin D. Parsons  
Meet with law clerk to discuss draft timeline and arguments for Rule 33 Briefing Memo. **[0.4 eliminated in exercise of billing judgment.]**

Date: 2/28/2017 0.9 Staff: Alan Mabee  
Meet with supervising attorney to discuss draft timeline and arguments for Rule 33 Briefing Memo. **[0.4 eliminated in exercise of billing judgment.]**

Date: 3/3/2017 2.3 Staff: Alan Mabee  
Continue RBA review and update timeline after meeting with supervising attorney. **[1.0 eliminated in exercise of billing judgment.]**

Date: 3/5/2017 0.8 Staff: Martin D. Parsons  
Research and notate cases for Rule 33 Briefing memo.

Date: 3/5/2017 1.6 Staff: Alan Mabee  
Begin drafting Rule 33 Briefing memo.

Date: 3/5/2017 2.1 Staff: Alan Mabee  
Additional research of cases and regulations for arguments in memo. **[0.6 eliminated in exercise of billing judgment.]**

Date: 3/8/2017 3.1 Staff: Alan Mabee  
Continue draft of Rule 33 Briefing memo. Finalize draft and submit to supervising attorney. **[1.1 eliminated in exercise of billing judgment.]**

Date: 3/8/2017 1.2 Staff: Martin D. Parsons  
Review and notate draft of Rule 33 memo.

Date: 3/9/2017 0.9 Staff: Martin D. Parsons  
Meet with law clerk to discuss memo and assignments. **[.4 eliminated in exercise of billing judgment.]**

Date: 3/9/2017 0.9 Staff: Alan Mabee  
Meet with supervising attorney to discuss memo and assignments. **[.4 eliminated in exercise of billing judgment.]**

Date: 3/10/2017 2.1 Staff: Martin D. Parsons  
Revise draft of Rule 33 memo. **[0.5 eliminated in exercise of billing judgment.]**

Date: 4/2/2017 0.5 Staff: Martin D. Parsons  
Meet with law clerk to discuss assignments.

Date: 4/2/2017 0.5 Staff: Alan Mabee  
Meet with supervising attorney to discuss assignments.

Date: 4/2/2017 1.4 Staff: Alan Mabee  
Additional research for memo. **[0.4 eliminated in exercise of billing judgment.]**

Date: 4/3/2017 1.3 Staff: Alan Mabee  
Review RBA to confirm dates of diagnosis and appointments.

Date: 4/3/2017 1.5 Staff: Martin D. Parsons  
Review RBA to confirm facts in support of arguments.

Date: 4/4/2017 2.1 Staff: Martin D. Parsons  
Final review of RBA. **[2.1 eliminated in exercise of billing judgment.]**

Date: 4/4/2017 1.9 Staff: Martin D. Parsons

Finalize Rule 33 Briefing memo. (0.4) Proofread memo. (1.0) Make corrections to memo. (0.5)

Date: 4/4/2017 0.5 Staff: Martin D. Parsons  
Draft certificates of service for Rule 33 Memo.

Date: 4/6/2017 0.5 Staff: Martin D. Parsons  
File Rule 33 Briefing Memo and certificates of service.

Date: 4/11/2017 0.2 Staff: Martin D. Parsons  
Read and respond to multiple emails re: Rescheduling Rule 33 Conference.  
**[.2 eliminated in exercise of billing judgment.]**

Date: 4/26/2017 1.0 Staff: Martin D. Parsons  
Participate in Rule 33 phone conference.

Date: 4/26/2017 1.0 Staff: Alan Mabee  
Participate in Rule 33 phone conference. **[1.0 eliminated in exercise of billing judgment.]**

Date: 4/27/2017 0.4 Staff: Martin D. Parsons  
Telephone conference with client to discuss status of appeal.

Date: 5/24/2017 0.7 Staff: Martin D. Parsons  
Review and notate proposed joint motion for remand (JMR) drafted by VA attorney.

Date: 5/24/2017 0.4 Staff: Martin D. Parsons  
Draft and send email to VA attorney requesting clarification of points made in JMR.

Date: 5/25/2017 0.1 Staff: Martin D. Parsons  
Read and respond to email from VA attorney recommending extension of time to respond to questions. **[0.1 eliminated in exercise of billing judgment.]**

Date: 6/7/2017 0.7 Staff: Martin D. Parsons  
Review and notate revised joint motion for remand drafted by VA attorney.

Date: 6/7/2017 0.1 Staff: Martin D. Parsons  
Email VA attorney to accept revisions and authorize filing of JMR. **[0.1 eliminated in exercise of billing judgment.]**

Date: 7/3/2017 1.1 Staff: Martin D. Parsons  
Prepare closing letter to client regarding next steps, including copy of final JMR for his files.

Date: 7/10/2017 1.1 Staff: Martin D. Parsons  
Research for and preparation of application for reasonable attorneys' fees and expenses (prepare pleading, including review of Joint Motion and Court docket, for preparation of procedural history section of application.)

Date: 7/10/2017 0.7 Staff: Martin D. Parsons  
Prepare itemized list, including edits to same.

Date: 7/10/2017 0.9 Staff: Martin D. Parsons  
Finalized itemized list of application for reasonable attorneys' fees and expenses, including exercise of billing judgment. (0.4) Edit, revise, and finalize application for reasonable attorneys' fees and expenses (0.5).

### **CERTIFICATION**

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

Respectfully submitted,

July 11, 2017

Date

/s/ Martin D. Parsons

Martin D. Parsons

1150 Douglas Dr.  
Carbondale, IL 62901  
618-453-8280  
martin.parsons@siu.edu  
Counsel for Appellant



## **EXHIBIT B**

U.S. Department of Labor  
Bureau of Labor Statistics  
Washington, D.C. 20212

Consumer Price Index  
All Urban Consumers (CPI-U)  
Midwest  
All Items  
1982-84=100

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Avg	Percent Change	
														Dec.-Dec.	Avg.-Avg.
1990	124.5	124.9	125.5	125.8	126.0	126.9	126.9	128.4	129.4	130.0	130.4	130.2	127.4	5.7	4.9
1991	130.5	130.8	131.3	131.5	132.3	132.6	132.4	132.8	133.4	133.6	134.0	134.1	132.4	3.0	3.9
1992	134.1	134.3	134.8	135.1	135.5	136.0	136.3	136.7	137.2	137.4	137.6	137.7	136.1	2.7	2.8
1993	138.1	138.6	139.0	139.4	139.8	140.0	140.0	140.4	140.9	141.5	141.4	141.2	140.0	2.5	2.9
1994	141.5	142.1	142.6	142.9	143.3	144.0	144.3	145.2	145.6	145.3	145.8	145.7	144.0	3.2	2.9
1995	146.1	146.7	147.3	148.1	148.3	148.7	148.8	148.9	149.4	149.6	149.5	149.5	148.4	2.6	3.1
1996	150.2	150.8	151.7	152.3	152.7	152.9	153.2	153.4	154.0	154.4	155.0	155.3	153.0	3.9	3.1
1997	155.5	155.9	155.9	156.1	156.3	156.7	156.6	157.2	157.5	157.7	157.7	157.3	156.7	1.3	2.4
1998	157.6	158.0	158.4	159.0	159.4	159.5	159.8	159.5	159.9	160.1	160.1	159.8	159.3	1.6	1.7
1999	160.4	160.5	161.0	162.2	162.2	162.5	162.9	163.2	164.3	164.3	164.6	164.4	162.7	2.9	2.1
2000	164.9	165.9	167.1	167.0	167.5	169.7	168.8	168.2	170.0	170.1	170.3	170.2	168.3	3.5	3.4
2001	171.9	172.1	171.7	172.8	174.2	173.8	172.5	173.0	174.6	172.6	172.5	171.9	172.8	1.0	2.7
2002	172.1	172.5	173.6	174.7	174.8	175.3	175.3	175.8	176.2	176.3	176.1	175.5	174.9	2.1	1.2
2003	176.2	177.8	178.6	177.8	177.7	178.4	178.1	178.8	179.5	179.1	178.9	178.4	178.3	1.7	1.9
2004	179.4	180.2	181.0	181.5	182.9	183.3	183.2	183.3	183.6	184.5	184.8	183.8	182.6	3.0	2.4
2005	184.1	185.2	186.3	187.7	187.4	187.8	188.4	189.7	192.5	192.1	190.3	189.7	188.4	3.2	3.2
2006	190.8	190.7	192.0	193.0	193.6	194.1	194.6	195.1	193.7	192.3	192.8	192.9	193.0	1.7	2.4
2007	193.068	194.458	196.389	197.405	199.194	199.263	198.989	198.551	199.714	199.455	200.762	200.227	198.123	3.8	2.7
2008	201.427	201.896	203.723	205.393	207.168	208.968	210.071	209.351	209.252	206.019	201.737	199.582	205.382	-0.3	3.7
2009	200.815	201.453	202.021	202.327	203.195	205.350	204.814	205.632	205.601	205.706	206.247	205.613	204.064	3.0	-0.6
2010	206.564	206.563	207.359	207.777	207.987	207.886	208.211	208.639	208.788	208.689	208.816	209.270	208.046	1.8	2.0
2011	210.388	211.090	212.954	214.535	215.899	215.954	216.099	216.586	216.968	215.653	215.614	215.173	214.743	2.8	3.2
2012	216.368	216.855	218.975	219.405	219.145	219.017	218.956	220.462	221.125	220.375	219.483	219.033	219.100	1.8	2.0
2013	219.282	221.599	222.121	221.931	223.049	223.775	222.902	223.046	223.252	222.171	221.718	221.194	222.170	1.0	1.4
2014	222.247	223.493	225.485	226.214	226.565	227.588	226.997	226.587	226.913	225.793	224.396	222.821	225.425	0.7	1.5
2015	221.545	222.301	223.550	223.797	224.732	225.946	225.853	225.830	225.184	225.050	224.009	222.722	224.210	0.0	-0.5
2016	223.301	223.196	224.621	225.609	(r)226.476	(r)227.835	(r)226.786	(r)227.097	227.636	227.358	226.673	226.794	226.115	1.8	0.8
2017	228.279	228.633	228.824	229.682	229.705										
(r) Revised.															

(r) Revised.