

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

WILLIAM J. TEDESCO,)	
)	
Appellant,)	
)	
v.)	No. 18-1805
)	
ROBERT L. WILKIE, Secretary of)	
Veterans Affairs,)	
)	
Appellee.)	

**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 William J. Tedesco applies for an award of reasonable attorneys' fees and expenses in the amount of \$17,023.38.

I. PROCEDURAL HISTORY

Appellant, William J. Tedesco, served in the Marine Corps, during which time he injured his right knee. *R. at 4904*. This injury was found to be service connected and disability compensation was granted in 2002. *R. at 6901*. As a result of the right knee injury, Mr. Tedesco also suffered problems with his left knee and filed a claim for compensation. His left knee was found to be service connected secondarily to his right knee with an effective date of June 19, 2002. *R. at 6638*.

In August 2004, the VA issued a decision awarding service connection to appellant for a left knee disability and assigned a 30% disability rating. In March 2010, the appellant filed a claim for an increased rating for his left knee disability, *R. at 6177*, and in October 2010, the

Regional Office continued his 30% disability rating for his left knee disability. *R. at 6010-14*. The appellant filed a Notice of Disagreement in August 2011, *R. at 5989*, and perfected his appeal to the Board. In January 2017, the Board of Veterans Appeals conducted an in-person hearing and on March 27, 2018 affirmed the Regional Office decision denying entitlement to an increased rating for a left knee replacement in excess of 30 percent. *R. at 1-12*.

Mr. Tedesco filed a Notice of Appeal to the U.S. Court of Appeals for Veterans Claims (“the Court” or “CAVC”) on April 10, 2018. On September 17, 2018, Appellant forwarded to counsel for the Secretary and attorney for the Court’s Central Legal Staff a detailed ten page memorandum summarizing the issues in the case pursuant to the Court’s order. The Rule 33 Conference was held on October 2, 2018. On October 31, 2018, Appellant filed his brief in support of his position. On March 5, 2019, Appellant filed a reply brief. On July 18, 2019, oral argument was conducted before the CAVC where the issues raised in the briefs were argued by counsel. On August 16, 2019, the CAVC set aside the Board’s decision of March 27, 2018 and remanded this matter for further proceedings.

II. GROUNDS FOR AN AWARD

In order to warrant an award of attorneys’ fees and expenses under the EAJA, a party must meet four requirements: (1) a showing that the appellant is a prevailing party; (2) a showing that the appellant is eligible for an award; (3) an allegation that the government’s position was not substantially justified; and (4) an itemized statement of fees and expenses sought. Owens v. Brown, 10 Vet.App. 65, 66 (1997) (internal quotation omitted). As discussed below, Appellant Tedesco satisfies each of these requirements. Further, there are no “special circumstances” which would make the award of EAJA fees unjust under § 2412(d)(1)(A).

A. APPELLANT IS A PREVAILING PARTY AND IS ELIGIBLE TO RECEIVE AN AWARD.

To obtain “prevailing party” status, a party need only to have obtained success “on any significant issue in litigation which achieve[d] some of the benefit...sought in bringing the suit.” Shalala v. Shafer, 509 U.S. 292, 302 (1993). Prevailing party status may be established by the procurement of a favorable settlement. See Maher v. Gagne, 448 U.S. 122, 129 (1980); see also Cullens v. Gober, 14 Vet. App.234 (2001) (*en banc*) (If there is a settlement of the appeal in which the Secretary agrees to grant some of the benefits sought, the appellant is a “prevailing party,” even if the Secretary does not concede error). Appellant is a “prevailing party” in this case because the Secretary remanded the issue to the Board to consider whether the evidence of record supports a 60% rating under DC 5505 based on severe painful motion, which is a determination separate from, though may include consideration of, limitation of motion – which was the precise relief he sought on appeal.

Appellant is a party eligible to receive an award of reasonable fees and expenses because his net worth did not exceed \$2 million at the time his appeal was filed. See Exhibit A (Declaration of William J. Tedesco). Therefore, appellant has fulfilled the first and second requirements for receiving an EAJA award. See Owens, 10 Vet. App. at 66.

B. THE POSITION OF THE DEPARTMENT OF VETERANS’ AFFAIRS WAS NOT SUBSTANTIALLY JUSTIFIED

The Secretary can defeat Appellant’s application for fees and costs only by demonstrating that the government’s position was substantially justified, both during the administrative stage before the agency and during the litigation stage. See Brewer v. American Battle Monument Commission, 814 F.2d 1564, 1566-1567 (Fed. Cir. 1987); Gordon v. Peake, 22 Vet. App. 265, 268 (2008); Stillwell v. Brown, 6 Vet. App. 229, 301 (1994). In order to demonstrate that its

position was 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 merits...” Pierce v. Underwood, 487 U.S. 552, 565 (1988); accord, Beta Sys. V. United States, 866 F.2d 1404, 1406 (Fed.Cir. 1989). If either the government’s litigation position or its administrative position was unreasonable, the Court usually finds that the government’s conduct was not substantially justified, and does not consider the conduct in the other forum. See Calma v. West, 12 Vet. App. 66, 69 (Vet. App. 1988); Moore v. Gober, 10 Vet. App. 436 (Vet. App. 1997). In this case, the VA denied Appellant a higher rating for his left knee claim but the Court held that VA imposed an incorrect standard when making its decision. Therefore, the government’s position during the administrative stage was not substantially justified.

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

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.” See Ussery v. Brown, 10 Vet. App. 51, 53 (1997) (quoting Elczyn v. Brown, 7 Vet. App. 170, 176-177 (1994)). “In determining the number of hours which were ‘reasonably spent’ [on the litigation], the Court may consider a number of factors, including whether the work performed was duplicative, [whether] an attorney takes extra time due to inexperience, or [whether] an attorney performs tasks normally performed by paralegals, clerical personnel, or other non-attorneys.” Id.

Attorney Susan Saidel, a 1995 graduate of Widener Law School, represented appellant in this case. Work performed by Susan Saidel is billed at \$195.00 per hour.¹ Work billed by Widener Veterans Law Clinic students is billed at \$166.00.² An itemized statement of the services rendered by Appellant's counsel and student interns is attached to this application as Exhibit B, and the reasonable fees and expenses for which appellant seeks compensation are listed below this section. Included in Exhibit B is a certification that Appellant's counsel has reviewed the billing statement and is satisfied that it accurately reflects the work performed by all counsel and that Appellant's counsel "considered and eliminated all time that is excessive or redundant." See Balbridge and Demel v. Nicholson, 19 Vet. App. 227, 240 (2005). The undersigned counsel has carefully reviewed all time entries charged under the matter during the applicable timeframe, removing the following entries:

1. Entries for time spent meeting with student interns regarding the appeal at issue as part of that time entails instruction.
2. Entries of time that constitute block billing.

¹ A rate in excess of \$125 per hour for Appellant's counsel is justified in this case based on the increase in the cost of living since the EAJA was amended in March 1996. See 28 U.S.C. § 2412 (d) (2)(A)(ii). The \$125 per hour attorney fee rate, adjusted for the Philadelphia - Wilmington - Atlantic City region, was \$195.25 in October 2018, which was the approximate "mid-point" of the time frame of counsel's services. This rate was calculated by using the Department of Labor's Consumer Price Index for Urban Consumers ("CPI-U") in the Philadelphia - Wilmington - Atlantic City region, adjusted for inflation between March 1996 and October 2018. See Exhibit C; Mannino v. West, Vet. App. 242 (1999). It reflects "Local" CPI as opposed to the "national" CPI. See Parrot v. Shulkin, 851 F.3d 1242, 1249 (Fed. Cir. March 13, 2017). The market rate for Appellant's counsel exceeded \$195.25 per hour during the relevant time period. See Harris v. Paige, Civ No. 08-2126 (Ed. PA. 2013) (nothing that federal courts in the Philadelphia area have approvingly cited the fee schedule of Philadelphia's Community Legal Services ("CLS") to be a fair reflection of the prevailing market rates in Philadelphia); CLS Fee Schedule effective July 1, 2018, attached as Exhibit D (reflecting a rate range from \$ 550 to \$640 for attorneys with 21- 25years' experience).

² USAO Attorney's Fees Matrix (<https://www.justice.gov/usao-dc/page/file/1189846/download>),

In the exercise of billing judgment, appellant has eliminated 20.3 hours from both the itemized statement of this fee petition.

Any award of attorney fees under the terms of Appellant's agreement with Widener University, Delaware Law School Veterans Law Clinic will be awarded to Widener University, Delaware Law School Veterans Law Clinic to be used to support the activities of the Veterans Law Clinic. See Retainer Agreement.

I. CONCLUSION

As set forth above, Appellant has met the threshold requirements for an EAJA award. *Owens*, 10 App. at 66. WHEREFORE, Appellant William Tedesco respectfully request that the Court award attorney's fees and expenses in the total amount of \$17,023.38.

Respectfully submitted,

William Tedesco

By His Attorney

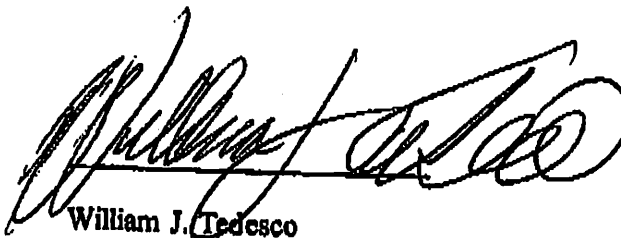
/s/ Susan Saidel, Esquire

DECLARATION OF WILLIAM J. TEDESCO

I, William J. Tedesco, declare that my net worth at the time of the filing of the appeal in this case (*Tedesco v. Wilkie*, 18-1805) was less than two million dollars (2,000,000).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 12/4/2019



William J. Tedesco

EXHIBIT B
Tedesco v. Wilkie, 18-1805
Itemized Statement of Services and Expenses

Date	Billor	Description of Task	Time¹	Expense
5/15/18	Susan Saidel	Initial review of BVA Decision issued 3/27/18 and Veterans Consortium/Pro Bono Program summary	.4	\$78.00
5/21/18	Susan Saidel	Phone call to client; introduction and explanation of process	.2	\$39.00
5/29/18	Rachel Boseman (student)	Download RBA and create file, draft Notice of Appeal and retainer agreement, calendar next steps	.4	\$66.40
6/21/18	Rachel Boseman	Initial review and index of RBA (pages 1-1000) to determine whether record is complete and if 6/26/18 motion to dispute needed	2.9	\$481.40
6/21/18	Rachel Boseman	Initial review and index of RBA (pages 1001-2000) to determine whether record is complete and if 6/28/18 motion to dispute needed	2.7	\$448.20
6/22/18	Rachel Boseman	Initial review and index of RBA (pages 2001 - 3000) to determine whether record is complete	2.5	\$415.00
6/22/18	Rachel Boseman	Initial review and index of RBA (pages 3001 - 4000) to determine whether record is complete	2.4	\$398.40
6/22/18	Susan Saidel	File retainer/CAVC fee agreement (issues with website and filing)	.3	\$58.50
6/23/18	Rachel Boseman	Initial review and index of RBA (pages 4001 - 5000 pages) to determine whether record is complete	2.2	\$365.20
6/23/18	Rachel Boseman	Initial review and index of RBA (pages 5001 - 6000 pages) to determine whether record is complete	2.3	\$381.80
6/24/18	Susan Saidel	Review summary of RBA and outline appeal ideas	.6	\$117.00
6/26/18	Rachel Boseman	Initial review and index of RBA (pages 6001 - 7164 pages) to determine whether record is complete	2.1	\$348.60
6/28/18	Rachel Boseman	Legal research on issue of increased rating post knee replacement (issue #1) in preparation for Rule 33 conference memo	3.0	\$564.40
6/29/18	Rachel Boseman	Legal research issue #1 for Rule 33 conference memo	2.4	\$398.40
6/29/18	Susan Saidel	Review of research for Rule 33 conference memo	.8	\$156.00
7/5/18	Rachel Boseman	Research issue of rating for instability of knee (issue #2) in preparation for Rule 33 Conference	2.5	\$415.00
7/10/18	Rachel Boseman	Draft Rule 33 Conference memo, part I	1.9	\$315.40
7/12/18	Rachel Boseman	Draft Rule 33 Conference memo, part I	2.5	\$415.00

¹ The time accounting system used by VLC allocates 1/10 of an hour for every six minutes or fraction thereof over half spent on the client's business. All time figures are expressed in decimals.

7/13/18	Rachel Boseman	Draft Rule 33 Conference memo, part II	1.8	\$298.80
7/19/18	Rachel Boseman	Draft/revise Rule 33 Conference memo, part I and II	1.2	\$199.20
7/19/18	Susan Saidel	Phone call from client, re: earlier effective date	.3	\$58.50
7/20/18	James Palmer (attorney)	Review Saidel e-mail and referral memo, review and edit Rule 33 conference memo	1.0	\$195.00
7/23/18	James Palmer	Edit Rule 33 conference memo	1.0	\$195.00
8/9/18	Susan Saidel	Phone call to client with status update	.2	\$39.00
8/30/18	Susan Saidel	Edit/revise Rule 33 brief, legal research on stability of knee issue	2.0	\$390.00
9/17/18	Susan Saidel	E-mail memo to OGC and Court's Central Legal Staff, file certification of service	.1	\$19.50
9/25/18	Susan Saidel	E-mail and phone call to client re status, send copy of memo to client	.3	\$58.50
10/1/18	Susan Saidel	Prepare for Rule 33 Conference	.6	\$117.00
10/2/18	Susan Saidel	Rule 33 Conference	.2	\$39.00
10/3/18	Susan Saidel	Phone call to client with update	.2	\$39.08
10/3/18	Susan Saidel	Review of record for preparation of brief and for additional issue of effective date	2.7	\$526.50
10/12/18	Susan Saidel	Additional research of issue #1 and drafting of section I of appellant's brief	2.2	\$429.00
10/22/18	Susan Saidel	Additional research of issue #2 and drafting section II of appellant's brief	2.1	\$409.50
10/23/18	Susan Saidel	Draft appellant's brief – fact section, revise section I and II	3.1	\$604.50
10/26/18	Susan Saidel	Draft/revise appellant's brief (including citations to record)	2.7	\$526.50
10/29/18	James Palmer	Edit appellant's brief	1.1	\$214.50
10/30/18	Susan Saidel	E-mail to client re: filing of brief with CAVC and status of cases	.1	\$19.50
10/31/18	Susan Saidel	File brief with CAVC	.1	\$19.50
10/31/18	Susan Saidel	Phone call and e-mail to client re: case status and filing of brief	.3	\$58.50
1/2/18	Susan Saidel	Phone call from OGC requesting agreement to extension of time	.1	\$19.50
2/7/19	Susan Saidel	Telephone call from client	.3	\$58.50
2/22/19	Susan Saidel	Review Appellee's brief and outline reply	1.0	\$195.00
2/22/19	TJ McCarthy (student)	Draft response to appellee's brief	2.7	\$448.20
2/24/19	Susan Saidel	Revise/edit response to appellee's brief	.9	\$175.50
3/5/19	Susan Saidel	File reply brief with CAVC	.1	\$19.50

4/2/19	Susan Saidel	E-mail to client re: status of decision	.1	\$19.50
4/24/19	Susan Saidel	Review CAVC orders scheduling oral argument	.1	\$19.50
5/17/19	Susan Saidel	E-mail to client re: Oral argument scheduled for 7/18/19	.1	\$19.50
6/25/19	Yvette Donaldson	Review of briefs submitted to the CAVC and prepared questions for moot court in preparation of CAVC hearing	1.3	\$215.80
7/06/19	Yvette Donaldson	Oral argument preparation – compile binder of all cases and filings	1.9	\$315.40
7/9/19	Susan Saidel	Prepare for moot with VLC staff	2.0	\$390.00
7/9/19	Yvette Donaldson	Prepare for moot with VLC staff	1.5	\$249.00
7/10/19	Yvette Donaldson	Oral argument prep – compile binder of all cases and filings and case summaries	2.0	\$332.00
7/11/19	Yvette Donaldson	Prepared documents and obtained signatures for filing with CAVC for student appearance (second chair)	.6	\$99.60
7/15/19	Susan Saidel	E-mail to client re: CAVC argument (how to view oral argument)	.1	\$19.50
7/15/19	Susan Saidel	Moot with VLC staff	1.0	\$195.00
7/16/19	Susan Saidel	Telephone call from client – instructions on how to view oral argument	.4	\$78.00
7/17/19	Susan Saidel	Preparation for oral argument (including moot)	1.8	\$351.00
7/18/19	Susan Saidel	Travel to Washington from Philadelphia D.C. for CAVC oral argument (taxi-train-taxi)	3.6	\$702.00
7/18/19	Yvette Donaldson	Travel to Washington D.C. from NJ for CAVC oral argument	3.1	\$514.60
7/18/19	Susan Saidel	Check in with court/Prepare for oral argument	.8	\$156.00
7/18/19	Yvette Donaldson	Check in with court/Prepare for oral argument	.8	\$132.80
7/18/19	Susan Saidel	Participate in oral argument	1.1	\$214.50
7/18/19	Yvette Donaldson	Participate in oral argument	1.1	\$182.60
7/18/19	Susan Saidel	Travel from Washington D.C. to Philadelphia (taxi-train-taxi)	3.6	\$702.00
7/18/19	Yvette Donaldsson	Travel from Washington D.C. to NJ (car)	3.2	\$531.20
7/19/20	Susan Saidel	Phone call to client (update)	.2	\$39.00
8/17/19	Susan Saidel	Review CAVC decision	.2	\$39.00
8/19/19	Susan Saidel	E-mail to client re: CAVC decision	.1	\$19.50
8/22/19	Susan Saidel	Phone call to client re: CAVC decision	.3	\$58.50
9/22/19	Diane Adamchak	Draft EAJA application; review of applicable rules and deadline dates	1.2	\$199.20

9/25/19	Diane Adamchak	Draft EAJA application and itemized statement of services (students)	1.2	\$199.20
11/25/19	Susan Saidel	Review EAJA application and complete itemized statement of services (attorneys)	1.0	\$195.00
		TOTAL	94.9	\$17,023.38