

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

WAHAD ANSARI,)	
)	
Appellant,)	
)	
vs.)	Vet. App. No. 17-394
)	
DAVID J. SHULKIN, M.D.,)	
)	
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 WAHAD ANSARI, 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 November 30, 2017, this Court issued a memorandum decision that remanded the November 22, 2016, Board of Veterans' Appeals (Board) decision that denied service connection for tinnitus. The Court found the Board committed administrative error in providing inadequate reasons and bases for its decision.

Pursuant to 28 U.S.C. § 2412(d), appellant seeks reasonable attorneys fees in the amount of \$4,250.93 based on an expenditure of 18.5 hours of time billed at the rate of \$189.34 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 \$4,250.93.

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 \$4,250.93.

Respectfully submitted,

WAHAD ANSARI, Appellant

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BILLING RECORDS & REPORT [Attorney Time – Hours]

Re: WAHAD ANSARI, Appellant

USCAVC Case No. 17-394

Preface:

Following a summary of issues memorandum and a brief on the merits, on November 30, 2017, this Court issued a memorandum decision that remanded the November 22, 2016, Board decision that denied service connection for tinnitus. The Court found the Board committed administrative error in providing inadequate reasons and bases for its decision.

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
12/6/16	Review Board decisions, file materials, medical, and appellate history for determination to appeal.	0.8
2/7/17	Received notice of appeal emails, etc.	0.1
2/8/17	Notice of Docketing for BVA's decision w/in 30 days; RBA w/in 60 days.	0.1
2/27/17	BVA decision transmittal and duplicate.	0.1
3/23/17	Appearance of Charles Jenkins, for OGC.	0.1
4/6/17	RBA Notice. Calendar tentative brief date.	0.1
4/27/17	Review and calendar briefing schedule order.	0.1
5/1/17	Calendar Ct. Conference and schedule for issues briefing.	0.1
5/5/17	Open SOI template to review/outline RBA. [760 pages].	1.5
5/5/17	Continue RBA review, outline. [afternoon]	3.0
5/7/17	Begin SOI.	1.5
5/7/17	Review RBA, pull case citations, and finish SOI draft.	1.2
5/7/17	Final review and edits. Confirm citations	0.6
5/10/17	Rule 33 filed.	0.1
5/24/17	Prepare for conference: review Board decision, SOI, and begin conference memo.	0.4
5/24/17	Conference held. Finish conference memo, email to attys.	0.3
6/21/17	Open brief outline and review Board decision, SOI and review conference memo in preparation for brief.	1.4

6/21/17	Conversion of SOI to brief. Review caselaw, RBA, and pull case citations.	2.4
6/21/17	Finish SOI. Final review and revise brief draft. Create table of contents. Check citations.	0.8
6/22/17	Appellant's brief filed. Update calendar. MIDPOINT.	0.1
8/21/17	Review email from OGC and reply. M to extend Appellee brief. Clerk's order.	0.1
10/2/17	Appellee brief filed. Update calendar.	0.1
10/13/17	Skim Board decision, review Appellant brief, and summarize Appellee Brief for determination on reply brief. Review RBA. Update prevail.	1.8
10/25/17	ROP filed. Email ROP to clerk for review.	0.1
11/6/17	Review email from law clerk.	0.1
11/14/17	Assigned to Judge Greenberg.	0.1
11/30/17	Read and outline key provisions of Memo Decision and email to attorneys for review and review responses. Update CAVC docket. Calendar for EAJA.	0.4
12/26/17	Review Judgment. Confirm EAJA calendar.	0.1
2/26/18	Review docket, emails, timesheet documents, activity log, and correspondence. EAJA draft.	0.9

Total Hours: 18.5 hours.

Issues / Claims Being Remanded:

Due to administrative error, on November 30, 2017, this Court issued a memorandum decision that remanded the November 22, 2016, Board decision that denied service connection for tinnitus.

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 in June 2017 – 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 229.780. See, Bureau of Labor Statistics, CPI Tables for the midwest urban. See, *Elczyn v. Brown*, the rate is for the *All-Items Index*. See, https://www.bls.gov/cpi/cpi_dr.htm#2016.

D. Hourly Rate For This Appeal:

The statutory formula results in the following calculations.

\$125.00 (Base Amount)
(multiplied by)
229.780 (Midwest CPI in June 2017 midpoint date)
(divided by)
\$151.70 (Midwest CPI in March, 1996)
<hr/>
\$189.34 (Adjusted Rate for attorney time.)

Conclusion

Applying the statutory rate of \$189.34 to the total time expended as

detailed above results in \$4,250.93 – the amount sought herein.

Respectfully submitted,

WAHAD ANSARI, Appellant

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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:

Charles A. Jenkins, Esq.
Office of the General Counsel
Department of Veterans Affairs
810 Vermont Ave., NW
Washington DC 20420

on March 5, 2018.

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