

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

LENARD W. GRAHAM,)	
Appellant,)	
)	
v.)	Docket No. 17-1519
)	
PETER O'ROURKE,)	
Acting Secretary of Veterans Affairs,)	
Appellee.)	

**APPELLANT'S APPLICATION FOR AN AWARD OF ATTORNEY'S 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), Appellant applies for an award of reasonable attorney's fees and expenses in the amount of **\$9,527.80**.

PROCEDURAL HISTORY

A timely Notice of Appeal of a March 1, 2017, Board Decision, was filed in this Court on May 22, 2017. Counsel for Appellant entered their appearances on June 28, 2017. The Secretary mailed the Record Before the Agency (RBA) to Appellant on July 20, 2017. On July 27, 2017, the Court granted Appellant's motion to extend time to review the RBA. The Summary of the Issues Memorandum was delivered to Secretary on October 18, 2017. The Rule 33 conference was held on November 1, 2017. Appellant filed his brief on December 1, 2017. After the Court granted an extension of time, the Secretary filed his brief on March 16, 2018.

On May 2, 2018, the Court ordered the parties to each submit a supplemental brief regarding a claimant's withdrawal of an issue on appeal at a hearing. On May 4, 2018, the Court scheduled oral argument for July 10, 2018, at 10:00 a.m. On May 30, 2018, Appellant submitted a supplemental brief as ordered by the Court. On June 1, 2018, the Secretary submitted a supplemental brief as ordered by the Court.

On June 11, 2018, the parties filed a Joint Motion for Partial Remand (JMPR). On June 20, 2018, the Court revoked its previous order that scheduled oral argument and granted the JMPR vacating and remanding the Board's decision with respect to its dismissal of Appellant's appeal for an initial compensable rating for scars to the left eye brow and inner upper lip.

THE APPELLANT IS A PREVAILING PARTY

A party prevails when he obtains success "on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing the suit." *Shala v. Schaefer*, 113 S. Ct. 2625, 2632 (1993). Appellant is a prevailing party because the Court vacated and remanded the Board's decision that dismissed Appellant's appeal for an initial compensable rating for scars to the left eye brow and inner upper lip. This Court-ordered relief triggered a "material alteration of the legal relationships of the parties necessary to permit an award of attorney's fees." *Buckhannon Bd. and Care Home, Inc. v. West Virginia Dep't of Health and Human Res.*, 121 S. Ct. 1835, 1840 (2001).

THE GOVERNMENT'S POSITION WAS NOT SUBSTANTIALLY JUSTIFIED

EAJA fees are warranted when the government's position is not substantially justified. The government's position must have a "reasonable basis both in law and fact" for it to be substantially justified. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The parties agreed that the Board erred when it failed to provide an adequate statement of reasons or bases for its determination that Appellant withdrew his appeal for an initial compensable rating for scars to the left eye brow and inner upper lip at his September 2016 Board hearing. (JMPR at 2). Specifically, the Board failed to provide any analysis as to whether Appellant explicitly, unambiguously, and with a full understanding of the consequences, withdrew his appeal for scars. (JMR at 3-4). On remand, the parties agreed that the Board should reassess whether Appellant fulfilled the necessary requirements for a valid verbal withdrawal of an appeal at a Board hearing. The Government's error had no basis in fact or in law, was not substantially justified, and became the basis on which the Court relied in its decision to vacate the Board's March 1, 2017, decision and to remand the matter for further adjudication.

EAJA FEES ARE WARRANTED IN THIS CASE

As an officer of the Court, undersigned Counsel hereby states that Appellant's net worth did not exceed \$2,000,000 at the time he filed his Notice of Appeal with this Court, nor did he own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7,000,000 and which it had more than 500 employees. See *Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996). Appellant is thus eligible to receive an award under 28 U.S.C. § 2412(d)(2)(B).

The claimed hourly rate is reasonable in light of the fact that Appellant was forced to retain Counsel to appeal a BVA decision which failed to comply with required procedure. No special circumstances, as defined by 28 U.S.C. § 2412(d)(1)(A), exist in this case which would make an attorney fees award unjust. This case was not one of first impression involving a good faith argument; nor did this case involve a new, more stringent requirement for adjudication.

For the equitable regular hourly rate, Counsel for Appellant utilized the fixed starting rate under the EAJA of \$125.00, plus the cost-of-living calculated pursuant to the CPI-U, the United States Department of Labor's Consumer Price Index, for:

1) Washington-Baltimore-D.C.-MD-VA as published by the Bureau of Labor Statistics, for second half 2017, such dates covering the period in which the majority of work on this appeal was completed. As of March 29, 1996, the CPI-U was 100; for second half 2017, it was 159.738. (Exhibit 2). It therefore increased by ~60%. Applying this increase to the \$125.00 hourly rate provided by EAJA, the current hourly rate for Harold Hoffman is \$200.00.

2) South Urban Consumers as published by the Bureau of Labor Statistics, for second half 2017, such dates covering the period in which the majority of work on this appeal was completed. As of March 29, 1996, the CPI-U was 152.4; for second half 2017, it was 238.487. (Exhibit 4). It therefore increased by ~56%. Applying this increase to the \$125.00 hourly rate provided by EAJA, the current hourly rate for Meghan Gentile and Evan Snipes is \$196.00.

I certify that I have (1) reviewed the combined billing statement and am satisfied that it accurately reflects the work performed by all representatives; and (2) considered and eliminated all time that is excessive or redundant. Attached is an itemized statement, broken down into detailed case tasks, all of which are inextricably intertwined to the preparation of the entire case. (Exhibit 1).

Appellant's attorneys worked together in reviewing strategy and arguments as well as editing each other's work to ensure good work product. The time billed for conversations between Appellant's attorneys is properly billed for each attorney because both attorneys' efforts are distinct and required to generate a well-argued and well-written product. Attorneys in all practices should confer and it is proper to bill for discussions involving strategy and argument. Likewise, all attorneys should have filings edited before submission. Improving, through conferring and editing, another attorney's work product is a billable event. There

is no time billed in this application for training or any other labor that is not specific to this appeal and unnecessary to producing the best product for the Appellant.

The total hours expended, after reductions are accounted for, were 44.3 (4.9 by Harold Hoffman; 0.7 by Meghan Gentile; 38.7 by Evan Snipes); the regular hourly rate is \$200.00, \$196.00, and \$196.00 respectively. Expenses totaled \$825.40 as detailed in Exhibit 1. Thus, the total amount of fees, costs, and expenses **\$9,527.80**.

WHEREFORE, Appellant respectfully requests that the U.S. Court of Appeals for Veterans Claims award his attorney fees, costs, and other expenses, in the total amount of **9,527.80**.

Dated this 13th day of July, 2018.

Submitted,

/s/ Evan Snipes

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Suite 804
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202-677-0363
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Exhibit 1**ITEMIZED VETERANS LEGAL ADVOCACY GROUP STAFF HOURS FOR 17-1519**

Date	By	Description of Work	Time Spent	Time Billed
06/20/2017	HHH	Agree to representation, discuss appeal, draft and send paperwork	0.6	0.6
06/28/2017	HHH	Enter notice of appearance with fee agreement	0.2	0.2
06/28/2017	MG	Enter notice of appearance	0.1	0.1
06/28/2017	HHH	Notify client that appearance is entered, send Consent to Release (CTR)	0.3	0.3
06/28/2017	HHH	Create files, add to logs and calendars	0.3	0.3
07/20/2017	MG	Phone call w/ client re: CTR	0.3	0.3
07/26/2017	MG	Emailed OGC re: extension to review RBA, drafted extension	0.3	0.0
07/27/2017	MG	Filed Extension to review RBA	0.1	0.1
10/03/2017	ETS	Enter Notice of Appearance	0.1	0.1
10/12/2017	ETS	Review Board Decision; develop preliminary arguments	0.8	0.8
10/13/2017	MG	Phone call w/ client re: case status	0.1	0.1
10/15/2017	ETS	Review RBA (pgs. 21-1009); take notes	3.0	3.0
10/15/2017	ETS	Review RBA (pgs. 1010-1890); take notes	1.6	1.6
10/17/2017	ETS	Research Withdrawal of claim at Hearing	0.4	0.4
10/17/2017	ETS	Draft SOI – Facts	0.5	0.5
10/17/2017	ETS	Draft SOI – Argument I	0.8	0.8
10/17/2017	ETS	Draft SOI – Argument II	0.4	0.4
10/17/2017	ETS	Edit SOI	0.5	0.5
10/18/2017	ETS	Phone call with client; update case status; discuss strategy	0.6	0.6
10/18/2017	ETS	Submit SOI through email; Draft/Submit Certificate of Service	0.4	0.4
11/01/2017	ETS	Prepare for Conference	0.5	0.5
11/01/2017	ETS	Conference Held; Update Notes;	0.4	0.4
11/15/2017	ETS	Phone call w/ client; case status update	0.2	0.2

11/28/2017	ETS	Review SOI, RBA notes, Draft Appellant Brief Outline	0.6	0.6
11/28/2017	ETS	Draft Preliminary Statement and History and Facts	0.7	0.7
11/28/2017	ETS	Draft Board Decision	0.4	0.4
11/28/2017	ETS	Draft Argument II	1.6	1.6
11/29/2017	ETS	Draft Argument III	1.1	1.1
11/29/2017	ETS	Draft Summary of Argument	0.5	0.5
11/29/2017	ETS	Draft Conclusion	0.3	0.3
11/29/2017	ETS	Draft Issues Presented	0.5	0.5
11/29/2017	ETS	Draft Tables	0.7	0.7
11/30/2017	ETS	Edit & Revise Entire Brief	1.0	1.0
11/30/2017	ETS	Edited Appellant Brief; added reversal argument case cites; made comments	1.3	1.3
12/01/2017	ETS	Incorporate MG Edits	0.4	0.4
12/01/2017	ETS	Final Review of Brief, paginate tables, submit	0.5	0.5
01/04/2018	ETS	Phone Call w/ client; update case status	0.3	0.3
01/10/2018	ETS	Draft and mail letter to client; update case status, discuss case strategy	0.8	0.8
03/26/2018	ETS	Review Secretary's Brief; Determine need to submit a reply brief	1.3	1.3
03/27/2018	ETS	Phone call with client; update case status	0.5	0.5
03/27/2018	ETS	Draft and Submit notice to not reply	0.2	0.2
04/10/2018	HHH	Review ROP; Draft and submit response to ROP	0.5	0.5
04/19/2018	ETS	Phone call w/ client; update case status	0.2	0.2
05/02/2018	ETS	Review Court's Order for the parties to provide supplemental briefing	0.2	0.2
05/04/2018	ETS	Review Court's Order regarding scheduling Oral Argument	0.1	0.1
05/25/2018	ETS	Research Withdrawal of Claims at a hearing; review <i>Acree</i> ; develop supplemental brief argument	1.5	1.5
05/25/2018	ETS	Phone call w/ HHH re: case strategy	0.5	0.5
05/25/2018	HHH	Phone call w/ ETS re: case strategy	0.5	0.5
05/28/2018	ETS	Email OGC re: staying the case pending <i>Acree</i>	0.2	0.2
05/28/2018	ETS	Format and outline supplemental brief	0.3	0.3

05/28/2018	ETS	Draft of supplemental brief	2.2	2.2
05/29/2018	ETS	Listen to phone message left by OGC; return phone call regarding position on staying case	0.1	0.1
05/29/2018	ETS	Complete draft of supplemental brief	1.9	1.9
05/29/2018	ETS	Edit & Revise supplemental brief	1.1	1.1
05/30/2018	ETS	Phone call w/ HHH re: case strategy and whether to request a stay	0.4	0.4
05/30/2018	HHH	Phone call w/ ETS re: case strategy and whether to request a stay	0.4	0.4
05/30/2018	HHH	Edit supplemental brief; comment, make corrections	0.9	0.9
05/30/2018	HHH	Email OGC regarding our decision to not request a stay	0.2	0.2
05/30/2018	ETS	Incorporate HHH edits; submit supplemental brief	0.6	0.6
06/04/2018	ETS	Review Secretary's supplemental brief	1.0	1.0
06/05/2018	ETS	Review Secretary's Rule 30(b) notice regarding <i>Acree</i> decision	0.1	0.1
06/05/2018	ETS	Read the <i>Acree</i> decision; take notes	0.7	0.7
06/05/2018	ETS	Email correspondence with HHH, MG re: <i>Acree</i> decision and impact on our case	0.4	0.4
06/05/2018	HHH	Email correspondence with ETS, MG re: <i>Acree</i> decision and impact on our case	0.2	0.2
06/05/2018	MG	Email correspondence with ETS, HHH re: <i>Acree</i> decision and impact on our case	0.1	0.1
06/07/2018	ETS	Phone Call w/ OGC re: JMPR offer as a result of <i>Acree</i>	0.1	0.1
06/07/2018	ETS	Phone call w/ HHH re: JMPR offer	0.3	0.3
06/07/2018	HHH	Phone call w/ ETS re: JMPR offer	0.3	0.3
06/07/2018	ETS	Phone call w/ OGC re: JMPR	0.1	0.1
06/08/2018	ETS	Phone call w/ client re: JMPR	0.4	0.4
06/08/2018	ETS	Review JMPR draft	0.7	0.7
06/10/2018	HHH	Review JMPR draft	0.4	0
06/11/2018	ETS	Sign and email signature acceptance of JMPR to OGC	0.2	0.2
06/11/2018	ETS	Review JMPR filed with Court	0.1	0.1
06/20/2018	ETS	Review Court's order granting JMPR and cancelling oral argument	0.1	0.1
07/12/2018	ETS	Tabulated EAJA Hours	1.1	1.1
07/12/2018	ETS	Draft procedural history section of EAJA	0.5	0.5
07/12/2018	ETS	Draft prevailing party section of EAJA	0.1	0.1

07/12/2018	ETS	Draft substantially justified section of EAJA	0.3	0.3
07/13/2018	HHH	Edited EAJA app.	0.5	0.5
07/13/2018	ETS	Incorporate HHH edits, filed EAJA	0.3	0.3
TOTAL			45.0	44.3

Total

BY	RATE	RATE	TIME SPENT	TIME BILLED	TOTAL
Harold Hoffman	Attorney, Washington DC	\$200.00	5.3	4.9	\$980.00
Meghan Gentile	Attorney, Albany, GA	\$196.00	1.0	0.7	\$137.20
Evan Snipes	Attorney, Montgomery, AL	\$196.00	38.7	38.7	7,585.20
					\$8,702.40

Expenses

Expense	Amount	TOTAL
Westlaw	1	\$48.00
postage, paper, copies	1	\$23.00
Filing Fee	1	\$50.00
Flight from Albany, GA to Washington D.C. due to Oral Argument scheduled for July 10, 2018 (Purchased May 25, 2018).	1	\$704.40
		\$825.40

I certify that I have (1) reviewed the combined billing statement and am satisfied that it accurately reflects the work performed by all representatives; and (2) considered and eliminated all time that is excessive or redundant. Attached is an

itemized statement, broken down into detailed case tasks, all of which are inextricably intertwined to the preparation of the entire case.

Submitted,

/s/ Evan T. Snipes

Evan T. Snipes
evansnipes@vetlag.org
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Exhibit 2

Consumer Price Index - All Urban Consumers

Area: Washington-Baltimore, DC-MD-VA-WV
Item: All items
Base Period: 1982-84=100
Years: 1996 to 2017

Year	HALF1	HALF2
1996		100.0
1997	100.6	101.0
1998	101.5	102.7
1999	103.4	105.1
2000	106.6	108.6
2001	109.7	111.1
2002	112.1	113.9
2003	115.6	116.9
2004	118.3	120.7
2005	122.8	125.8
2006	127.7	130.0
2007	132.000	134.927
2008	138.490	140.509
2009	138.777	140.850
2010	141.700	142.736
2011	146.259	147.691
2012	149.603	150.822
2013	151.798	153.203
2014	154.626	155.069
2015	154.886	155.820
2016	156.770	157.591
2017	158.666	159.738

Consumer Price Index - All Urban Consumers

Area: South urban
Item: All items
Base Period: 1982-84=100
Years: 1996 to 2017

Year	HALF1	HALF2
1996	152.6	154.6
1997	156.4	157.4
1998	158.3	159.6
1999	160.9	163.1
2000	166.1	168.3
2001	170.9	171.4
2002	172.3	174.3
2003	176.7	177.8
2004	180.5	183.1
2005	186.1	190.5
2006	193.8	195.6
2007	198.495	202.226
2008	207.777	209.585
2009	206.483	209.206
2010	210.913	211.764
2011	217.249	219.987
2012	222.708	223.776
2013	226.012	227.429
2014	230.302	230.802
2015	229.501	230.793
2016	231.469	234.204
2017	236.424	238.487

Date of Purchase: May 25, 2018

Flight Receipt for Albany, GA to Washington-Reagan National, DC

PASSENGER INFORMATION

MEGHAN GENTILE
SkyMiles Number: 9115707573

Confirmation Number: HCDTNJ
Ticket Number: 0062326985537

FLIGHT INFORMATION

Date and Flight	Status	Class	Seat/Cabin
ABY>ATL Sun 08Jul2018 OO 4328	OPEN	W	
ATL>DCA Sun 08Jul2018 DL 2594	OPEN	W	13E
DCA>ATL Thu 12Jul2018 DL 2595	OPEN	W	12B
ATL>ABY Thu 12Jul2018 OO 4602	OPEN	W	

DETAILED CHARGES

Air Transportation Charges

Base Fare: \$620.46 USD

Taxes, Fees & Charges:

United States - September 11th Security Fee(Passenger
Civil Aviation Security Service Fee) (AY) \$11.20 USD
United States - Transportation Tax (US) \$46.54 USD
United States - Passenger Facility Charge (XF) \$18.00 USD
United States - Flight Segment Tax (ZP) \$8.20 USD

Total Price: \$704.40 USD

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KEY OF TERMS

- Arrival date different than departure date

F - Food available for purchase

** - Check-in required
***- Multiple meals
*\$ - Multiple seats
AR - Arrives
B - Breakfast
C - Bagels / Beverages
D - Dinner

L - Lunch
LV - Departs
M - Movie
R - Refreshments, complimentary
S - Snack
T - Cold meal
V - Snacks for sale

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