

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Regina M. Pirkel,

Appellant,

v.

**Robert L. Wilkie,
Secretary of Veterans Affairs,**

Appellee.

U.S.C.A.V.C. Case No. 14-4303

APPELLANT'S APPLICATION FOR AWARD OF ATTORNEY'S FEES & EXPENSES

Appellant, Mrs. Regina M. Pirkel, hereby applies to this honorable Court for an award of his attorney's fees and expenses in the amount of \$ 24,511.92. This application is made pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and this Court's Rule 39. Mrs. Pirkel has expressly authorized this application.

I. Procedural History.

On September 23, 2014, the Board of Veterans' Appeals dismissed Mr. Pirkel's appeal of the VA's implementation of the Board of Veterans' Appeals's August 14, 2006 decision for the second time following appeal to the Federal Circuit and remand from this Court. Ms. Pirkel during the pendency of his appeal died and Mrs. Pirkel was substituted as appellant. Mrs. Pirkel filed a timely notice of appeal to this Court on

December 17, 2014. The lawyer (with respect to whose fees this application is concerned) entered his appearance on December 17, 2014.

This case was litigated. It was necessary for Mrs. Pirkl to (A) examine, inventory, and analyze the claim file; (B) review and inventory the Secretary's designation and (C) counter-designate additional contents of the record on appeal, (D) inspect and inventory the record when it was filed, (E) file an opening brief, (F) reviewed for response the appellee's brief, and (G) file a reply brief. As well as an appeal to the United States Court of Appeals for the Federal Circuit. This Court's dispositive order was dated December 26, 2018, about 60 months after counsel entered his appearance.

This application is timely under 28 U.S.C. § 2412(d)(1)(B).

II. Averments.

Mrs. Pirkl avers—

- (1) This matter is a civil action;
- (2) This action is against an agency of the United States,
namely the Department of Veterans Affairs;
- (3) This matter is not in the nature of tort;
- (4) This matter sought judicial review of an agency
action, namely the prior disposition of Mrs. Pirkl's
appeal to the Board of Veterans' Appeals;

- (5) This Court has jurisdiction over the underlying appeal under 38 U.S.C. § 7252;
- (6) Mrs. Pirkel is a “party” to this action within the meaning of 28 U.S.C. § 2412(d)(2)(B);
- (7) Mrs. Pirkel is a “prevailing party” in this matter within the meaning of 28 U.S.C. § 2412(d)(1)(a);
- (8) Mrs. Pirkel is not the United States;
- (9) Mrs. Pirkel is eligible to receive the award sought;
- (10) The position of the Secretary was not substantially justified; and
- (11) There are no special circumstances in this case which make such an award unjust.

Mrs. Pirkel submits below an itemized statement of the fees and expenses for which she applies. The itemization shows the rates at which the fees and (where applicable) the expenses were calculated. Accordingly, Mrs. Pirkel contends that he is entitled to an award of attorney’s fees and expenses in this matter in the total amount itemized.

III. Argument.

The assessment of the “jurisdictional adequacy” of a petition for EAJA fees is controlled by the factors summarized and applied in, *e.g.*, *Cullens v. Gober*, 14 Vet. App.

234, 237 (2001) (*en banc*).

A. “Court”

This Court is a court authorized to award attorney’s fees and expenses as sought herein. 28 U.S.C. § 2412(d)(2)(F). This Court has exclusive jurisdiction of this matter. 38 U.S.C. § 7252(a).

B. Eligibility: “Party”

Mrs. Pirkel is a party eligible to receive an award of fees and expenses because his net worth does not exceed \$2 million. *See* 28 U.S.C. § 2412(d)(2)(B). Mrs. Pirkel’s declaration establishes this allegation. It is annexed to this application as Exhibit 1.

Mrs. Pirkel’s eligibility may also be inferred from this Court’s waiver of its filing fee. *See Owens v. Brown*, 10 Vet. App. 65 (1997) (93-1106); *Bazalo v. Brown*, 9 Vet. App. 304 (1996) (*en banc*) (93-660); *Jensen v. Brown*, 8 Vet. App. 140 (1996) (*per curiam* order) (90-661).

C. “Prevailing”

To be a “prevailing party” within the meaning of the statute, a party need only have succeeded “on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.” *Texas Teachers Association v. Garland Independent School District*, 489 U.S. 782, 791-92, 109A S.Ct. 1486, 1493, 103 L.Ed.2d 866, 876 (1989)).

The “prevailing party” requirement is satisfied by a remand. *Stillwell v. Brown*, 6 Vet. App. 291, 300 (1994). *See Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360 (Fed. Cir. 2003) (remand because of alleged error and court does not retain jurisdiction). Mrs. Pirkel is a “prevailing party” entitled to an award of fees and expenses because this Court vacated the Board’s decision to dismiss Mr. Pirkel’s appeal to consider the effect of 38 C.F.R. § 3.170 (1949) or its successor regulations on the December 1956 and April 1966 reductions.

This Court sharpened the criteria for “prevailingness” in *Sumner v. Principi*, 15 Vet. App. 256, 260-61 (2001) (*en banc*). “Prevailingness” now depends on the presence of either a finding by the Court or a concession by the Secretary of “administrative error.” Mrs. Pirkel relies upon the following to satisfy the *Sumner* criteria:

1. Mrs. Pirkel argued in her opening brief that the Board’s dismissal of Mr. Pirkel’s appeal was not made in compliance with the instructions of the Federal Circuit. Appellant’s Opening Brief, pp. 4-11. Mrs. Pirkel also argued in her opening brief that the Board erred by relying upon the holding in *Reizenstein*. Appellant’s Opening Brief, pp. 11-14.
2. This Court affirmed the Board’s dismissal of Mrs. Pirkel’s appeal and that decision was appealed to the Federal Circuit which reversed this Court judgment dismissing Mrs. Pirkel’s appeal.

3. The final dispositive order, Exhibit A, reports at p. 1 noted that this Court's judgment had been reversed and ordered that the Board decision dated September 23, 2014 was vacated and this matter was remanded for further proceedings consistent with the Federal Circuit's decision.

Order, p. 1.

This statement in the memorandum decision established that the Court "recognized" and entered findings as to the "administrative errors" on which the remand was predicated. Thus, this Court's December 26, 2018 Order in Mrs. Pirkl's case established that the remand of her appeal was predicated on a finding of administrative error.

D. The Position of the Secretary Was Not Substantially Justified

To defeat this application for fees and expenses the Secretary must show that the Government's position was "substantially justified." *Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994) (92-205), *appeal dismissed*, 46 F.3d 1111 (Fed. Cir. 1995) (94-7090). *See* 28 U.S.C. § 2412(d)(1)(B). The Government must show its position to have had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 563-68, 108B S.Ct. 2541, 2549-51, 101 L.Ed.2d. 503-506 (1988); *Beta Systems v. United*

States, 866 F.2d 1404, 1406 (Fed. Cir. 1989). “Substantial justification” is in the nature of an affirmative defense: If the Secretary wishes to have its benefit, he must carry the burden of proof on the issue. *Clemmons v. West*, 12 Vet. App. 245, 246 (1999) (97-2138), *appeal dismissed*, 206 F.3d 1401 (Fed. Cir. 2000) (99-7107), *rehrg denied*, _ F.3d _ (May 2, 2000). It is sufficient for Mrs. Pirkel simply to aver this element. However, it should be noted that the VA’s position was not substantially justified at either the administrative or the litigation levels.

E. Itemized Statement of Fees and Expenses

Set out below are the required declaration of the lawyer, and an itemized statement of the services rendered and the fees and expenses for which Mrs. Pirkel seeks compensation. *See* 28 U.S.C. § 2412(d)(1)(B).

Attorney Time, Costs and Other Expenses

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
9/29/14	Received on 9/29/14 the Board 9/22/14 decision and made an initial review of Board’s decision to evaluate whether an appeal should be filed.	1.00	
10/28/14	Made a more thorough review of the Board’s decision, identifying possible bases for an appeal. This review included an examination of prior decisions on the VA and the Board in this case as well as consideration of current decisions of this court and the Federal Circuit.	2.00	
12/3/14	Letter to claimant indicating a willingness to proceed with and appeal and enclosing the required initial paperwork needed to be signed to initiate the appeal.	n/c	P

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
12/12/14	Received and review paperwork from veteran	n/c	
12/17/14	Reviewed the documentation prepared for the filing of the appeal; E-filed notice of appeal; notice of appearance, motion to waive filing fee; fee agreement; filed BVA/VARO fee agreement; ltr. to VAGC w/consent form; ltr. to client w/copies	1.00	P
2/21/15	Based on the reviews made of the Board's decision and the potential errors identified and the possible issues to be argued, I prepared written instructions to the paralegal for preparation of annotated record citations needed for both procedural and evidentiary records required in this case. The paralegal based on these instructions reviews the RBA contents of 2409 pages, organizes relevant records in chronological order, compares the records in the RBA with records submitted by the claimant or his or her representative, also to previously obtained copies of records in either hard copy or electronic records and the makes verbatim annotations of those records organizing those annotations in chronological order for review by the attorney.	2.00	
3/5/15	Paralegal reviewed pages 1 through 1,204 in the RBA, organizing the relevant procedural events in chronological order.	1.00*	
	Paralegal compared pages 1 through 1,204 in the RBA, with records submitted by the claimant or his or her representative as well as with previously obtained copies of records in either hard copy or electronic records.	1.00*	
	Paralegal made verbatim annotations of pages 1 through 1,204 in the RBA and as well as any additional relevant procedural events not found in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
3/6/15	Paralegal reviewed pages 1,205 through 2,409 in the RBA, organizing the relevant procedural events in chronological order.	1.00*	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
	Paralegal compared pages 1,205 through 2,409 in the RBA, with records submitted by the claimant or his or her representative as well as with previously obtained copies of records in either hard copy or electronic records.	1.00*	
	Paralegal made verbatim annotations of pages 1,250 through 2,409 in the RBA as well as any additional relevant procedural events not found in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
4/17/15	Attorney's review of the record citations and annotations prepared by the paralegal to confirm and Required additional annotations.	1.50	
5/7/15	Began preparation of the CLS memo by identifying and framing the issues to be presented in the memo based on the prior reviews of the Board decision and the annotations prepared by the paralegal.	2.00	
5/8/15	Drafted statement of facts and relevant proceedings.	2.00	
5/11/15	Wrote the argument sections of the memo.	2.00	
5/12/15	E-mailed pre-briefing conference memo.	n/c	
6/1/15	Prepared for and participated in CLS Pre-Briefing Conference.	2.00	
7/28/15	Brief prep. - research - regs., caselaw, statutes; draft issues and statement of the case	4.00	
7/29/15	Brief prep. - draft of Argument.	2.00	
7/30/15	Edit and refine Argument	2.00	
7/31/15	Completed final revisions to draft of brief	2.00	
8/5/15	Finalized brief for e-filing; cc: client	1.00	P
11/19/15	Rcv'd. and reviewed Appellee's Brief f. 11/18/15.	2.00	
1/6/16	Reply Brief prep. - draft of Argument.	2.00	
1/7/16	Edit and refine Argument	2.00	
1/8/16	Completed final revisions to draft of brief	2.00	
1/12/16	E-filed Reply Brief.	n/c	
7/27/16	Received and reviewed 7/25/16 Order submitting case to a panel for decision	n/c	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
2/2/17	Received and reviewed 2/01/17 PER CURIAM ORDER dissolving the panel and returning to single judge.		n/c
2/13/17	Rec'd e-notice dtd 2/10/17 Order for oral argument before a single judge to be held on Thursday, February 16, 2017, at 10:00 A.M. (ET) (9:00 A.M. CST) as follows: Appellant will present argument from the U.S. District Court for the District of Kansas, Frank Carlson Federal Building, Topeka, KS; the Secretary will present argument from the U.S. District Court for the District of Columbia, E. Barrett Prettyman U.S. Courthouse, Washington, D.C..	1.00	
2/13/17	Received and reviewed order directing the parties to discuss two issues: 1. In its opinion <i>Pirkl v. Shinseki</i> , 718 F.3d 1379 (Fed. Cir. 2013), the U.S. Court of Appeals for the Federal Circuit stated that there are some circumstances under which a finding of clear and unmistakable error in an earlier decision requires that a later decision be revisited. <i>See Pirkl</i> , 718 F.3d at 1384-85. Specifically, the parties should explain whether circumstances requiring such revisitation are present here. The parties should support their respective positions with citation to all relevant authority. The Court would appreciate submission of these citations without argument when convenient for the parties. AND FURTHER 2. Did the Board in the September 2014 decision on appeal properly consider and apply the Federal Circuit's decision in <i>Reizenstein v. Shinseki</i> , 583 F.3d 1331 (Fed. Cir. 2009)?	2.00	
2/14/17	Prepared for oral argument on issue one.	4.00	
2/15/17	Prepared for oral argument on issue two.	4.00	
2/16/17	Presented oral argument by remote presentation.	2.00	
3/9/17	Rec'd e-notice dtd 3/7/17 of CAVC Mem Dec. that the September 23, 2014, Board decision was AFFIRMED.		n/c

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
3/30/17	Analyzed Court decision for possible appeal to the Federal Circuit.	2.00	
4/7/17	Prepared and filed NOA to Fed. Cir.	1.00	
4/18/17	Prepared docketing statement.	1.00	
7/25/17	Brief prep. - research - regs., caselaw, statutes; draft issue and statement of the case	4.00	
7/26/17	Brief prep. - draft of Argument.	4.00	
7/27/17	Edit and refine Argument	4.00	
7/28/17	Completed final revisions to draft of brief	4.00	
8/4/17	Finalized brief for filing; cc: client	2.00	P
12/15/17	Rcv'd. and reviewed Appellee's Brief f. 12/13/17.	2.50	
2/15/18	First draft of reply brief prepared.	4.00	
2/16/18	Completed first draft Appellant's Reply Brief	4.00	
2/20/18	Editing of draft	2.50	
2/21/18	Worked on refining arguments.	2.50	
2/22/18	Made further edits and revisions.	6.00	
2/23/18	Made final edits.	.50	
2/26/18	Filed Reply Brief 2/23/18.	n/c	
7/24/18	Rcv'd. Order d. 7/20/18 setting oral arg. for 9/4/18. Sent Resp. to Oral Arg. Order.	n/c	
9/1/18	Preparation for oral argument.	4.00	
9/2/18	Preparation for oral argument.	4.00	
9/3/18	Travel to Washington D.C. for oral argument.	8.00	
9/4/18	Oral Argument at Federal Circuit.	4.00	
9/5/18	Return from Washington D.C.	8.00	
10/18/18	Rcv'd. and reviewed Opinion & Judgment dated 10/17/18 REVERSED and REMANDED.	n/c	
12/29/18	Prepared and filed EAJA Application; cc: client	1.00	P

*8 hours were performed by paralegal
and are billed at \$ 90.00 per hour = \$ 720.00
121.5 hours x \$ 188.55 per hour = \$ 22,908.83

Total Attorney Fee Requested: \$ 23,628.83

Expenses

UPS Expenses CAVC:	\$.00
Postage:	9.20
Copying Expenses CAVC: (61 x \$.25)	15.25
Travel Expenses Federal Circuit Arg:	340.00
Printing Expenses Federal Circuit:	
Brief	263.04
Appendix	94.56
<u>Reply Brief</u>	<u>161.04</u>
Total Expenses:	\$ 883.09

Total attorney fee & expenses: \$ 24,511.92

According to the U.S. Department of Labor Bureau of Labor Statistics, the National Consumer Price Index for all Urban Consumers in the Midwest Region, as of March 29, 1996, the base year CPI-U was 151.7; as of March 2017 it was 228.824, a 50.84 % increase. Applying this increase to the \$ 125.00 hourly rate provided by the Equal Access to Justice Act, the current hourly rate would be \$ 188.55.

Applying the rate computed above to the total time expended by counsel for Appellant, Appellant seeks a total attorney fee of \$ 23,628.83.

The lawyer has reviewed the itemization to correctly categorize each entry. The lawyer has also reviewed the itemization to exercise “billing judgment” by (A) determining whether the activity or expense might be an overhead expense or, for any other reason, not properly billable and by (B) assigning to each task a rate appropriate to the work involved, using the three rates described above. However,

the lawyer will be grateful to have brought to his attention any mistakes which might remain.

For costs and expenses expended by counsel for Appellant, Appellant seeks a total reimbursement of \$ 883.09, for a total attorney fee, costs, and expenses award of \$ 24,511.92.

I declare and state under penalty of perjury under the laws of the United States of America that the information set forth in this declaration is true and correct.

/s/Kenneth M. Carpenter
Kenneth M. Carpenter
CARPENTER, CHARTERED
Counsel for Appellant

IV. Prayer for Relief

Mrs. Pirkel respectfully moves for an order awarding to appellant his attorney's fees and expenses as set forth herein.

This application for attorney's fees and expenses is—

Respectfully submitted for Mrs. Pirkel by:

/s/Kenneth M. Carpenter
KENNETH M. CARPENTER
Counsel for Appellant
1525 Southwest Topeka Boulevard
Post Office Box 2099
Topeka, Kansas 66601

Submitted by e-filing submission
On January 18, 2019.

Exhibit 1

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Regina M. Pirkel, Appellant, v. Robert A. McDonald, Secretary of Veterans Affairs, Appellee.	U.S.C.A.V.C. Case No.: 14-4303
---	---------------------------------------

DECLARATION OF NET WORTH

Appellant, Regina M. Pirkel, hereby declares and states:

1. I am the appellant named in this appeal. This declaration is based upon my personal knowledge.
2. At the time this civil action was filed, my personal net worth did not exceed \$2,000,000 (two million dollars); nor did I own any unincorporated business, partnership, corporation, association, unit of local government, or organization, the net worth of which exceeded \$7,000,000 (seven million dollars) and which had more than 500 employees.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: December 17, 20 14.

Executed at: St. Joseph, MN



Regina M. Pirkel

EXHIBIT 1