

TRAVIS MAY,

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Appellant,

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vs.

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ROBERT L. WILKIE,

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)

Secretary of Veterans Affairs,

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)

)

Appellee.

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Vet. App. No. 18-437

Comes now, Appellant Travis May, through counsel, and files this motion for an award of reasonable attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (2012).

Pursuant to 28 U.S.C. § 2412(d), appellant seeks reasonable attorney's fees in the amount of \$4324.42 based on an expenditure of 22.3 hours of time billed at the rate of \$193.92 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 \$4324.42.

The prerequisites for an award of attorneys and expenses pursuant to 28 § 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 attorney's fees and expenses pursuant to EAJA in this case. All of the provisions and prerequisites under the statute and governing case law have been met.

WHEREFORE, Appellant respectfully requests the Court award attorney's fees in the amount of \$4324.42.

Respectfully submitted,

Travis May, Appellant

By: /s/Joseph J. Donnelly
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BILLING RECORDS & REPORT [Attorney Time – Hours]

Re: Travis May, Appellant

USCAVC Case No. 18-437

Preface:

On February 13, 2019, this Court issued a Memorandum Decision to remand the Board's October 10, 2017, Board of Veterans' Appeals decision that denied service-connection for a right knee disability. The Court found that the Board erred when it failed to provide an adequate statement of reasons or bases for its decision.

DATE	SERVICES PERFORMED (By Perry Pirsch, unless otherwise indicated.)	HRS
11/04/17	Review Board decision, check docket, and review file docs for determination whether to appeal.	0.8
01/22/18	Receive forms from client, reviewed for filing.	0.4
01/24/18	Appearance of Perry A. Pirsch, Joseph J. Donnelly, and John S. Berry for appellant. Filed notice of appeal, etc.	0.3
01/24/18	Notice of Docketing for BVA's decision w/in 30 days; RBA w/in 60 days.	0.1
02/16/18	Board Decision transmittal; copy of Board decision.	0.2
03/16/18	Entry of appearance of Edward V. Cassidy, Jr. for appellee.	0.1
03/26/18	RBA Notice. Calendar review.	0.1
03/30/18	Entry of appearance of Jonathan G. Scruggs for appellee.	0.1
04/17/18	Notice to file Appellant's Brief.	0.1
05/03/18	Review Court order Rule 33 conference, update calendar.	0.2
05/15/18	RBA review 1-1200 (4005 pages).	3.0
05/15/18	RBA review 1201-2400 (4005 pages).	3.0
05/16/18	RBA review 2401-4005 (4005 pages).	3.0
05/16/18	Draft SOI.	3.0
05/17/18	Rule 33 cert of service.	0.1
05/31/18	JD prepare for Rule 33 conference, review BVA decision, review SOI, conference held. Finish conference memo. Email attorneys, update calendar.	1.0
06/28/18	Compose appellant brief, composed index, table of contents.	3.0
07/02/18	Filed appellant brief.	0.1

08/01/18	Appearance of Joseph J. Donnelly as lead counsel for appellant; Notice of Perry A. Pirsch to withdraw as counsel.	0.2
08/01/18	Appearance of Stephani Bennett for appellant.	0.1
08/24/18	JD email with OGC re: motion for extension to file reply brief.	0.1
08/24/18	JD clerk stamp order granting motion for extension to file reply brief.	0.1
10/15/18	JD review brief, Secretary brief, no reply brief.	1.0
11/06/18	JD review ROP.	0.3
11/21/18	JD review assigned case to judge Schoelen.	0.1
01/31/19	JD review reassigned case to judge Allen.	0.1
02/13/19	JD review memo decision and summarize. Update EAJA docket and calendar.	0.5
03/01/19	JD reviewed Judgement.	0.1
05/07/19	JD reviewed Mandate.	0.1
06/05/19	JD review docket, emails, timesheet documents, activity log and correspondence. Prepare EAJA application.	1.0

Total Hours: 22.3 hours

Issues / Claims Being Remanded:

On February 13, 2019, this Court issued a Memorandum Decision to remand the Board's October 10, 2017, Board of Veterans' Appeals decision that denied service-connection for a right knee disability. The Court found that the Board erred when it failed to provide an adequate statement of reasons or bases for its decision.

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 issues 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 July 2018 – the date the appellant's brief was filed.

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 235.346. 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/regions/midwest/data/xgtables/ro5xq01.htm>

D. Hourly Rate For This Appeal:

The statutory formula results in the following calculations.

\$125.00	(Base Amount)
	(multiplied by)
\$235.346	(Midwest CPI in June 2018 midpoint date)
	(divided by)
\$151.70	(Midwest CPI in March 1996)
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\$193.92	(Adjusted Rate for attorney time)

CONCLUSION

Applying the statutory rate of \$193.92 to the total time expended as detailed above results in \$4324.42 – the amount sought herein.

Respectfully submitted,

Travis May, Appellant

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Attorney for Appellant

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:

Jonathan G. Scruggs, Esq.
Office of the General Counsel
Department of Veterans Affairs
810 Vermont Ave., NW
Washington DC 20420

On June 5, 2019.

By: /s/ Joseph J. Donnelly
Joseph J. Donnelly, Esq.