

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

JAMES H. OATES,	)	
Appellant,	)	
	)	
v.	)	
	)	Vet App No. 18-2417
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

**APPELLANT'S APPLICATION FOR AN AWARD  
OF REASONABLE ATTORNEY FEES AND EXPENSES**

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) and U.S.Vet.App. R. 39, Appellant applies for an award of reasonable attorney's fees and expenses in the amount of \$7737.27.

**SUMMARY OF PROCEEDINGS**

Mr. Oates appealed, through counsel, the January 12, 2018, Board decision that denied entitlement to a rating higher than 90 percent for degenerative joint disease of the right hip, from May 20, 2015; the Board granted a TDIU rating effective May 20, 2015. Appellant filed a brief in January 2018 and replied to the Secretary's brief. In November 2019, the parties entered into an agreement for the Secretary to award a separate 10 percent rating for painful motion of the lumbar spine, effective May 20, 2015. They filed a joint

motion to terminate appeal with a stipulated agreement. This Court granted said motion and issued mandate effective November 14, 2019. Mandate was issued, effective November 12, 2019.

## **ARGUMENT**

The Court may award reasonable attorney fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F). In order for the Court to have jurisdiction over an EAJA application, it must be filed within the 30-day period set forth in 28 U.S.C. § 2412(d)(1)(B). The application must contain: (1) a showing that the applicant is a prevailing party within the meaning of the EAJA; (2) an assertion that the applicant is a party eligible for an award under the EAJA because the party's net worth does not exceed \$2,000,000 dollars; (3) an allegation that the position of the Secretary at the administrative level or in litigation was not substantially justified; and (4) an itemized statement of the fees and expenses sought. *See* 28 U.S.C. § 2412(d); *Cullens v. Gober*, 14 Vet.App. 234, 237 (2001)(*en banc*); *Chesser v. West*, 11 Vet.App. 497, 499 (1998); *Bazalo v. Brown*, 9 Vet.App. 304, 308 (1996)(*en banc*), *rev'd on other grounds sub nom. Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998). An award under EAJA is appropriate in this case.

An application for fees under EAJA is timely if filed within thirty days after the judgment becomes final. 28 U.S.C. § 2412(d)(1)(B). In the instant case, the application is filed within the thirty day time period, hence it is timely.

Appellant is a prevailing party for EAJA award. Instead of denying, as the Board did in the decision on appeal, the Secretary agreed to settle the appeal by awarding a separate rating of 10 percent for the lumbar spine, effective May 20, 2015.

Appellant filed the captioned appeal in his individual capacity. Therefore, in order to qualify as a "party" under EAJA, it must be shown that the party's "net worth did not exceed \$2,000,000 at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B). Appellant asserts it does not and is unaware of circumstances which would make an award of fees unjust in this case.

The position of the United States was not substantially justified in this case for the claims he prevailed. The Supreme Court has held that "substantially justified," as used in EAJA, means justified in substance, in the main, or to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988). In determining whether the Government's position was substantially justified, the Court must consider the underlying agency action.

"[P]osition of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings."

28 U.S.C. § 2412(d)(2)(D); *Felton v. Brown*, 7 Vet.App. 276, 289 (1994). As discussed above, the Secretary agreed to award a separate rating for the lumbar spine instead of continuing the Board's denial. Under such circumstances, the Government's position should not be deemed substantially justified. The Government bears the burden of demonstrating that its position was substantially justified. *Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet.App.291, 301 (1994). The Secretary must show "that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." *Gavette v. OPM*, 808 F.2d 1456, 1467 (Fed. Cir. 1986).

This application is accompanied by an affidavit from Appellant's attorney, attached hereto as Appendix A. The affidavit includes an itemization of the number of hours expended on this litigation on prevailing claims, and after adjusting for billing judgment. The application demonstrates that, based upon the specific services performed, the fee sought is a reasonable one. In this circuit, an application for attorney fees is allowable where it is based on records that are substantially reconstructed and reasonably accurate. *P.P.G. Indus. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1570 (Fed.Cir. 1988). Here, the application is based upon contemporaneous time records.

Under 28 U.S.C. § 2412(d)(2)(A)(ii), attorneys may demonstrate that an increase in the cost of living justifies an increase in the statutory cap. *See Pierce v. Underwood*, 108 S.Ct. 2553 (1988) (referring to a cap of \$75.00 per hour “adjusted for inflation”); *Philips V. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991). An increase for cost of living is generally allowed. *Coup v. Heckler*, 834 F. 2d 313, 320 (3d Cir. 1987); *Baker v. Brown*, 839 F.2d 1075 (5th Cir. 1988) (allowed except in unusual circumstances).

In *Elczyn v. Brown*, 7 Vet.App. 170 (1994), this Court decided that an Appellant's attorney can petition for a fee in excess of the statutory cap based upon the Consumer Price Index. *Id.* at 179-181. This Court further directed attorneys filing for an increased fee based upon the CPI to choose a midpoint date in the litigation to establish the appropriate date for calculating the cost of living increase. *Id.* at 181. The Appellant chooses January 2019, the filing date of his brief, to calculate the increase.

Appellant submits that the Court should increase the \$125.00 per hour cap by the general inflationary index in the cost of living since March of 1996, as reflected by the CPI for all urban consumers in the United States. *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991); *Jones v. Lujan*, 887 F.2d 1096, 1101 n.8 (D.C. Cir. 1989) (increase in cost of living in Washington, D.C.).

Calculations based on data from the Bureau of Labor Statistics reflect that compensation should be at the rate of \$206.50 per hour.<sup>1</sup>

In addition to attorney fees, Appellant is entitled to recover expenses. 28 U.S.C. § 2412(d)(1)(A); *Cook v. Brown*, 6 Vet.App. 226, 237-40 (1994). The affidavit referred to above includes an itemization of expenses incurred herein, in the total amount of \$55.47

### **CONCLUSION**

For the foregoing reasons, Appellant respectfully requests the Court to order the Secretary of Veterans Affairs to pay reasonable attorney fees and expenses in the total amount of \$7737.27 to Jeany Mark, counsel for Appellant.

Respectfully submitted,

/s/Jeany Mark  
Jeany Mark  
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Tel: 202-393-3020  
Appellant's Counsel

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<sup>1</sup> See <http://data.bls.gov>: consumer price index for 11/1996 for Washington DC is 161.20 and for 1/2019 is 262.30. Adjusted hourly rate=\$125.00+(\$125.00 multiply by [(262.30 minus 161.2)divided by 161.2]

## **AFFIDAVIT**

## **Appendix A**

I hereby certify under penalty of perjury under the laws of the United States of America that the following itemization is true and accurate.

### **LEGAL SERVICES** (Exercised billing judgment; only on claims prevailed)

<b><u>Date</u></b>	<b><u>Actions</u></b>	<b><u>Time (hrs)</u></b>
01.25.18	Review BVA decision	0.5
01.25.18	Discuss with client re: BVA decision	0.3
01.26.18	Communication from client re: appeal (pstg \$0.49)(copies 5)	0.4
05.11.18	Prepare notice of appeal and appearance (scan 2)	0.3
05.11.18	Communication with client re: status(pstg \$0.49, copies 3)	0.2
05.14.18	Review court's notice	0.1
05.14.18	Sent consent form to OGC	0.1
06.12.18	Review court's notice	0.1
06.12.18	Communication with court re: filing (postage \$0.49)	0.1
06.15.18	Review court's notice	0.1
06.18.18	Review court's notice	0.1
07.03.18	Review notice of appearance by OGC counsel	0.1
07.18.18	Review court's notice re: RBA notice	0.1
07.24.18	Review RBA CD to ensure readability	0.1
09.14.18	Reviewed RBA rule 10 review (2120 pages)	2.8
09.14.18	Communicate with OGC atty re: records deficiencies	0.1
09.17.18	Comm from OGC atty re: RBA issues	0.1
09.20.18	Prepare Rule 10 response	0.1
09.21.18	Review court's notice	0.1
09.21.18	Enter appearance (EM)	0.1
10.03.18	Review notice of appearance by OGC counsel	0.1
10.10.18	Review court's notice	0.1
10.18.18	Review BVA decision and take notes (R. 1-21) (EM)	1.5
10.18.18	Review RBA and take notes (R. 22-971) (EM)	2.5
10.19.18	Review RBA and take notes (R. 972-2120)(EM)	2.3
10.22.18	Draft pre-briefing memorandum: spine rating (EM)	1.0
10.22.18	Draft pre-briefing memorandum: TDIU (EM)	0.3
10.22.18	Draft cert. of service (EM)	0.1
11.05.18	Email to opposing counsel (EM)	0.1
11.05.18	Review email from opposing counsel (EM)	0.1
11.06.18	Review notes/memo prior to conference (EM)	0.5
11.06.18	Briefing conference held (EM)	0.3
01.05.19	Draft brief: TDIU) (EM)	1.5

01.09.19	Draft brief: separate spine rating) (EM)	1.5
01.09.19	Draft brief: Board weighed irrelevant evidence) (EM)	0.5
01.09.19	Draft brief: summary/statement of facts) (EM)	2.5
01.21.19	Edit brief (EM)	0.5
01.22.19	Finalize brief (EM)	0.5
03.22.19	Review court's notice	0.1
05.03.19	Review and take notes on Appellee's brief (EM)	2.0
05.03.19	Legal research: separate ratings for sep. manifestations (EM)	2.0
05.03.19	Draft reply brief: prior spine SC denial not relevant (EM)	0.5
05.03.19	Draft reply brief: unfavorable spine VAX not relevant (EM)	1.5
05.03.19	Draft reply brief: Secretary misconstrues 38 C.F.R. § 4.67 (EM)	1.5
05.03.19	Draft reply brief: Secretary misread medical record (EM)	1.3
05.03.19	Draft reply brief: Retrospective medical opinion (EM)	0.5
05.06.19	Finalize reply brief (EM)	0.5
06.07.19	Review court's notice	0.1
07.03.19	Review court's notice	0.1
07.11.19	Review court's notice	0.1
07.31.19	Review court's notice	0.1
08.01.19	Email opposing counsel: client privacy issue (EM)	0.1
08.01.19	Review court's notice	0.1
08.01.19	Review Secretary's <i>Solze</i> notice and take notes (EM)	0.2
08.02.19	Review court's notice	0.1
08.02.19	Review Secretary's amended <i>Solze</i> notice (EM)	0.1
08.02.19	Draft response to <i>Solze</i> notice (EM)	0.1
10.07.19	Review court's notice	0.1
10.07.19	Review email from opposing counsel (EM)	0.1
10.07.19	Email to opposing counsel (EM)	0.1
10.07.19	Review OGC draft motion to clarify (EM)	0.1
10.07.19	Email to opposing counsel (EM)	0.1
10.23.19	Review email from opposing counsel (EM)	0.1
10.23.19	Email to opposing counsel (EM)	0.1
10.24.19	Review court's notice	0.1
10.24.19	Review settlement offer, take notes (EM)	0.5
11.04.19	Discuss settlement offer with client (EM)	0.4
11.04.19	Email to opposing counsel (EM)	0.1
11.04.19	Review email from opposing counsel (EM)	0.1
11.04.19	Email signed settlement to opposing counsel (EM)	0.1
11.05.19	Review Court's notice	0.1
11.14.19	Review Court's notice	0.1
12.10.19	Scrub timesheet for billing judgment and prepare EAJA	2.5



Total: hours 37.2 hrs@ \$206.50/hour = \$7681.80

**Expenses:**

Filing Fees	50.00
Postage	1.47
Scan	2.00
Copies	2.00

Total Expenses	\$ 55.47
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/s/ Jeany Mark  
Jeany Mark