

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

**CASE FILE NO.: 18-6257**

**HENRY G. COMBS,**  
**Appellant,**

**v.**

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

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

Appellant, Mr. Combs, hereby applies to this honorable Court for an award of his attorney's fees and expenses in the amount of \$6,137.87. This application is made pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and this Court's Rule 39.

**I. PROCEDURAL HISTORY**

On July 13, 2018, the Board of Veterans' Appeals (Board) entered a decision that denied entitlement to an earlier effective date prior to November 14, 1991, for an award of service connection for tinnitus. A conference was held on May 6, 2019, the parties filed their written briefs, and the court issued an order for oral argument on February 27, 2020. Subsequently, the parties entered into negotiations, reached an agreement, and entered into a Joint Motion to Terminate the appeal based on a stipulated agreement, which was filed with the Court on April 7, 2020, and approved by the Court on April 16, 2020. The parties agreed that the Secretary will award an effective date of November 5, 1969, for the grant of entitlement to service connection

for tinnitus, with a 0% rating; and award a 10% rating for tinnitus, effective March 10, 1976.

This application is timely under 28 U.S.C. § 2412(d)(1)(B).

## **II. AVERMENTS**

Mr. Combs avers—

- (1) This matter is a civil action;
- (2) This action is against an agency of the United States, namely the Department of Veterans Affairs;
- (3) This matter is not in the nature of tort;
- (4) This matter sought judicial review of an agency action, namely the prior disposition of Mr. Combs' appeal to the Board of Veterans' Appeals;
- (5) This Court has jurisdiction over the underlying appeal under 38 U.S.C. § 7252;
- (6) Mr. Combs is a "party" to this action within the meaning of 28 U.S.C. § 2412(d)(2)(B);
- (7) Mr. Combs is a "prevailing party" in this matter within the meaning of 28 U.S.C. § 2412(d)(1)(a);
- (8) Mr. Combs is not the United States;
- (9) Mr. Combs is eligible to receive the award sought;
- (10) The position of the Secretary was not substantially justified; and
- (11) There are no special circumstances in this case which make such an award unjust.

Mr. Combs submits below an itemized statement of the fees and expenses for which he applies. The attached itemization shows the time counsel spent representing Mr. Combs on his appeal to the Court. Accordingly, Mr. Combs contends that he is entitled to an award of attorney's fees and expenses in this matter in the total amount itemized.

### **III. ARGUMENT**

The assessment of the "jurisdictional adequacy" of a petition for EAJA fees is controlled by the factors summarized and applied in, e.g., *Cullens v. Gober*, 14 Vet. App. 234, 237 (2001) (*en banc*).

#### **A. "Court"**

This Court is a court authorized to award attorney's fees and expenses as sought herein. 28 U.S.C. § 2412(d)(2)(F). This Court has exclusive jurisdiction of this matter. 38 U.S.C. § 7252(a).

#### **B. Eligibility: "Party"**

Mr. Combs is a party eligible to receive an award of fees and expenses because his net worth does not exceed \$2 million. See 28 U.S.C. § 2412(d)(2)(B). The declaration set forth in paragraph 6A in the Attorney-Client Fee Contract filed with the Court and served upon the Secretary on November 13, 2018, establishes this fact.

#### **C. "Prevailing"**

To be a "prevailing party" within the meaning of the statute, a party need only have succeeded "on any significant issue in litigation which achieve[d] some of the

benefit . . . sought in bringing suit.” *Texas Teachers Association v. Garland Independent School District*, 489 U.S. 782, 791-92, 109A S.Ct. 1486, 1493, 103 L.Ed.2d 866, 876 (1989)).

The “prevailing party” requirement is satisfied by a remand. *Stillwell v. Brown*, 6 Vet. App. 291, 300 (1994). See *Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360 (Fed. Cir. 2003) (remand because of alleged error and court does not retain jurisdiction). This Court sharpened the criteria for “prevailingness” in *Sumner v. Principi*, 15 Vet. App. 256, 260-61 (2001) (*en banc*). “Prevailingness” now depends on the presence of either a finding by the Court or a concession by the Secretary of “administrative error.” Mr. Combs’ is a “prevailing party” entitled to an award of fees and expenses. For this assertion, Mr. Combs’ relies upon the following to satisfy the *Sumner* criteria:

The parties agreed that the VA will award an effective date of November 5, 1969, for the grant of entitlement to service connection for tinnitus, with a 0% rating and award a 10% rating for tinnitus, effective March 10, 1976. As this issue was in dispute, and the Secretary agreed to reinstate the full benefit sought, Mr. Combs is a prevailing party.

#### **D. The Position of the Secretary Was Not Substantially Justified**

To defeat this application for fees and expenses the Secretary must show that the Government’s position was “substantially justified.” *Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301

(1994) (92-205), *appeal dismissed*, 46 F.3d 1111 (Fed. Cir. 1995) (94-7090). See 28 U.S.C. § 2412(d)(1)(B). The Government must show its position to have had a “reasonable basis both in law and fact.” *Pierce v. Underwood*, 487 U.S. 552, 563-68, 108B S.Ct. 2541, 2549-51, 101L.Ed.2d. 503-506 (1988); *Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

“Substantial justification” is in the nature of an affirmative defense: If the Secretary wishes to have its benefit, he must carry the burden of proof on the issue. *Clemmons v. West*, 12 Vet. App. 245, 246 (1999) (97-2138), *appeal dismissed*, 206 F.3d 1401 (Fed. Cir. 2000) (99-7107), *rehrg denied*, \_\_ F.3d \_\_ (May 2, 2000). It is sufficient for Mr. Combs’ simply to aver this element.

#### **E. Itemized Statement of Fees and Expenses**

Annexed to this application are the required declaration of the lawyer, Exhibit A, and an itemized statement of the services rendered and the fees and expenses for which Mr. Combs’ seeks compensation, Exhibit B. See 28 U.S.C. § 2412(d)(1)(B).

Mr. Combs' counsel seeks compensation for attorney’s fees and expenses incurred at the following rate and in the amounts shown<sup>1</sup> for representation in this Court:

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<sup>1</sup> The chart summarizes hours, fees, and expenses. The chart only reflects hours of work performed for which the applicant is seeking compensation. Exhibit B is an itemized list of all fees and expenses—even those for which the applicant is not seeking compensation.

<b>Attorney &amp; Administrative Services</b>	<b>Rate:</b>	<b>Hours:</b>	<b>Fee:</b>	<b>Totals:</b>
Kenneth H. Dojaquez, Attorney	\$202.80	16.82	\$3,410.37	<b>\$3,410.37</b>
Paralegal & Law Clerk	\$150.00	17.85	\$2,677.50	<b>\$2,677.50</b>
<b>Total for Services</b>				<b>\$6,087.87</b>
<b>Total for Expenses</b>				<b>\$50.00</b>
<b>Total for Application</b>				<b>\$6,137.87</b>

## **F. Calculation of Rate of Fees**

The fees in this case were calculated using the maximum hourly rate permitted under EAJA.

### *1. Lawyer's Standard Rates.*

At the Court, Mr. Dojaquez' standard fee agreement states he shall be entitled to the greater of 20% of the gross amount of any past due benefits recovered for the appellant or an award of attorneys fees under EAJA. At the agency level, Mr. Dojaquez similarly limits his fee to a 20% contingency fee. Mr. Dojaquez' practice is limited to veteran benefits law; thus, Mr. Dojaquez considers his standard hourly rate to be commensurate with the "EAJA" rate in effect at the time Mr. Dojaquez provides services. However, based upon his geographical area, years of practice, and experience in veterans benefits law, a reasonable hourly rate for his services in other types of cases would be at least \$200.00.

### *2. Reasonableness of Lawyer's Rate.*

Widely followed tabulations establish that the lawyer's hourly rate billed in this application is well below the prevailing rate. See the "*Laffey*<sup>2</sup> matrix" and a similar table attributed to the United States Attorney, both of which appeared in *Covington v. District*

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<sup>2</sup> *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983).

of *Columbia*, 839 F. Supp. 894, 904 (D.D.C.) in 1993; and see a similar version of the “Laffey matrix” from BARTON F. STICHMAN & RONALD B. ABRAMS, THE VETERANS BENEFITS MANUAL, p. 1634 (2009). The *Covington* and VBM versions of the “Laffey matrix” have been adjusted for inflation. One readily finds that the lawyer’s rate for attorney fees in this case is well below the rates shown in the tabulations.

Also, in Exhibit A, the applicant’s lawyer declares the billing rate utilized in Mr. Combs’ case is less than the prevailing market rate for similar services performed by attorneys in Columbia, South Carolina.

### 3. Calculation of “EAJA Cap.”

As the Court is aware, the statutory maximum rate for lawyer fees under EAJA is now \$125.00 per hour. 28 U.S.C. § 2412(d)(2)(A). It may be adjusted for inflation by using the United States Department of Labor’s Consumer Price Index for All Urban Consumers (published by the Bureau of Labor Statistics) appropriate to the region, *Mannino v. West*, 12 Vet. App. 242, 244 (1999) (97-784), for the approximate mid-point of the representation. For this case, we used the date on which the Appellant’s Opening Brief was filed, July 22, 2019, as the mid-point of representation. *Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994). Exhibit C. The rate-cap for the fees for lawyer services used in this application has been calculated as follows:

$$\begin{array}{rcl}
 \text{CPI-U [Southern Region, (July 2019)]}^3 & & \\
 \$125 \times \frac{\quad}{\text{CPI-U (Southern Region, March 1996)}} & = & \$125 \times \frac{247.250}{152.4} = \$202.80
 \end{array}$$

#### 4. Rate Applied.

Mr. Dojaquez is the only person who performed work on this case, so only one billing rate was used.

#### 5. Billings Herein & “Billing Judgment.”

The lawyer has also reviewed the itemization to exercise “billing judgment” by determining whether the activity or expense might be an overhead expense or, for any other reason, not properly billable. In particular, the lawyer did not charge for work done on theories that either were not a basis for remand, or were related to issues that are not billable (e.g. inextricably intertwined). The lawyer also seeks to assure sound “billing judgment” by reducing the number of billable hours of work performed that might be considered excessive and by seeking less than the “EAJA-CPI rate.” However, the lawyer will be grateful to have brought to his attention any mistakes which might remain.

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<sup>3</sup> The CPI-U is available at the Internet web site of the Bureau of Labor Statistics, <http://www.bls.gov/ro3/cpiso.htm>  
The graph used for this application was found at:  
[http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data\\_tool=dropmap&series\\_id=CUUR0300SA0,CUUS0300SA0](http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=dropmap&series_id=CUUR0300SA0,CUUS0300SA0)



## **G. Expenses**

All expenses are claimed at the actual cost incurred, with no “mark ups” or premiums.

## **H. Reasonableness of the Fee**

Finally, it is necessary to show the reasonableness of the award sought on the basis of the 12 factors summarized in *Hensley v. Eckerhart*, 461 U.S. 424, 430 n. 3, 103A S.Ct. 1933, 76 L.Ed.2d 40 (1983):

1. *The time and labor* required is reported in the attached itemization.
2. *The novelty and difficulty of the questions.* His appeal dealt with complex, and novel issues that required extensive research to coordinate statutory interpretation with case law spanning over 15 years. This appeal required counsel, with assistance from staff, to review dozens of CAVC and CAFC cases.
3. *The skill requisite to perform the legal service properly.* Veterans disability is a species of law of its own, requiring specialization, continuing education, and experience.
4. *The preclusion of employment by the attorney due to acceptance of the case.* This factor did not affect this engagement.
5. *The customary fee.* There are no lawyers known to the applicant and counsel who accept clients in veterans’ benefits matters on the basis of a “flat rate” or “customary fee.”

6. *Whether the fee is fixed or contingent.* The engagement agreement in this case is contingent upon sufficient success on the merits. Pursuant to the agreement, the attorney shall be entitled to an award of attorneys fees under EAJA.

7. *Time limitations imposed by the client or the circumstances.* This engagement was not affected by unusual urgency.

8. *The amount involved and the results obtained.* The amount for which the application is made is stated earlier. The amount of the veteran's benefits in controversy is not regarded by the applicant as relevant for the purposes of this application.

9. *The experience, reputation, and ability of the attorney.* The lawyer whose fees are sought is now in his eighth year in the practice of veteran's benefits law. He is a member and an active participant in the National Organization of Veterans' Advocates.

10. *The "undesirability" of the case.* This engagement was not affected by this factor.

11. *The nature and length of the professional relationship with the client.* Undersigned counsel has represented Mr. Combs since November 2012 through the filing of this appeal and will represent him on the remand to the Board.

12. *Awards in similar cases.* EAJA awards in veterans benefits cases are not collected in a counterpart of a jury award digest, but decisions of this Court reveal awards over \$20,000.00. *E.g., Perry v. West*, 11 Vet. App. 319 (1998)

(\$20,430 award approved); *Ussery v. Brown*, 10 Vet. App. 51 (1997) (93-0696)  
(approved application for \$21,898).

### **I. Wrap-Up Application**

Mr. Combs recognizes that the Secretary is privileged to oppose this application. Such a dispute may require that Mr. Combs file responsive pleadings. In those instances, Mr. Combs asks that he be permitted to supplement this application with a single, final “wrap-up” application which would include fees and expenses incurred after the date of this application.

### **IV. Prayer for Relief**

Mr. Combs respectfully moves for an order awarding to appellant his attorney’s fees and expenses as set forth herein. This application for attorney’s fees and expenses is—

Respectfully submitted for Mr. Combs by:

/s/ Kenneth H. Dojaquez

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**ANNEXED**

Exhibit A ..... Lawyer’s Declaration

Exhibit B ..... Itemized List of Services, Fees, and Expenses

Exhibit C ..... CPI-U Chart

Exhibit D.....*Laffey Matrix*

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

**CASE FILE NO.: 18-6257**

**HENRY G. COMBS,**  
**Appellant,**

**v.**

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

**ATTORNEY'S  
DECLARATION  
RE: ITEMIZATION OF  
FEES AND EXPENSES**

Kenneth H. Dojaquez, attorney for the appellant, hereby declares and states:

1. I am the lawyer who represents the appellant named in this appeal. This declaration is based upon my personal knowledge as stated herein.

2. On November 8, 2018, the appellant signed an engagement agreement for me to represent him with a pending appeal before the Court. I have represented appellant in this matter continuously since that date. I entered my appearance in this case on November 8, 2018.

3. I worked on this case for a period of time before filing the Notice of Appeal in expectation that an appeal to the court would be filed, and that work is itemized in the attached statement of fees and expenses.

4. The engagement agreement in this case is contingent upon sufficient success on the merits. Pursuant to the agreement, I will be entitled to an award of attorneys fees under EAJA. I explained to Mr. Combs that, if we were successful at the Court, I would apply for my fees under EAJA.

5. To ensure my billing rates are reasonable, I consulted with other practitioners. Based upon my personal experience at a private firm in Columbia, South Carolina, and inquiry to other practitioners, the billing rates charged by me in Mr. Combs' case are consistent with or less than the prevailing market rates for similar services performed by attorneys in Columbia, South Carolina.

6. The attached itemization of fees and expenses is based on entries made contemporaneously with the work or expenditure. Fees for time are based on measured time or reasonably accurate estimates sometimes rounded to hundredths of an hour. I have reviewed the itemized billing statement of fees and expenses to ensure they are correct. I am satisfied that the statement accurately reflects the work I performed. I know of no errors or misrepresentations in the statement. I have considered and eliminated all time that is excessive or redundant.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed in Columbia, South Carolina, this the following date: May 18, 2020

/s/ Kenneth H. Dojaquez

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## Appellant Henry Combs CAVC (18-6257)

	Start	End	Time	Hours	
2018					
13-Jul			0:00	0.50	Review BVAD for issues to appeal
25-Oct	11:00	11:10	0:10	0.17	phone call with vet to discuss representation. Set up meeting to go over case and contract
8-Nov	12:38	13:04	0:26	0.433333	Meeting with client to discuss appeal and contract
2019					
15-Mar			0:00	8.53	Law clerk: RBA review
22-Apr	13:20	14:36	1:16	1.27	Draft R33 memo: review and outline arguments
	14:36	15:49	1:13	1.22	Draft R33 memo: argument
	15:49	16:10	0:21	0.35	Draft R33 memo: edit and revise
29-Apr	15:19	15:41	0:22	0.37	Paralegal: prepare and redact RBA cites in memo
13-Jun			0:00	4.00	Law clerk: legal research
14-Jun			0:00	4.00	Law clerk: legal research
9-Jul	12:50	14:46	1:56	1.93	Legal research: Sellers, Shea, Ingram
14-Jul	7:20	8:00	0:40	0.67	Legal research: Sellers, Shea, Ingram. Outline argument
22-Jul	10:00	10:20	0:20	0.33	Draft brief: outline argument
	10:20	10:45	0:25	0.42	Draft brief: Nature of case; facts
	11:40	12:50	1:10	1.17	Draft brief: Argument 1
	12:50	13:40	0:50	0.83	Draft brief: Argument 2
	13:40	14:18	0:38	0.63	Draft brief: edit and revise
	14:18	14:39	0:21	0.35	Draft brief: TOC/TOA
2020					
2-Jan	13:00	14:01	1:01	1.02	Review Sec brief; outline arguments; legal research
	14:01	14:42	0:41	0.68	Draft reply brief: argument 1
	15:03	15:23	0:20	0.33	Draft reply brief: argument 2
	15:23	16:23	1:00	1.00	Draft reply brief: argument edit and revise; add arg 3
	16:23	16:39	0:16	0.27	Draft reply brief: TOC/TOA
2020					
7-Jan	13:38	14:04	0:26	0.43	Draft motion for oral argument
27-Feb	10:10	10:20	0:10	0.17	Call with Secretary to discuss JMR.
	10:20	10:45	0:25	0.42	Call with client to discuss JMR offer
2-Mar	12:40	13:00	0:20	0.33	Review proposed JMR and briefs
	13:00	13:10	0:10	0.17	Call to client to discuss content of JMR. Draft note to file and email to Secretary
9-Mar	12:30	13:20	0:50	0.83	Reviewed Secretary's updated JMR proposal. Conducted additional research in Sellers and other cases. Called Secretary and rejected the JMR.
7-Apr	11:25	11:54	0:29	0.48	Reviewed Secretary's settlement agreement. Called client to advise. Returned signed agreement to Secretary
15-May	9:25	10:22	0:57	0.95	Paralegal: draft EAJA application
18-May	8:45	9:10	0:25	0.42	Review EAJA application



Appellant Henry Combs CAVC (18-6257)

	Start	End	Time	Hours	
				16.82	Total Hours (Attorney)
				202.80	Rate
				3410.37	Total Fee (Attorney)
				17.85	Total Hours (Paralegal)
				150.00	Rate
				2677.50	Total Fee (Paralegal)
				6087.87	Total Fee
Expenses					
				50.00	CAVC filing fee
Total for Application					
				6137.87	Total

Start and end times are depicted as in the 24 hr clock

Time is depicted as hour:minutes

Hours depicted as fractions of hours (e.g. 1.25 is one hour 15 minutes)



## USAO ATTORNEY'S FEES MATRIX — 2015-2019

*Revised Methodology starting with 2015-2016 Year*

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17	2017-18	2018-19
31+ years	568	581	602	613
21-30 years	530	543	563	572
16-20 years	504	516	536	544
11-15 years	455	465	483	491
8-10 years	386	395	410	417
6-7 years	332	339	352	358
4-5 years	325	332	346	351
2-3 years	315	322	334	340
Less than 2 years	284	291	302	307
Paralegals & Law Clerks	154	157	164	166

### *Explanatory Notes*

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-