

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

MATTHEW W. CRUMLICH,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 17-2630
)	
ROBERT L. WILKIE,)	
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), and U.S. Vet App. R. 39, appellant Matthew W. Crumlich, through counsel, applies for an award of reasonable attorney's fees and expenses in the amount of \$16,924.58.

Procedural History of the Case

On July 31, 2017, the Board of Veterans' Appeals (Board) found Mr. Crumlich had not filed a timely Substantive Appeal with respect to an August 2013 VA regional office (RO) decision that denied entitlement to benefits for post-traumatic stress disorder (PTSD) and residuals of a low back injury. Mr. Crumlich appealed to the U.S. Court of Veterans Claims. On June 28, 2019, the case was remanded back to the Board for further adjudication. Order, June 28,

2019. Mr. Crumlich is the prevailing party as a result of the remand, and Mr. Crumlich is eligible and entitled to an award of attorney's fees.

Grounds for an Award

The Equal Access to Justice Act (EAJA) provides as follows:

Except as otherwise specifically provided by statute, a court *shall* award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added). This provision expressly applies to this Court and to actions brought in this Court by Appellants seeking judicial review of the decisions of the Board of Veterans' Appeals. *Id.* at § 2412(d)(2)(F).

This Court has analyzed and provided guidance regarding how the EAJA applies to cases pending before it. *Bazalo v. Brown*, 9 Vet.App. 304 (1996), *reversed in part Bazalo v. West*, 150 F.3d 1380, 1382 (Fed.Cir. 1998). The Court has outlined predicate findings that are necessary to warrant an award by the Court of attorney's fees and expenses to an eligible party pursuant to EAJA. These are: (1) the party opposing the United States must be a prevailing party (2) the government's position must not have been substantially justified; (3) there must be no circumstances that make an award against the government unjust; and (4) a

showing that the appellant is eligible to receive an award at the time the appeal was filed. *Bazalo v. Brown*, 9 Vet.App. at 309.

As will be demonstrated below, the appellant, Mr. Crumlich, satisfies each of these predicate requirements.

I. SPECIFIC SHOWING THAT APPELLANT'S NET WORTH DOES NOT EXCEED TWO MILLION DOLLARS

Mr. Crumlich satisfies the EAJA requirement of his net worth not exceeding \$2,000,000 in order for him to be eligible for an award of attorney's fees and expenses. *See* 28 U.S.C. § 2412(d)(2)(B). Filed with the Court is Appellant's fee agreement with counsel in which Mr. Crumlich certifies his net worth did not exceed \$2,000,000 at the time this case was filed. Also, the Appellant filed a Declaration of Financial Hardship and the Court accepted it lieu of the filing fee. This is direct evidence that Mr. Crumlich's net worth did not exceed \$2 million at the time the appeal was filed. Mr. Crumlich's net worth did and does not exceed \$2 million at the time the appeal was filed and at the present time and he is therefore eligible and entitled to receive an EAJA award. Counsel will provide to the Court and the Secretary additional information regarding Mr. Crumlich's net worth if necessary.

II. THE APPELLANT SATISFIES EACH OF THE OTHER REQUIREMENTS FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES

A. The Appellant is a Prevailing Party

To obtain "prevailing party" status, an appellant to this Court need only have gained success "on any significant issue in litigation which achieves some benefit . . . sought in bringing suit." *Shalala v. Schaefer*, 113 S.Ct. 2625, 2632 (1993). This Court has held that "[u]nder *Schaefer*, the 'prevailing party' requirement is satisfied when a remand is obtained." *Stillwell v. Brown*, 6 Vet.App. 291, 300 (1994). Mr. Crumlich is a prevailing party entitled to an award of fees and expenses because the Court vacated the Board's decision finding Mr. Crumlich had not filed a timely Substantive Appeal with respect to an August 2013 VA regional office (RO) decision that denied entitlement to benefits for post-traumatic stress disorder (PTSD) and residuals of a low back injury.

B. The Position of the Secretary Was Not Substantially Justified

For the position of the Secretary to be considered substantially justified:

[T]he VA must demonstrate the reasonableness, in law and fact of the position of the VA in a matter before the Court, and of the action or failure to act by the VA in a matter before the VA, based upon the totality of the circumstances, including the merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the Court.

Elczyn v. Brown, 7 Vet.App. 175, quoting *Stillwell v. Brown*, 6 Vet.App. 302.

The position of the Secretary during the litigation of this case was not substantially justified.

The Secretary's position in the course of this litigation was substantially unjustified because the Board failed to consider the evidence within the requirement of the authorizing statute. See *DAV v. Gober*, 234 F.3d 682, 704 (Fed. Cir, 2001). Moreover, the Board failed to follow its own mailing procedure. See *Baxter v. Principi*, 17 Vet.App. 407, 410 (2004).

Thus, for this and other reasons, the position of the government, the Secretary, and the BVA was not substantially justified at either the administrative stage or the litigation stage before the Court.

C. No Special Circumstances Exist to Make an Award Unjust

Finally, there is no evidence that "special circumstances" exist in Mr. Crumlich's case that would make an award of reasonable fees and expenses unjust. 28 U.S.C. § 2412(d)(1)(A). The errors committed by the BVA and the Secretary did not present issues of first impression before this Court or involve good faith arguments, nor did this case involve one of "new, different, or more stringent requirements for adjudication." See *Stillwell v. Brown*, 6 Vet.App. at 303-304.

III. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES

The appellant has claimed a reasonable amount of attorney's fees, predicated upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Elczyn, Vet.App.* 176-177 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433; 103 S.Ct. 1933, 1939; 76 L.Ed.2d 40 (1983)). To document the amount of fees and expenses requested, the EAJA provides that an applicant "shall" include in the application "the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 38 U.S.C. § 2412(d)(1)(B).

Accordingly, counsel for appellant states the following itemization of the actual time expended and expenses in this case at which fees and expenses were computed:

Attorney Time Expended and Nature of Work Performed

<u>Date</u>	<u>Hours</u>	<u>Nature of Work Performed</u>
9/14/17	0.10	Timothy Franklin (TF) received Board decision first initial review.
10/16/17	0.10	Sean Kendall (SK) received call from VA attorney. No Charge (NC)
10/20/17	0.10	SK received form by fax. (NC)
11/16/17	0.10	TF received Record Before Agency (RBA) and Court order, updated calendars.
11/27/17	0.5	TF reviewed Board decision make notes for appeal.

12/15/17	0.2	TF exchanged email with client.
12/18/17	0.4	TF reviewed Briefing Memo, drafted email for VA attorney and Central Legal Staff (CLS), drafted Certificate of Service and e-filed with Court, client received documents through email.
1/10/18	0.3	TF prepared for and attended Briefing Conference.
1/10/18	0.10	TF exchanged email with client.
1/19/18	0.2	SK sent document to client. (NC)
2/22/18	1.0	TF proof and edited Brief, e-filed Brief with Court.
4/20/18	0.10	TF exchanged email with VA attorney.
6/07/18	0.8	TF reviewed Appellee's Brief, gave instructions to law clerk, sent and exchanged email with client.
6/20/18	0.3	TF reviewed and edited Reply Brief, reviewed and edited Argument #1, discussed case with law clerk.
6/20/18	0.2	TF send email to VA attorney, drafted Motion for Extension, email with copy of document to client. (NC)
7/03/18	1.2	TF reviewed and edited Reply Brief.
7/05/18	0.4	TF final review of Reply Brief, e-filed Reply Brief with Court, sent copy of Reply Brief by email to client.
8/14/18	0.3	TF Reviewed Court order add deadline to calendar.
8/15/18	0.10	TF sent copies of orders to client, exchanged email with client.
8/16/18	1.0	TF draft and filed Motion for Leave and motion for oral argument, exchanged email with VA attorney, downloaded Record of Proceedings, sent client

copy of filings.

8/16/18	0.5	TF legal research.
9/13/18	1.0	Proof and edit of Supplemental Memorandum e-file with CAVC. (NC)
9/14/18	0.3	TF Reviewed VA attorney's supplemental memo, discussed case with law clerk, sent copy of document to client.
11/19/18	0.10	TF received message from client, sent email to client.
12/19/18	0.10	TF sent email to colleagues regarding case. (NC)
12/21/18	0.8	TF reviewed all case Briefs and responses.
12/27/18	5.0	TF prepared for oral argument, prepared cover letter argument, reworking outline, review of all case briefs and responses.
1/07/19	2.5	TF continued to prepare for oral argument, rewrote due process section of argument
1/08/19	6.0	TF preparing for oral argument, reviewed additional cases, continued to work on outline.
1/09/19	4.0	TF preparing for oral argument, focus on Supplemental Briefing order, conference with colleague.
1/13/19	5.0	TF continue review of cases, editing Argument outline, preparing notebook for Argument.
1/14/19	6.0	TF travel time to Washington, DC, for Oral Argument.)Only billing one way from Denver to Washington D.C.
1/15/19	0.2	TF prepared expense report for travel. (NC)
1/15/19	4.0	TF preparing for oral Argument, meeting with Court clerk and VA attorney, attended Oral

		Argument. (NC for travel time Washington D.C to Denver)
1/16/19	0.10	TF sent email to client.
1/17/19	0.2	TF reviewed Court Order, updated calendar, sent email to client with copy of document.
1/18/19	0.10	TF reviewed and responded to VA attorney's email re extension.
2/12/19	0.10	TF exchanged email with client.
2/19/19	0.3	TF reviewed VA attorney's response to show cause order.
6/06/19	0.5	TF reviewed Court decision leave message for client.
9/24/19	1.5	Proof, edit, and file EAJA Application. (NC)

Appellant seeks attorney's fees at the rate of \$211.50 per hour for representation services before the U.S. Court of Appeals for Veterans Claims. This rate was calculated by adjusting the \$125 per hour statutory EAJA rate by the increase in the cost of living.

For the period July 1996 to July 2019, the available data for counsel is for the Denver-Lakewood-Aurora, CO urban area as determined by the Bureau of Labor Statistics' Consumer Price Index. For the period July 1996 through December 2017, the consumer price index increased by 105.23 points. The consumer price index was 257.230 in December 2017 (second half) and it was 152.0 in July 1996; thus, there was a 69.2% increase during this period.

Appellant has chosen December 2017, as the "midpoint" date for this litigation. See 28 U.S.C. 2412(d)(2)(A)(ii); *Elcyzyn v. Brown*, 7 Vet.App. 170, 181 (1994) ("[A] permissible cost of living increase would be measured from [March 29, 1996], the date of the enactment [of amendment] of EAJA, . . . to the date [of a midpoint in the litigation.]").

The CPI-U increase of 69.2% equals a rate of \$211.50 per hour.

The rate per hour, multiplied by the number of billable hours (42.5) results in a total attorney's fee amount of: \$8,988.75.

Law Clerk Time Expended and Nature of Work Performed

<u>Date</u>	<u>Hours</u>	<u>Nature of Work Performed</u>
12/08/17	2.0	Uploaded Record Before Agency (RBA), bookmarking documents.
12/15/17	3.0	Legal research.
12/15/17	2.0	Drafting Briefing Memo.
2/02/18	1.0	Drafting Brief, drafting Statement of Facts.
2/02/18	1.0	Legal research.
2/06/18	2.0	Drafting Brief, drafting Due Process Argument.
2/06/18	2.0	Drafting Brief, drafting Argument two and three.
2/06/18	1.0	Drafting Brief, drafting Table of Authorities, formatting.
6/08/18	0.5	Reviewed previous filings in case.
6/08/19	0.5	Reviewed case law, statutes, regulations.
6/08/19	0.7	Continued to review case law, evidence.

6/08/19	4.5	Drafting Reply Brief, drafting outline, Due Process section.
6/11/18	4.0	Drafting Reply Brief, legal research.
6/20/18	2.0	Drafting Reply Brief, editing first Argument. (NC)
6/20/18	3.0	Drafting Reply Brief, legal research, drafting third Argument.
6/20/18	1.5	Drafting Reply Brief, legal research, drafting second Argument.
6/21/18	0.8	Drafting Reply Brief, reviewed and edited.
7/03/18	1.0	Drafted Reply Brief, drafted Table of Contents, Table of Authorities, final edits. (NC)
8/15/18	1.2	Legal research.
8/15/18	1.2	Discussed case with counsel. (NC)
8/16/18	1.5	Legal research for response to Supplemental Memorandum (SM).
8/16/18	0.8	Drafting introduction and first Argument.
8/16/18	2.2	Discussed research with counsel, drafted outline, drafting first Argument.
8/17/18	1.5	Legal research.
8/17/18	2.2	Completed draft of first issue.
8/20/18	2.9	Legal research, drafted third issue.
8/20/18	2.0	Legal research.
8/21/18	1.0	Legal research, organized Due Process for fourth issue.
8/21/18	1.0	Legal research, drafted third Argument. (NC)

8/21/18	0.9	Legal research on second issue.
8/22/18	3.4	Legal research, drafting issue two.
8/22/18	0.8	Updated factual analysis sections on issues two, three, four. (NC)
8/22/18	2.3	Proofed draft of Memorandum, edited.
8/23/18	2.3	Completed edits to Memorandum, organized research. (NC)
9/13/18	3.4	Edits to Memorandum, discussed document with counsel.
9/13/18	1.2	Completed final edits of Memorandum.
11/27/18	1.4	Gathered case law for all cases cited in Brief. (NC)
12/26/18	1.8	Preparation for Oral Argument Moot. (NC)
Total	56	

The law clerk legal work at the rate of \$130.00 per hour for a total of \$7,280.00.

Appellant is also billing for the paralegal work performed by attorney's assistant.

<u>Date</u>	<u>Hours</u>	<u>Nature of Work Performed</u>
9/18/19	0.4	Preparing EAJA application.
9/19/19	2.6	.Preparing EAJA application.
9/20/19	3.75	Preparing EAJA application.
9/21/19	0.75	Preparing EAJA application.

Total 7.5

The assistant bills for paralegal work at the rate of \$80.00 per hour for a total of \$600. In the interest of billing discretion, we are not billing the \$80 an hour assistant time.

Appellant is also billing for the other work performed by attorney's assistant.

<u>Date</u>	<u>Hours</u>	<u>Nature of Work Performed</u>
8/10/17	0.2	Drafted Notice Appeal, discussed case with counsel.
8/14/17	0.10	Sent form to client.
8/14/17	0.2	Drafted and filed Notice of Appeal, Notice of Entry of Appearance, Fee Agreements with Court.
8/16/17	0.10	Sent form to client.
8/18/17	0.10	Sent copy of documents to client.
8/28/17	0.2	Scanned and sent document to client.
8/29/17	0.2	Spoke to client, faxed document to Court.
10/16/17	0.2	Sent client form, spoke to client.
10/18/17	0.10	Spoke to client.
10/23/17	0.2	Sent form to VA attorney, faxed form to Court.
12/08/17	0.10	Updated calendars.
12/15/17	0.10	Sent copy of Court document to client.
2/09/18	0.2	Drafted Motion for Extension, sent it to counsel.
2/09/18	0.3	Discussed case with counsel, edited Motion for

		Extension and filed it with Court.
2/12/18	0.10	Sent copy of document to client.
6/06/19	0.10	Updated calendars.
8/21/19	0.10	Sent letter to VA in Denver.
8/21/19	0.10	Sent letter to VA in Denver.
8/30/19	0.10	Sent copy of Court document to client.
Total	2.8	

The assistant bills at the rate of \$20.00 per hour for a total of \$56. In the interest of billing discretion, we are not billing the \$20 an hour assistant time.

Appellant also seeks reimbursement for the costs of this litigation, primarily for oral argument costs. An itemization of expenses for which reimbursement is sought is as follows:

<u>Nature of Expense</u>	<u>Amount</u>
Hotel	\$ 251.74
Airline Tickets	\$ 315.60
Lyft Travel to and from Airport	\$ 88.49
Total:	\$ 655.83

Lead Attorney Certification

As lead attorney the undersigned certifies that he has read the above combined billing statement and is satisfied that it accurately reflects the work

performed by all representatives. The undersigned further certifies that all time that was redundant or excessive, in lead attorney's estimation, was eliminated

Accordingly, the total amount of attorney's fees and expenses for which appellant seeks reimbursement for legal representation services before the Court of Appeals for Veterans Claims on his behalf is: \$16,924.58.

Dated: September 24, 2019.

Respectfully submitted,

/s/ Timothy R. Franklin

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