

# UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

**JOHN S. WEBB,**

Appellant

v.

**ROBERT L. WILKIE,**  
Secretary of Veterans Affairs,

Appellee

:

VA App. No. 18-294

:

:

***APPELLANT'S APPLICATION  
FOR ATTORNEY'S FEES and  
COSTS PURSUANT TO THE  
EQUAL ACCESS TO JUSTICE  
ACT AND MEMORANDUM IN  
SUPPORT***

:

:

## ***APPLICATION***

Appellant moves for \$20,937.96 in attorney's fees and \$450.00 in costs, for a total of \$21,387.96, pursuant to 28 U.S.C. §2412(d)(1)(A).

Appellant was a prevailing party, appellee's position in this case was not substantially justified, and the appellant's net worth at the time the appeal was filed did not exceed \$2 million. *See* attached affidavit of appellant. An itemized statement detailing the time spent and fees sought on the case is attached. Appellant meets all the criteria under the statute, and the Court should award fees as requested.

## ***MEMORANDUM OF LAW IN SUPPORT***

To obtain an award of fees under the Equal Access to Justice Act, appellant must be a prevailing party, show he is eligible for the award, and allege that the position of the government was not substantially justified, *Bazalo v. Brown*, 9 Vet. App. 304 (1996). Appellant meets all three criteria.

A "prevailing party" is one who obtained success "on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit," *Shalala v. Schaefer*, 113 S. Ct. 2625, 2632 (1993). In a Stipulated Agreement attached to a Joint Motion to Terminate the Appeal filed June 6, 2019, the Secretary agreed to award appellant service connection for the residuals of a right testicle epididymal cyst,

including a right radical orchiectomy. Page 4, Joint Motion. On June 18, 2019, the Court entered an order approving the settlement. Appellant thus meets the first requirement for a fee award.

Second, appellant must establish that his net worth at the time of filing the appeal did not exceed \$2 million. Attached in appellant's statement, affirming that fact. The appellant therefore meets this second criteria.

Third, appellee's position on this claim was not substantially justified. The Board's denial of the benefit sought was contrary to law and to the evidence of record. *See* Appellant's Opening Brief, pages 6 - 9. There was no justification for the Board's action. Since the General Counsel did not believe that VA's position had a reasonable basis, either in law or in fact, sufficient to urge this Court to uphold the Board's action, an award of fees and costs to appellant's counsel is fully warranted.

Attached are counsels' affidavits describing the claim for \$20,937.96 in fees, based on 60.2 hours of work for Attorney Cook and 47.8 hours for Attorney Mooney, at a rate of \$ 193.87 (\$125/hour plus a COLA from March 1996, using the CPI-U for the Midwest, and August 2018, the date of filing appellant's brief, as the midpoint.) Appellant also seeks reimbursement of the \$50 filing fee, and costs in the amount of \$400 (reflecting the non-refundable portion of the airplane tickets purchased for travel to Washington, D.C. for the oral argument set for June 11).

Based on the above, and on the pleadings in this case, an award of fees and costs in the amount of \$21,387.96 is proper.

Respectfully submitted,

/s/ Barbara J. Cook

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHN S. WEBB,

: CAVC No. 18-294

Appellant

: APPELLANT'S  
AFFIRMATION as to  
NET WORTH

v.

ROBERT L. WILKIE,

:

Secretary, Department of Veterans  
Affairs

:

I, John Webb, am the appellant in this case.

Under penalty of perjury, I affirm that my net worth, now and throughout the time this court case was pending, is and has been less than \$2 million.

24 June 2019

Date

John S. Webb  
John S. Webb

Time Entries For: Webb, John for Attorney Barbara J. Cook

Jul 9, 2019	Letter to client with EAJA petition	0.10
Jun 27, 2019	Draft EAJA petition	0.90
Jun 20, 2019	Review, edit, and ensure accuracy of time sheets	0.30
Jun 18, 2019	Continue to review and edit time sheets	0.60
Jun 18, 2019	Letter to client with Court order and affidavit for EAJA	0.30
Jun 18, 2019	Receive and review order and mandate from Court, calendar due date for EAJA	0.10
Jun 13, 2019	Continue to review and edit time sheets	0.50
Jun 10, 2019	Call to Court about oral argument	0.10
	Receive order from Court cancelling argument	0.10
	Start to review and edit time sheets	0.50
Jun 9, 2019	Listen to oral argument in <i>Payne</i> in preparation for possible oral argument related to 3.310	1.30
Jun 8, 2019	Discuss possible oral argument with attorney Michael Mooney in light of joint motion and no order from Court	0.40
Jun 6, 2019	Email to Court about motion to terminate appeal	0.10
	Discuss offer with client	0.30
	Discuss terms with attorney Michael Mooney	0.20
	Emails and telephone calls with James Carlson about terms of settlement, agree and sign	0.40

Jun 5, 2019	Read <i>Ollis</i> and <i>Viegas</i> as to result/cause, discuss with attorney Michael Mooney	1.30
Jun 5, 2019	Discuss case with attorneys at Chisholm, Chisholm & Kilpatrick and with attorney Michael Mooney	1.40
	Telephone call and email to client about settlement offer	0.30
	Telephone calls with James Carlson, review and discuss draft settlement	0.80
	Discuss settlement offer with attorney Michael Mooney	0.30
Jun 4, 2019	Review briefs, read cases on proximate cause	1.20
Jun 4, 2019	Discuss possible points for oral argument with attorney Michael Mooney	0.30
	Research “result of”; read <i>Gardner</i> and discuss with Attorney Amy Odom	0.40
Jun 3, 2019	Read Federal Circuit cases and analyze, integrate into argument	1.70
	Prepare for moot	0.70
	Do moot with attorneys at Chisholm, Chisholm, & Kilpatrick and discuss with attorney Michael Mooney afterwards	1.20
	Discuss case with Attorney Amy Odom	0.30
Jun 2, 2019	Revise outline of oral argument	0.90
	Review ROP and add citations and points to oral argument notes	1.30
	Review <i>Chenery</i> cases and outline theory of reversal	0.80

Jun 1, 2019	Discuss possible oral argument questions with attorney Michael Mooney	0.30
	Review and edit outline for oral argument	0.40
	Read and research cases on pointlessness of remand, including Gypsum, Janssen, Hatlestad, Beverly	0.60
May 31, 2019	Discuss oral argument outline with attorney Michael Mooney and do practice moot with him	1.30
	Review RBA for citations and precise language related to identification of correct issue and medical evidence supporting claim	0.30
May 30, 2019	Draft oral argument outline	0.80
	Discuss oral argument outline with Attorney Michael Mooney	0.50
	Complete ROP review for details and citations	0.30
	Read <i>Chenery</i> and <i>Fleshman</i> and research and read cases citing them	1.80
	Email to client about argument on YouTube	0.20
	Review § 7261 and read <i>Monk</i> , other case, legislative history regarding Court's authority	0.60
May 29, 2019	Re-read and analyze <i>Byron</i> and <i>DeLoach</i>	0.40
May 29, 2019	Review ROP for details and citations	0.60
	Discuss case with attorney Michael Mooney	0.50
	Research and read cases on secondary as related to treatment	0.40

	Research and read cases on proximate cause and reversal	0.70
May 28, 2019	Read Judge Allen's articles on reversal, discuss with attorney Michael Mooney	0.80
May 28, 2019	Read and outline <i>Byron</i>	0.30
	Research <i>Stegall</i> affirmances and discuss with attorney Michael Mooney	1.30
May 26, 2019	Analyze case, re-read briefs, take notes on issues	0.70
May 25, 2019	Review select portions of ROP	0.30
May 24, 2019	Analyze case and consider oral argument approach, possible questions	0.60
May 23, 2019	Analyze relief seeking	0.30
	Discuss oral argument with attorney Michael Mooney	0.70
May 18, 2019	Review ROP, take notes on points for argument	1.80
May 18, 2019	Email to James Carlson about offer	0.20
May 12, 2019	Letter to client to confirm view of case	0.20
May 7, 2019	Email to client with offer and question about attorney Michael Mooney entering appearance	0.20
May 7, 2019	Telephone call from James Carlson about possible JMR	0.10
Apr 3, 2019	Email to client with details about oral argument	0.20
Apr 1, 2019	Receive and calendar order from Court about oral argument date	0.10
Mar 27, 2019	Email to and from client about oral argument	0.20



Mar 26, 2019	Receive order from Court about panel, discuss with attorney Michael Mooney	0.20
Jan 30, 2019	Prepare and file no dispute as to ROP	0.20
Jan 22, 2019	Email from and to client about reply brief and next steps	0.30
Jan 10, 2019	Review, finalize, and file reply brief	0.40
Jan 8, 2019	Review C & P and integrate and edit whole	1.60
	Discuss argument with attorney Michael Mooney to ensure all and correct points are made	1.00
Jan 7, 2019	Edit based on adding GC brief and responding	1.60
Jan 6, 2019	Edit draft up to reversal	1.70
	Add reversal argument	0.30
	Review and edit entire draft	0.30
Nov 19, 2018	Review GC brief and note due date for reply or motion for extension	0.10
Aug 2, 2018	Letter to client with brief, next steps	0.20
Aug 2, 2018	Final review of opening brief, correct typos and cites, file brief	0.70
Aug 1, 2018	Ensure RBA cites are correct	0.40
Jul 30, 2018	Review RBA and make sure all evidence included, check case citations	0.60
Jul 29, 2018	Complete draft - search for case on meds affecting service connection, add argument to draft, consider challenge to BVA issue, edit for result and proximate cause, read Federal	

	Circuit cases on direct result	2.60
Jul 28, 2018	Edit draft for clarity and standard of review	0.30
Jul 28, 2018	Research secondary, draft rest of argument	1.70
Jul 28, 2018	Edit draft, check RBA for specific references, integrate into facts, add misinterpretation and <i>Stegall</i>	1.50
Jul 23, 2018	Review and edit facts and summary	1.00
Jul 20, 2018	Telephone call with John Webb about plan at court	0.20
Jul 18, 2018	Email to client about strategy at court	0.60
Jul 11, 2018	Read draft of opening brief and discuss with attorney Michael Mooney	0.40
Jun 16, 2018	Letter to client with update on case and plan for brief	0.20
May 23, 2018	Email to client with update on CLS conference and next steps	0.20
May 23, 2018	Prepare for and attend PBC conference	0.40
May 9, 2018	File PBC certificate of service	0.10
May 8, 2018	Prepare certificate of service	0.20
May 8, 2018	Review PBC draft of attorney Michael Mooney, edit, and pull together critical documents, ensure they support point made, email to GC and CLS	0.90
May 2, 2018	Review PBC order, update calendar with due date for memo and conference	0.10
Apr 12, 2018	Receive briefing order from court and update file with deadline for brief	0.10

Apr 8, 2018	Review RBA and confirm that critical documents are there	0.40
Apr 5, 2018	Receive RBA and calculate due date for any objection, update file with due date	0.10
Mar 12, 2018	Email to GC about making sure I am counsel since I did not get a cc of BVA decision filed in January	0.10
Mar 9, 2018	Check court file as had not received BVA decision, update file on due date of RBA to me to be sure I receive	0.20
Feb 12, 2018	Email release to VA	0.20
Feb 6, 2018	Checked docket to be sure filing fee received	0.10
Jan 22, 2018	Emails from and to client about briefs, process	0.30
Jan 18, 2018	Letter to client with appeal papers	0.10
Jan 18, 2018	Check to be sure case docketed, letter to clerk with filing fee	0.10
Jan 17, 2018	Email to client about status of appeal	0.10
Jan 16, 2018	Prepare and file NOA, appearance, retainer	0.40
Jan 9, 2018	Letter to client with release for court, confirming appeal will be filed, initial process	0.30
Jan 5, 2018	Email to client about next steps: appeal to court	0.20
Jan 4, 2018	Emails with client about adverse BVA decision	0.20
Jan 4, 2018	Review BVA decision and discuss with attorney Michael Mooney	0.30
Jan 2, 2018	Skim BVA decision	0.20
Total hours		60.2

I, Barbara Cook, under penalty of perjury, affirm that the above is a true and accurate accounting of the time I spent on the case of *Webb v. Wilkie*, CAVC # 18-294. In the exercise of billing judgment, I omitted time spent on administrative tasks, and time that appeared duplicative.

/s/Barbara J. Cook

## TIME SHEET SUMMARY

John S. Webb  
Case #18-0294

<u>Date</u>	<u>Activity by attorney Michael J. Mooney</u>	<u>Hours</u>
1/4/18	Review BVA decision denying service connection for orchiectomy, did memo summarizing facts, law, and outlining the legal arguments, for attorney Barbara Cook.	3.0
4/28/18	Received notice of pre-briefing conference on May 23, 2018, add to calendar.	.1
4/28/18	Started review of 1500 page RBA with focus on procedural history, C&P exams and veteran's doctors reports and records. Take detailed notes.	3.4
4/30/18	Continued review of RBA,, prepared rough draft of pre-briefing conference memo for Barbara Cook.	1.7
6/5/18	Began work on rough draft of Appellant's opening brief. Reviewed RBA notes, developed and refined principal arguments on the merits.	3.3
6/10/18	Finished all but the conclusion of the rough draft.	2.8
6/11/18	Did extensive research on proximate cause, read regs and case law, modify rough draft to reflect this research.	3.4
6/23/18	Rewrote for flow, clarity, refined arguments.	1.9
6/23/18	Added full cites from RBA, pulled those pages form record, did cover page, Table of Contents, gave everything to attorney Barbara Cook for rewrite.	1.7
7/11/18	Discuss case with Barbara Cook.	.2
11/19/18	Received VA's Reply brief. Read, took detailed notes, began researching law cited and re-reading RBA sections cited. Did rough draft of our response.	6.0
12/30/18	Rewrite my rough draft of our response, refine it, add context, double check VA's brief to be sure I understand all of their arguments and have addressed them.	2.2
12/30/18	Gave rough draft to Barbara Cook to review, rewrite, refine add arguments, change arguments.	.1
1/8/19	Discuss/debate changes to brief made by Barbara Cook.	1.0

5/23/19	Discuss oral argument strategy with attorney Barbara Cook.	.7
5/28/19	Began preparations as second chair for oral argument. Reread briefs, note areas of agreement and disagreement, factually and legally. Read relevant Federal Circuit law on obtaining reversal, read Judge Allens article on reversal.	2.7
5/28/19	Discuss above with attorney Barbara Cook.	.4
5/28/19	Discuss <i>Stegall</i> issues with attorney Barbara Cook.	.5
5/29/19	Discuss issues to research with attorney Barbara Cook.	.5
5/30/19	Additional discussions/debates with attorney Cook regarding court's and Board's respective roles in processing uncontested facts.	.5
5/30/19	Carefully reread BVA decision and VA's brief to verify VA's assertions in court as to the parameters of the Boards finding. Began rough draft of an outline of veteran's arguments in Court with regard to novel issues the Court appears to have a particular interest in exploring and resolving via a full panel decision.	1.7
5/31/19	Discuss/debate with attorney Cook likely issues the Court will raise at oral argument and prepare adequate responses.	1.3
5/31/19	Go through entire record and note every statement the veteran ever made to the VA regarding his condition, the bases of his claim either in writing or at his BVA hearing.	1.2
6/1/19	Prepare a written outline of my oral argument as second chair in the unlikely event attorney Cook became incapacitated.	.9
6/1/19	Discuss possible questions at oral argument with attorney Cook.	.3
6/3/19	Participate with attorney Cook in a "moot" by phone, of the issues in the case by multiple counsel at the CCK Law Firm in Providence RI, along with follow up discussions.	1.2
6/4/19	Further discussions as to potential issues that could arise at oral argument.	.3
6/5/19	Further discussions and debates with attorney Cook in anticipation of questions, concerns or arguments the court might express at oral argument.	.5
6/5/19	Discuss, develop with attorney Cook, a proposed general rule of law that appellant would want the court to announce on the primary issue in this case.	.5

6/5/19	Prepare for and participate in the second CCK "moot" by phone of the issues here and strengths and weaknesses of the appeal.	1.4
6/5/19	Receive notice that VA will settle the case on terms acceptable to the veteran, discuss that with attorney Cook.	.3
6/7/19	Begin to summarize time sheets.	1.7
6/8/19	Discuss with Barbara Cook possibility of court rejecting settlement.	.4
TOTAL HOURS		47.8

I, Michael J. Mooney, under penalty of perjury, affirm that the above is a true and accurate accounting of the time I spent on the case of *Webb v. Wilkie*, CAVC # 180294. In the exercise of billing judgement, I omitted time spent on administrative tasks, and time that appeared to be duplicative.

/s/Michael J. Mooney