

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

JAMES GOLDEN, JR.)	
Appellant,)	
)	
v.)	
)	Vet App No. 16-1208
PETER O'ROURKE,)	
Acting Secretary of Veterans Affairs,)	
Appellee.)	

**APPELLANT'S APPLICATION FOR AN AWARD
OF REASONABLE ATTORNEY FEES AND EXPENSES**

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) and U.S.Vet.App. R. 39, Mr. Golden applies for an award of reasonable attorney's fees and expenses in the amount of \$ 27848.31.

SUMMARY OF PROCEEDINGS

In a December 30, 2015, decision, the Board of Veterans' Appeals, amongst others, denied Appellant's claim for entitlement to an evaluation greater than 70 percent for PTSD. The veteran appealed said denial to this court and filed a Brief and replied to the Secretary's brief. This Court issued a memorandum decision, setting aside the Board's decision and remanding the matter. The Secretary sought reconsideration of this decision. Granting the Secretary's motion to reconsider, this court withdrew its decision and issued a

second decision, again finding error and remanding the matter, but affirmed part of the Board decision. Subsequently, upon motion to reconsider by Appellant, this court again withdrew the decision and issuing another decision, finding error in part and remanding the Board's decision while affirming other part. Both parties then filed motions for reconsideration and in the alternative by panel. The Court granted the parties' motions for panel review and ordered supplemental briefing and oral argument. On February 23, 2018, the court issued a panel decision, finding that the Board erred when it uses GAF scores to assign a psychiatric rating in cases where the DSM-5 applies. It set aside the board's decision and remanded the denied claim. Judgment was issued on March 19, 2018.

ARGUMENT

The Court may award reasonable attorney fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F). In order for the Court to have jurisdiction over an EAJA application, it must be filed within the 30-day period set forth in 28 U.S.C. § 2412(d)(1)(B). The application must contain: (1) a showing that the applicant is a prevailing party within the meaning of the EAJA; (2) an assertion that the applicant is a party eligible for an award under the EAJA because the party's net worth does not exceed \$2,000,000 dollars; (3) an allegation that the position of the Secretary at the administrative level or in litigation was not substantially

justified; and (4) an itemized statement of the fees and expenses sought. *See* 28 U.S.C. § 2412(d); *Cullens v. Gober*, 14 Vet.App. 234, 237 (2001)(*en banc*); *Chesser v. West*, 11 Vet.App. 497, 499 (1998); *Bazalo v. Brown*, 9 Vet.App. 304, 308 (1996)(*en banc*), *rev'd on other grounds sub nom. Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998). An award under EAJA is appropriate in this case.

An application for fees under EAJA is timely if filed within thirty days after the judgment becomes final. 28 U.S.C. § 2412(d)(1)(B). In the instant case, the application is filed within the thirty day time period, hence it is timely.

Appellant is a prevailing party for EAJA award. As noted above, the Court found error in the Board decision, setting aside its decision on the denied claim and remanded the matter.

Appellant filed the captioned appeal in his individual capacity. Therefore, in order to qualify as a "party" under EAJA, it must be shown that the party's "net worth did not exceed \$2,000,000 at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B). Appellant asserts it does not and is unaware of circumstances which would make an award of fees unjust in this case.

The position of the United States was not substantially justified in this case. The Supreme Court has held that "substantially justified," as used in EAJA, means justified in substance, in the main, or to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988). In

determining whether the Government's position was substantially justified, the Court must consider the underlying agency action.

"[P]osition of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings."

28 U.S.C. § 2412(d)(2)(D); *Felton v. Brown*, 7 Vet.App. 276, 289 (1994). As discussed above, the Board's decision was set aside and the claim remanded because the Board erred in its decision. Under such circumstances, the Government's position should not be deemed substantially justified. The Government bears the burden of demonstrating that its position was substantially justified. *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 Secretary must show "that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." *Gavette v. OPM*, 808 F.2d 1456, 1467 (Fed. Cir. 1986).

This application is accompanied by an affidavit from Appellant's attorney, attached hereto as Appendix A. The affidavit includes an itemization of the number of hours expended on this litigation after adjusting for billing judgment, and demonstrates that, based upon the specific services performed, the fee

sought is a reasonable one. In this circuit, an application for attorney fees is allowable where it is based on records that are substantially reconstructed and reasonably accurate. *P.P.G. Indus. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1570 (Fed.Cir. 1988). Here, the application is based upon contemporaneous time records.

Under 28 U.S.C. § 2412(d)(2)(A)(ii), attorneys may demonstrate that an increase in the cost of living justifies an increase in the statutory cap. *See Pierce v. Underwood*, 108 S.Ct. 2553 (1988) (referring to a cap of \$75.00 per hour “adjusted for inflation”); *Philips V. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991). An increase for cost of living is generally allowed. *Coup v. Heckler*, 834 F. 2d 313, 320 (3d Cir. 1987); *Baker v. Brown*, 839 F.2d 1075 (5th Cir. 1988) (allowed except in unusual circumstances)

In *Elczyn v. Brown*, 7 Vet.App. 170 (1994), this Court decided that an Appellant's attorney can petition for a fee in excess of the statutory cap based upon the Consumer Price Index. *Id.* at 179-181. This Court further directed attorneys filing for an increased fee based upon the CPI to choose a mid-point date in the litigation to establish the appropriate date for calculating the cost of living increase. *Id.* at 181. The Appellant chooses September 2016, the approximate date of his brief, to calculate the increase.

Appellant submits that the Court should increase the \$125.00 per hour cap by the general inflationary index in the cost of living since March of 1996, as reflected by the CPI for all urban consumers in the United States. *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991); *Jones v. Lujan*, 887 F.2d 1096, 1101 n.8 (D.C. Cir. 1989) (increase in cost of living in Washington, D.C.). Calculations based on data from the Bureau of Labor Statistics reflect that compensation should be at the rate of \$196.96 per hour.¹

In addition to attorney fees, Appellant is entitled to recover expenses. 28 U.S.C. § 2412(d)(1)(A); *Cook v. Brown*, 6 Vet.App. 226, 237-40 (1994). The affidavit referred to above includes an itemization of expenses incurred herein, in the total amount of \$54.73.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests the Court to order the Secretary of Veterans Affairs to pay reasonable attorney fees and expenses in the total amount of \$ 27848.31 to Jeany Mark, counsel for Appellant.

¹ See <http://data.bls.gov>: consumer price index for 11/1996 for Washington DC is 100 and for 09/2016 is 157.57. Adjusted hourly rate=\$125.00+(\$125.00 multiply by [(157.57 minus 100) divided by 100]

Respectfully submitted,

/s/Jeany Mark

Jeany Mark

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Appellant's Counsel

AFFIDAVIT**Appendix A**

I hereby certify under penalty of perjury under the laws of the United States of America that the following itemization is true and accurate.

LEGAL SERVICES (Exercised billing judgment)(did not bill for team's time to prepare for moot court and any supervisor review time)

<u>Date</u>	<u>Actions</u>	<u>Time (hrs)</u>
01.06.16	Communication from client re: BVA decision	0.20
03.22.16	Review BVA decision for appeal (EM)	1.20
03.23.16	Communication with client re: appeal (pstg 0.49, 4 copies)	0.50
03.31.16	Communication from client re: appeal	0.10
04.06.16	Prepare and file NOA, Notice of Appearance	0.40
04.06.16	Communication with client (pstg\$0.49, copies 3)	0.20
04.07.16	Communication with court re: appeal	0.10
04.07.16	Enter appearance (EM)	0.10
04.25.16	Review BVA decision served upon CAVC (EM)	0.10
06.06.16	Review appearance of opposing counsel (EM)	0.10
06.06.16	Review RBA notice (EM)	0.10
06.14.16	Rule 10 RBA review	3.20
06.27.16	File Rule 10 RBA response (EM)	0.10
06.27.16	Review notice to file Appellant's Brief (EM)	0.10
06.29.16	Review notice of briefing conference (EM)	0.10
07.07.16	Review RBA and take notes (R. 1-1007) (EM)	4.30
07.08.16	Review RBA and take notes (R. 1008-2002) (EM)	4.10
07.11.16	Review RBA and take notes (R. 2002-2492) (EM)	1.90
07.11.16	Legal research: VA adoption of DSM-5 (EM)	1.50
07.12.16	Legal Research: Inextricably intertwined extrasched rate (EM)	1.20
07.12.16	Draft pre-briefing memorandum (GAF scores) (EM)	2.10
07.12.16	Draft pre-briefing memorandum (extrasched) (EM)	0.80
07.14.16	Serve pre-briefing memorandum/file cert. of service (EM)	0.20
07.28.16	Briefing conference held (EM)	0.40
07.28.16	Email conference summary to supervising partner (EM)	0.30
07.28.16	Call Veteran to explain case status (EM)	0.20
07.28.16	Email opposing counsel, re: position on extension (EM)	0.10
08.11.16	Legal research: Medical treatise evidence (EM)	2.70
08.15.16	Draft Brief (GAF scores) (EM)	3.50
08.15.16	Draft Brief (extraschedular rating) (EM)	0.50
08.16.16	Draft Brief (summary/statement of facts/conclusion) (EM)	1.50

08.26.16	Draft cover/tables (KT)	1.00
08.29.16	Final review of brief draft (EM)	0.50
08.29.16	File principal brief (EM)	0.10
10.27.16	Review and take notes on Appellee's brief (EM)	1.90
11.07.16	Draft reply brief: GAF scores (EM)	2.70
11.09.16	Draft reply brief: Extraschedular ratings (EM)	2.00
11.09.16	Prepare reply cover and tables (EM)	0.50
11.09.16	File reply brief (EM)	0.10
11.15.16	Review notice of ROP (EM)	0.10
11.22.16	Review ROP (CY)	0.40
11.28.16	File response to ROP (EM)	0.10
11.29.16	Review assignment to Judge Greenberg (EM)	0.10
01.31.17	Review <i>Golden I</i> and take notes (EM)	0.80
02.21.17	Skim Secretary's motion for recon (EM)	0.50
04.19.17	Review <i>Golden II</i> , take notes (EM)	2.60
04.25.17	Review Secretary's motion for recon, take notes (EM)	1.20
04.25.17	Legal research: Application of DC 9411 criteria (EM)	2.20
04.25.17	Draft motion for recon (misapplication of DC 9411) (EM)	3.10
04.25.17	Draft motion for recon (extraschedular rating) (EM)	1.10
04.28.17	Incorporate partner's feedback on draft recon motion (EM)	0.70
05.10.17	Final revisions to draft motion (EM)	0.50
07.18.17	Review <i>Golden III</i> , take notes (EM)	1.00
07.27.17	Review Secretary's 2 nd motion for recon, take notes (EM)	1.60
08.01.17	Draft 2 nd motion for recon (legal questions unresolved) (EM)	3.00
08.02.17	Revision/edits to 2 nd motion for recon (EM)	0.50
08.07.17	Further edits to 2 nd motion for recon (EM)	0.50
08.08.17	Final review of 2 nd motion for recon (EM)	0.30
10.10.17	Review order for panel decision (EM)	0.10
10.12.17	Review order for supplemental briefing, take notes (EM)	0.20
10.27.17	Legal research: Use of GAF and treatise evidence (EM)	2.30
10.27.17	Draft supplemental brief: Consider GAF scores (EM)	0.50
10.27.17	Draft supplemental brief: GAF scores remain relevant (EM)	0.90
10.27.17	Draft supplemental brief: Board must weigh GAF scores (EM)	2.70
11.02.17	Meeting with partner, re: draft revisions (EM)	0.80
11.02.17	Review Secretary's supplemental brief; take notes (EM)	0.90
11.02.17	Incorporate partner edits, medical opinion discussion (EM)	2.20
11.03.17	File supplemental brief (EM)	0.10
11.03.17	Meeting with partner, re: next steps in case (EM)	0.50
12.11.17	Meeting with partner, re: next steps in case (EM)	0.50
01.04.18	Review email from partner (scheduling moot) (EM)	0.10
01.08.18	Review Secretary's Supplemental Authority; take notes (EM)	1.90

01.09.18	Legal research: Retroactive scope of agency regulations (EM)	3.70
01.09.18	Draft: Response to notice of supplemental authority (EM)	1.80
01.10.18	Email to partners: 38 CFR 3.321(b) and <i>Golden</i> (EM)	1.10
01.10.18	File response to notice of supplemental authority (EM)	0.10
01.10.18	Email response to notice of supp. authority to G7 atty (EM)	0.10
01.10.18	Prepare for oral argument: Review BVA decision, briefs, memorandum decisions; motions; take notes (EM)	2.00
01.11.18	File notice of CAFC petition <i>NOVA v. Shulkin</i> (EM)	0.20
01.11.18	Prepare for oral argument: Review BVA decision, briefs, memorandum decisions; motions; take notes (EM)	4.50
01.11.18	Prepare for oral argument: outline talking points (EM)	3.50
01.11.18	Prepare for oral argument: review outline, practice delivery (EM)	2.50
01.12.18	Moot court/feedback session (EM)	2.00
01.12.18	Review colleague feedback; assess fixes to argument (EM)	1.50
01.12.17	Discuss oral argument with partner (EM)	0.50
01.12.18	Revise oral argument outline/practice delivery (EM)	4.50
01.15.18	Revise oral argument outline/practice delivery (EM)	4.00
01.16.18	Review key cases cited in briefs/motions; take notes (EM)	5.30
01.16.18	Revise oral argument outline/practice delivery (EM)	4.00
01.17.18	Moot court/feedback session (EM)	2.00
01.17.18	Review colleague feedback; assess fixes to argument (EM)	1.30
01.17.18	Meet with partner to discuss oral argument (EM)	0.40
01.17.18	Email colleague to plan practice session (EM)	0.10
01.17.18	Practice oral argument with colleague (EM)	0.50
01.17.18	Revise oral argument outline/practice delivery (EM)	3.60
01.18.18	Final edit of oral argument outline (EM)	1.50
01.18.18	Final assembly of reference materials for oral argument (EM)	3.00
01.18.18	Review outline/practice delivery (EM)	2.00
01.19.18	Arrive at Court/pre-argument briefing from clerk (EM)	1.00
01.19.18	Oral argument (EM)	1.30
01.23.18	Review recording of oral argument (EM)	1.30
01.23.18	Draft notice of clarification to the Court (EM)	0.90
01.24.18	Incorporate partner feedback/edits on draft notice (EM)	0.60
01.24.18	File notice of clarification (EM)	0.10
02.23.18	Review panel decision (EM)	0.50
03.19.18	Review notice of judgment (EM)	0.10
05.21.18	Review notice of mandate (EM)	0.10
06.18.18	Prepare EAJA	3.00

Total: 140.40 hours @ \$196.96/hour = \$27793.58

Expenses:

Postage	0.98
Copies	1.75
Scan	2.00
Filing Fee	50.00

Total Expenses	\$ 54.73
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/s/ Jeany Mark
Jeany Mark