

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

PERNELL D. WALKER-WHITFIELD,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 19-2438
)	
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 Pernell D. Walker-Whitfield, through counsel, applies for an award of reasonable attorney's fees and expenses in the amount of \$6,732.52.

Procedural History of the Case

On December 17, 2018, the Board of Veterans' Appeals (Board) denied Ms. Walker-Whitfield entitlement to Dependents' Educational Assistance benefits for coursework in social work. Ms. Walker-Whitfield appealed to the U.S. Court of Veterans Claims. On May 28, 2020, the case reached a settlement agreement. Order, May 28, 2020. Ms. Walker-Whitfield is the prevailing party as a result of the settlement agreement, and Ms. Walker-Whitfield 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, Ms. Walker-Whitfield, satisfies each of these predicate requirements.

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

Ms. Walker-Whitfield satisfies the EAJA requirement of her net worth not exceeding \$2,000,000 in order for her 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 Ms. Walker-Whitfield certifies her 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 Ms. Walker-Whitfield's net worth did not exceed \$2 million at the time the appeal was filed. Ms. Walker-Whitfield's net worth did and does not exceed \$2 million at the time the appeal was filed and at the present time and she is therefore eligible and entitled to receive an EAJA award. Counsel will provide to the Court and the Secretary additional information regarding Ms. Walker-Whitfield'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). Ms. Walker-Whitfield is a prevailing party entitled to an award of fees and expenses because the Court vacated the Board's decision denying entitlement to Dependents' Educational Assistance benefits for coursework in social work.

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 find Appellant's coursework in social work assistance compatible with the previous area of study. *See* 38 U.S.C. § 3691. Moreover, the Board failed to find that social work assistance was in the same general field as coursework in healthcare management. *See* 38 C.F.R. §

21.3046(c)(1)(ii). After both parties filed briefs in this matter, and before oral argument, the parties agreed to settle and terminate the appeal based upon Appellant's entitlement to the benefits she was seeking. This Court granted the parties' Joint Motion to Terminate Appeal in its May 28, 2020 Order.

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 Ms. Walker-Whitfield'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>
6/11/19	0.2	Exchanged emails with Pro Bono Consortium (PBC), downloaded Record Before Agency (RBA).
6/12/19	0.2	Drafted Notice of Entry of Appearance and Fee Agreements, filed with Court.
7/29/19	1.0	Edited and reviewed Briefing Memo, sent Briefing Memo to Central Legal Staff (CLS) and VA attorney, drafted Certificate of Service and e-filed with Court, directed staff to send copy to of document to client.
8/14/19	0.6	Attended Briefing Conference, reviewed notes, gave instructions to assistant.
9/9/19	0.4	Final proof of Brief, e-filed Brief with Court.
11/05/19	0.10	Reviewed and exchanged emails with VA attorney.
12/11/19	0.10	Reviewed email from VA attorney.
12/24/19	0.3	Reviewed VA attorney's Brief.
12/30/19	0.4	Reviewed and edited Reply Brief, e-filed Reply

		Brief with Court.
1/29/20	0.10	Received case assignment from Court.
2/26/20	0.3	Reviewed Court order, reviewed Reply Brief, discussed case with law clerk.
2/27/20	0.10	Assigned law clerk to draft Motion for Leave and Motion for Oral Argument.
3/03/20	0.4	Reviewed VA attorney's email, edited and filed Motion for Leave and Motion for Oral Argument with Court.
3/25/20	0.10	Reviewed Court order, sent Court to PBC and paralegal.
3/27/20	0.10	Reviewed Court order.
5/11/20	0.4	Sent email to PBC, gave instructions to paralegal, called client, sent emails to VA attorney, sent update to PBC.
5/14/20	0.8	Reviewed documents, exchanged emails with VA attorney, prepared documents, sent email to VA attorney, called client.
5/15/20	0.2	Exchanged emails with VA attorney.
5/26/20	0.10	Reviewed email from Court, sent email to Court.
5/29/20	0.3	Reviewed Court order, gave instructions to paralegal, called and left message for client.
Total	6.2	

Appellant seeks attorney's fees at the rate of \$216.26 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 December 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 July 2019, the consumer price index increased by 112.147 points. The consumer price index was 264.147 in July 2019 (first half) and it was 152.0 in July 1996; thus, there was a 73.78% increase during this period.

Appellant has chosen July 2019, as the "midpoint" date for this litigation. See 28 U.S.C. 2412(d)(2)(A)(ii); *Elcyszyn 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 73.78% equals a rate of \$217.26 per hour.

The rate per hour, multiplied by the number of billable hours (6.2) results in a total attorney's fee amount of \$ 1,347.01.

Law Clerk Time Expended and Nature of Work Performed

<u>Date</u>	<u>Hours</u>	<u>Nature of Work Performed</u>
5/22/19	0.09	Opened new file.
6/12/19	1.41	Reviewed Record Before Agency (RBA).
6/13/19	0.25	Reviewing RBA.
6/26/19	0.84	Reviewing documents.

6/26/19	0.82	Legal research, drafting Briefing Memo.
6/27/19	0.35	Drafting Briefing Memo, drafting legal section.
6/27/19	1.71	Drafting Briefing Memo, drafting Statement of Facts.
6/28/19	2.12	Drafting Briefing Memo, drafting analysis.
6/28/19	0.48	Drafting Briefing Memo, drafting Argument.
6/28/19	0.97	Proofing and editing Briefing Memo.
8/15/19	0.12	Discussing case with counsel.
8/15/19	1.88	Drafting Brief, drafting Fact section.
8/15/19	2.09	Drafting Brief, adapting Briefing Memo argument.
8/15/19	0.32	Drafting Brief, adapting Briefing Memo.
8/16/19	1.56	Drafting Brief, drafting Argument.
8/16/19	0.75	Drafting Brief, legal research.
8/16/19	0.59	Drafting Brief, drafting Statement of Issue and Summary.
8/19/19	1.71	Drafting Brief, drafting Argument, legal research.
8/20/19	2.41	Legal research.
8/20/19	1.07	Legal research.
8/20/19	0.22	Drafting Brief, legal research.
8/23/19	1.67	Drafting Brief, legal research.
8/23/19	2.0	Drafting Brief.
8/23/19	0.42	Drafting Brief, drafting summary.

8/23/19	1.17	Drafting Brief, editing for review.
8/28/19	1.25	Drafting Brief, drafting Table of Authorities.
8/28/19	0.81	Drafting Brief, drafting Table of Authorities, drafting Table of Contents.
8/28/19	0.42	Drafting Brief, proofing.
8/30/19	0.4	Proofing and editing Brief.
12/26/19	2.20	Drafting Reply Brief, drafting Argument.
12/26/19	0.75	Drafting Reply Brief, drafting Argument.
12/27/19	1.3	Drafting Reply Brief, drafting Argument.
12/27/19	1.4	Drafting Reply Brief, editing, updating Table of Contents and Table of Authorities.
2/28/20	0.42	Preparing motions for oral Argument.
4/16/20	1.4	Preparing cited Authorities for counsel.
Total	37.37	

The law clerk legal work at the rate of \$130.00 per hour for a total of \$4,858.10.

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>
6/11/20	1.5	Preparing EAJA application.
6/22/20	0.4	Preparing EAJA application.
6/23/20	2.1	Preparing EAJA application.
6/24/20	2.5	Preparing EAJA application.

Total 6.5

The assistant bills for paralegal work at the rate of \$80.00 per hour for a total of \$520.

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

<u>Date</u>	<u>Hours</u>	<u>Nature of Work Performed</u>
6/27/19	0.10	Updated calendars.
6/27/19	0.10	Sent copy of Court document to client.
7/18/19	0.10	Updated calendars.
7/18/19	0.10	Sent copy of Court document to client.
7/31/19	0.10	Sent copy of document to client.
10/02/19	0.10	Sent copy of document to client.
12/26/19	0.10	Updated calendars.
12/30/19	0.10	Sent client copy of document.
2/27/20	0.10	Sent copy of Court document to client.
3/05/20	0.10	Sent copy of document to client.
3/25/20	0.75	Drafted letter to client.
3/26/20	0.25	Mailed letter to client.
5/11/20	0.2	Case research.
6/03/20	0.10	Updated calendars.
6/05/20	0.10	Sent contact information to paralegal.
Total	2.4	

The assistant bills at the rate of \$20.00 per hour. 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. An itemization of expenses for which reimbursement is sought is as follows:

<u>Nature of Expense</u>	<u>Amount</u>
Photocopying @ \$.10 per page	\$ 2.40
Postage	\$ 4.62
Long Distance Telephone Charges	\$.39
Total:	\$ 7.41

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: \$6,732.52.

Dated: June 26, 2020.

Respectfully submitted,

Law Office of Sean Kendall

/s/ Timothy R. Franklin

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