

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

SITTI H. PRINCE,)	
Appellant,)	
)	
v.)	
)	Vet App No. 19-5738
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 \$ 3587.97.

SUMMARY OF PROCEEDINGS

In a February 6, 2019 decision, the Board of Veterans’ Appeals, in part, denied entitlement to a staged rating for PTSD: in excess of 50 percent prior to September 16, 2008; and in excess of 70 percent prior to December 22, 2010. The veteran appealed. Thereafter, the parties filed a joint motion for remand because the Board failed ensure compliance with VA’s duty to assist. The Court granted said motion and issued mandate May 5, 2020.

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. The parties agreed that the Board erred in its decision, warranting remand of the claim appealed.

Appellant filed the captioned appeal in her 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. 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 Board’s decision was set aside and the claim remanded for the VA to assist the veteran in developing her claim. 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, 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 2020.

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 \$206.60 per hour. ¹

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 \$12.10.

CONCLUSION

¹ See <http://data.bls.gov>: consumer price index for 11/1996 for Washington DC is 161.20 and for 01/2020 is 266.43. Adjusted hourly rate=\$125.00+(\$125.00 multiply by [(266.43 minus 161.2)divided by 161.2]

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 \$ 3587.97 to Jeany Mark, counsel for Appellant.

Respectfully submitted,

/s/Jeany Mark

Jeany Mark

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Appellant's Counsel

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)

<u>Date</u>	<u>Actions</u>	<u>Time (hrs)</u>
05.09.19	Review decision for appeal	0.4
08.12.19	Communication with client re: appeal (Copies: 5, pstg \$0.50)	0.3
08.23.19	Prepare notice of appeal and appearance	0.4
08.23.19	Communication with OGC re: consent form (scan 1)	0.1
08.23.19	Review court's notice	0.1
08.23.19	Communication with client re: status (copies 7, pstg \$0.60)	0.2
08.23.19	Review court's notice	0.1
09.18.19	Review court's notice	0.1
10.07.19	Review notice of appearance by OGC counsel	0.1
10.21.19	Review court's notice	0.1
10.23.19	Review RBA CD to ensure readability	0.1
11.05.19	Review RBA for Rule 10 (1684 pages, 21 documents)	2.2
11.12.19	Prepare R.10 Motion	0.1
11.13.19	Review court's notice	0.1
01.02.20	Communication with CLS(Diane) re: scheduling conference	0.1
01.07.20	Review court's notice	0.1
01.07.20	Review Board decision and take notes (R. 37-58)	1.1
01.07.20	Review RBA and take notes (R.1301-1684)	1.7
01.07.20	Review RBA and take notes (R.900-1300)	1.5
01.07.20	Review RBA and take notes (R.476-899)	1.6
01.07.20	Review RBA and take notes (R.59-475)	1.7
01.07.20	Review RBA and take notes (R.1-36)	0.2
01.08.20	Legal Research: caselaw and reg-records	0.4
01.08.20	Draft memo and cite RBA pages	0.6
01.09.20	Communication with CLS/OGC re: memo (scan 10 pages)	0.1
01.10.20	Draft certificate of service	0.1
02.03.20	Communication with OGC atty re: substitution	0.1
02.03.20	Communication with OGC atty re: position to memo	0.1
02.04.20	Review notes/memo/RBA for briefing conference	0.1
02.04.20	Briefing Conference	0.1
02.04.20	Prepare Motion to Stay	0.1
02.04.20	Review Court's order	0.1
02.25.20	Communication with OGC atty re: draft JMR	0.1

02.26.20	Review draft JMR	0.1
02.27.20	Finalize JMR (scan 1) and communicate with OGC atty	0.1
02.27.20	Review court's notice	0.1
02.27.20	Communication with Client: case status	0.2
04.22.20	Review Court order	0.1
04.22.20	Draft Response to Court Order (Scan 4)	0.4
04.23.20	Review Secretary's Response to Court Order	0.1
05.05.20	Review court's notice	0.1
06.03.20	Scrub timesheet for billing judgment and prepare EAJA	1.9

Total: 17.4 hrs@ \$205.51/hr = \$3575.87

Expenses:

Postage	1.10
Copies	3.00
Scans	8.00
Total Expenses	\$ 12.10

/s/ Jeany Mark
Jeany Mark