

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

CYNTHIA FRANKLIN,	)	
Appellant,	)	
	)	
v.	)	
	)	Vet. App. No. 19-1477
ROBERT L. WILIKIE	)	
Secretary of Veterans Affairs,	)	
Appellee.	)	

**APPELLANT’S APPLICATION FOR AWARD OF REASONABLE  
ATTORNEYS’ 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, CYNTHIA FRANKLIN, applies for an award of reasonable attorneys’ fees and expenses of **\$17,372.90**.

**PROCEDURAL HISTORY**

On January 11, 2019, the Board of Veterans’ Appeals (“Board” or “BVA”) issued a decision that, *inter alia*, denied Appellant’s claim for entitlement to service connection for (1) entitlement to service connection for the Veteran’s death; (2) entitlement to Dependency and Indemnity Compensation (“DIC”) benefits; (3) entitlement to a rating in excess of 50 percent for Major Depressive Disorder (“MDD”), for accrued benefit purposes; and (4) entitlement to TDIU, for accrued benefit purposes. Appellant filed a timely Notice of Appeal to this Court on March 4, 2019.<sup>1</sup>

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<sup>1</sup> Appellant did not appeal the Board’s denial of her entitlement to an increased rating, in excess of 10 percent for the right and left knee for accrued benefits purposes or her entitlement to service connection for a back and hip disorder for accrued benefits purposes.

On May 2, 2019, the Secretary served on Appellant's counsel the 4063 page Record Before the Agency ("RBA"). On May 20, 2019, the Court issued a Notice to File Appellant's brief within sixty days. On June 12, 2019, the Court granted Appellant's motion to reschedule the Rule 33 Staffing Conference from June 25, 2019 to July 31, 2019.

Pursuant to the Court's Order, Appellant's counsel prepared a detailed Rule 33 Staffing Conference Memorandum that addressed the legal errors committed by the Board in the decision on appeal, which she served on counsel for the Secretary and Central Legal Staff ("CLS") counsel on July 16, 2019. On July 31, 2019, the Rule 33 Staffing Conference was held as scheduled; however, the parties were unable to agree to a joint resolution of this case.

Appellant submitted her initial merits brief on October 15, 2019. Appellant argued (1) the Board provided an inadequate statement of reasons and bases when it relied upon two unfavorable VA medical opinions and by failing to consider positive evidence favorable to Appellant's claim for the cause of her late husband's death from cardiovascular disease; (2) the Board provided an inadequate statement of reasons and bases for its decision that relied upon the April 2012 VA medical opinion and by failing to consider positive evidence that showed Appellant was entitled to a rating, in excess of 50 percent for the service-connected MDD; (3) the April and May 2016 VA medical opinions used to deny Appellant's claim for the cause of the death of her late husband from cardiovascular disease were inadequate; and (4) entitlement to TDIU was inextricably intertwined with her entitlement to a higher schedular rating for her late husband's service-connected MDD, in excess of 50 percent.

The Secretary filed his brief on January 30, 2020, arguing against each of the positions contained in Appellant’s initial merits brief. Appellant submitted a reply brief in response on February 27, 2020. The Secretary’s counsel submitted the Record of Proceedings to the Court on March 11, 2020, and Appellant did not raise any objections to the Record of Proceedings. On April 29, 2020, the Court issued a Memorandum Decision that vacated and remanded the Board’s decision with regard to Appellant’s entitlement to service connection for the cause of her late husband’s death, her entitlement to a rating in excess of 50 percent for the service-connected MDD, and TDIU, for accrued benefits purposes.

### **ARGUMENT**

To be eligible for an award of attorney’s fees under EAJA: (1) the party must have been a “prevailing party and [be] eligible to receive an award under this subsection;” (2) the position of the United States must not have been “substantially justified;” and (3) there must be no special circumstances that would make an award unjust. *See* 28 U.S.C. § 2412(d); *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1466 (Fed. Cir. 1986) (en banc). Appellant meets these requirements with respect to his appeal for entitlement to service connection for his bilateral knee condition.

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

To obtain “prevailing party” status, a party must obtain success “on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing the suit. *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993). In making this inquiry, “substance should

prevail over form.” *Devine v. Sutermeister*, 733 F.2d 892 (Fed. Cir. 1984). In *Former Employees of Motorola Ceramic Products v. United States*, 336 F. 3d 1360 (Fed. Cir. 2003), the Federal Circuit made clear, *inter alia*, that “where a plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party [] without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court . . . .” *Id.* at 1360. Appellant is a prevailing party entitled to an award of fees and costs because the Court vacated and remanded her appeal for the service connection claim for the cause of her late husband’s death, as well as her claim for an increased rating for the service-connected MDD, for accrued benefits purposes and TDIU for accrued benefits purposes. *See* Court’s Memorandum Decision. *See also Zuberi v. Nicholson*, 19 Vet. App. 541 (2006); *Sumner v. Principi*, 15 Vet. App. 256 (2001) (*en banc*).

Additionally, to be eligible to file a petition for fees under 28 U.S.C. § 2412(d), a prevailing party must not be: (i) an individual whose net worth exceeded \$2,000,000.00 at the time the litigation began, nor (ii) a business entity whose net worth exceeded \$7,000,000.00 and which had more than 500 employees at the time the litigation began. 28 U.S.C. § 2412(d)(2)(B)(i), (ii). Appellant is eligible to receive an award of reasonable fees and expenses because her net worth did not exceed \$2 million at the time this civil action was filed, and is not a business entity. *See Owens v. Brown*, 10 Vet. App. 65, 67 (1997).

## **II. THE POSITION OF THE SECRETARY 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. *See Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). For the government's position to be substantially justified, it must have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Based on the Court's setting aside the Board's January 2019 decision and its remanding Appellant's claims back to the Board for further development, the position of the Secretary was not substantially justified.

## **III. NO SPECIAL CIRCUMSTANCES MAKE AN AWARD UNJUST ON THIS APPEAL.**

The Secretary does not meet the heavy burden of proving that "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). *See Devine v. Sutermeister*, 733 F.2d 892, 895 (Fed. Cir. 1984); *Love v. Reilly*, 924 F.2d 1492, 1495 (9th Cir. 1991). Courts narrowly construe the "special circumstances" exception so as not to interfere with the Congressional purpose for passing the EAJA, i.e., to insure that litigants have access to the courts when suing the Government. *See Martin v. Heckler*, 772 F.2d 1145, 1150 (11th Cir. 1985); *Taylor v. United States*, 815 F.2d 249, 253 (3rd Cir. 1987). There is no reason or special circumstance to deny this Fee Petition.

**IV. THE COURT SHOULD AWARD APPELLANT REASONABLE ATTORNEY FEES AND EXPENSES OF \$17,372.90.**

This Court “shall” award “fees and other expenses” when the other prerequisites of the statute have been met. 28 U.S.C. § 2412(d)(1)(A). The statute defines “fees and other expenses” to include reasonable attorney fees. 28 U.S.C. § 2412(d)(2)(A). When Congress authorized the award of “reasonable” attorney fees, the amount to be awarded is based upon “the number of hours expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckhart*, 461 U.S. 424, 433 (1983).

**V. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES.**

An itemized statement of the services rendered and reasonable fees and expenses for which Appellant seeks compensation is attached to this application as Exhibit A. Included in Exhibit A is a certification that co-counsel has “(1) reviewed the combined billing statement and is satisfied that it accurately reflects the work performed by all counsel; and (2) considered and eliminated all time that is excessive or redundant.” *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005). In the exercise of billing judgement, Appellant has eliminated five (5) hours of attorney time from this itemized statement and this fee petition, totaling \$1,029.20.

Appellant seeks fees at the following rate for representation in the Court of Appeals for Veterans Claims.<sup>2</sup>

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<sup>2</sup> A rate in excess of \$125 per hour for the attorney for Appellant in this case is justified based on the increase in the cost of living since the EAJA was amended in March 1996. *See* 28 U.S.C. § 2414(d)(2)(A)(ii). The \$125 attorney fee rate, adjusted for inflation for the Palm Beach Gardens area, was \$205.84 in April 2020, the month the Court issued its

<u>NAME</u>	<u>RATE</u>	<u>HOURS</u>	<u>FEE AMOUNT</u>
Amy S. Borgersen* (Three years of experience)	\$205.84	84.4	\$17,372.90
<b>SUBTOTAL:</b> \$17,372.90			

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memorandum decision, and the latest month for which data are available. *See* Bureau of Labor Statistics Data, CPI-U (Exhibit B). This rate was calculated by using the CPI-U for West Palm Beach/South Florida area for inflation between March 1996 and April 2020. *See* Exhibit B; *Mannino v. West*, 12 Vet. App. 242 (1999). The market rates for the Appellant's attorney exceeded \$205.84/per hour during the relevant time.

## **EXHIBIT A**

### **Attorney Hours for *Franklin v. Wilkie* Vet. App. No. 19-1477**

**\*All work was provided by Amy S. Borgersen, Esq., Co-Representative.**

<b>Date</b>	<b>Attorney</b>	<b>Description</b>	<b>Hours</b>
2/19/2019	Amy Borgersen ("Amy")	Called and left a voice message for client regarding January 2019 BVA decision.	0.2
2/21/2019	Amy	Reviewed BVA decision and discussed my findings with client and discussed relevant regulations, and included my thoughts on getting his claims for lumbar spine and right knee disability remanded back to the Board.	2.0
2/23/2019	Amy	Spoke to client to discuss CAVC attorney retainer and fee agreement for his signature, and the overall appellate process.	0.6
3/4/2019	Amy	Prepared letter to CAVC enclosing notice of appeal and notice of appearances and fee waiver.	0.5
3/4/2019	Amy	Received and reviewed CAVC e-filing transmission regarding its receipt of Appellant's Notice of Appeal, Declaration of Financial Hardship, and Appearances of Adam G. Werner and Amy S. Borgersen.	0.1
3/6/2019	Amy	Received and reviewed CAVC e-filing transmission regarding noticing of docking BVA Decision and RBA.	0.1
4/3/2019	Amy	Reviewed CAVC e-filing transmission Order re: BVA Decision transmittal and e-filing order re: copy of BVA decision.	0.1
4/5/2019	Amy	Received RBA consent and sent it to client.	0.1



4/10/2019	Amy	Spoke with client about RBA consent form and case status.	0.5
4/18/2019	Amy	Spoke with client and confirmed receipt of her signed consent form.	0.3
5/1/2019	Amy	Reviewed CAVC e-filing transmission of the Notice of Appearance for Attorney Matthew D. Showalter, Esq., for Appellee, Robert L. Wilkie, as lead counsel and updated file.	0.2
5/2/2019	Amy	Reviewed CAVC e-filing transmission re: Notice of Record Before the Agency and docketed dispute date.	0.1
5/8/2019	Amy	Received and reviewed Record Before Agency ("RBA") CD (4063 pgs.). Completed page-by-page review to determine legibility and completeness of all pages pursuant to Rule 10 (R.10).	6.0
5/20/2019	Amy	Prepared Appellant's response to the RBA.	0.5
5/20/2019	Amy	Spoke with client about RBA contents and thoughts on appealable issues.	0.6
5/20/2019	Amy	Reviewed CAVC e-file transmission Order re: Appellant's RBA dispute and calendared response due date.	0.2
5/30/2019	Amy	Received and reviewed CAVC order scheduling Rule 33 Staffing Conference; and calendared SOI due date.	0.2
6/10/2019	Amy	Corresponded with OGC regarding extension to submit Appellant's SOI memo.	0.2

6/11/2019	Amy	Prepared Appellant's motion to reschedule Rule 33 Staffing Conference from June 25, 2019 until July 31, 2019.	0.5
6/12/2019	Amy	Reviewed CAVC e-filing transmission re: granting Appellant's motion to reschedule and calendared new due date of July 31, 2019.	0.2
6/20/2019	Amy	Pulled cases involving inadequate VA examinations and benefit-of-the-doubt rule and medical consensus and TDIU with increased rating claims.	2.0
6/25/2019	Amy	Began outlining the issues for the Rule 33 Staff conference Memo. 1. Inadequate RB argument. 2. Duty to assist w/inadequate medical examination. 3. TDIU and claims for increased rating. 4. Benefit of the doubt rule.	3.0
7/12/2019	Amy	Begun preparing argument regarding the Board's violation of its statutory duty to assist by failing to provide adequate medical examinations or nexus opinions linking the Veteran's death to the service-connected MDD.	3.0
7/13/2019	Amy	Began preparing argument regarding the Board's inadequate statement of reasons or bases for why it rejected favorable evidence linking the Veteran's death to the service-connected MDD ran afoul of the "benefit of the doubt" rule.	2.0
7/13/2019	Amy	Conducted medical research into anxiety and heart disease and depression on heart disease. Reviewed VA examinations from April and May 2016 and pulled the medical studies identified within the VA examiner's opinion.	5.0

		Reviewed record for heart symptoms related to MDD symptoms.	
7/14/2019	Amy	Reviewed expert opinion submitted by Appellant and reviewed articles attached. Researched cases involving instances where expert did not review STRs and effect on expert opinion and adequacy.	2.0
7/14/2019	Amy	Prepared argument on the Board's inadequate statement of reasons or bases is that failed to explain why it rejected favorable evidence for an increased rating, in excess of 50 percent for the service-connected MDD.	2.0
7/15/2019	Amy	Prepared argument on why TDIU was inextricably intertwined with Appellant's claim for an increased rating for the service-connected MDD.	1.0
7/15/2019	Amy	Spoke with client about the prior expert's opinion and what is needed to be done, if the appeal is remanded back to BVA. Suggested getting a new medical opinion.	0.6
7/16/2019	Amy	Reviewed and edited Appellant's SOI and pulled documents to be attached to be redacted.	2.0
7/16/2019	Amy	Prepared certificate of service and submitted to CAVC and to OCG and CLS.	0.5
7/31/2019	Amy	Called and spoke to client regarding the undersigned preparation of the Rule 33 Memo and discussed potential outcomes from the conference.	0.5
7/31/2019	Amy	Prepared for Rule 33 Staff Conference and reviewed the RBA cited within Appellant's memo and reviewed cited case law.	1.0
7/31/2019	Amy	Attended Rule 33 Staff Conference.	0.5

7/31/2019	Amy	Called spoke to client regarding the outcome of the Rule 33 Staff Conference and OGC's failure to offer JMR and the Secretary's argument in favor of defending; and my thoughts of what we should do going forward.	0.8
7/31/2019	Amy	Reviewed CAVC e-filing transmission regarding the parties' attendance of the Rule 33 Staff Conference and calendared Appellant's Brief due date.	0.1
8/4/2019	Amy	Reviewed RBA in preparation of Appellant's Statement of the Case.	3.0
8/4/2019	Amy	Reviewed notes from Rule 33 Conference and prepared plan for filing the merits brief. Calendared self-imposed deadlines to keep briefing schedule.	0.6
8/29/2019	Amy	Corresponded with OGC regarding Appellant's request for extension to file brief and prepared motion for extension of time.	0.5
9/5/2019	Amy	Reviewed CAVC e-filing transmission regarding the clerk's granting Appellant's motion for extension of time and calendared new due date to submit Appellant's brief.	0.2
9/7/2019	Amy	Began outlining initial merits brief.  Drafted Issue Statement and rough draft of Statement of the Case.	2.0
9/7/2019	Amy	Began drafting Appellant's argument that the Board provided an inadequate statement of reasons and bases for its decision that relied upon two unfavorable VA medical opinions and by failing to consider positive evidence favorable to Appellant's service connection claim for	2.0

		the cause of her late husband's death from cardiovascular disease.	
9/8/2019	Amy	Began drafting Appellant's argument that the Board provided an inadequate statement of reasons and bases for its decision that relied upon the April 2012 VA medical opinion and by failing to consider positive evidence the showed Appellant was entitled to a rating, in excess of 50 percent for the service-connected MDD.	2.0
9/10/2019	Amy	Began drafting Appellant's argument that April and May 2016 VA medical opinions used to deny Appellant's claim for the cause of the death of her late husband from cardiovascular disease are inadequate.	1.0
9/10/2019	Amy	Began drafting Appellant's argument that her entitlement to TDIU is inextricably intertwined with her entitlement to a higher schedular rating for her late husband's service-connected MDD, in excess of 50 percent. Researched cases that supported this issue and spoke to other attorneys on this issue.	3.0
9/15/2019	Amy	Began outlining the Summary of the Argument and began compiling data for the Table of Authorities.	1.0
9/15/2019	Amy	Began editing Appellant's brief for content and reviewed evidence cited to within Appellant's brief for content and quotations.	2.0
9/20/2019	Amy	Revised Brief. Reconciled Statement of the Case with facts used in argument sections. Proofread Statement of the Case.	2.0
10/2/2019	Amy	Proofread and revised merits brief.	1.0

10/5/2019	Amy	Proofread and revised merits brief and added additional case citations.	2.0
10/12/2019	Amy	Proofread and revised Summary of the Argument.	1.0
10/12/2019	Amy	Proofread and revised merits brief.	1.0
10/13/2019	Amy	Began preparing and transferring complied table of contents data and began preparing the table of contents and table of authorities	1.5
10/14/2019	Amy	Completed the table of authorities, issue presented, and conclusion.	2.0
10/15/2019	Amy	Conducted final proofing and revised Appellant's brief.	1.0
10/15/2019	Amy	Reviewed CAVC e-filing transmission regarding submission of Appellant's brief and calendared Appellee's brief due date.	0.2
12/11/2019	Amy	Spoke with client and provided her with a status update on the case.	0.5
12/16/2019	Amy	Corresponded with OGC regarding his request for an extension to submit the Secretary's brief.	0.2
12/16/2019	Amy	Reviewed CAVC e-filing transmission from the clerk granting Appellee's motion for extension and calendared new due date.	0.2
1/30/2020	Amy	Received and reviewed the CAVC e-filing transmission regarding Appellee's submission of the Secretary's brief.	0.2
1/30/2020	Amy	Pulled all cases cited to within Appellee's brief and reviewed the cases in conjunction with the Appellee's arguments.	5.0

2/1/2020	Amy	Reviewed Appellee's brief and began outlining Appellant's reply. Conducted additional legal research into the arguments and cases cited by the Secretary.	2.0
2/13/2020	Amy	Corresponded with OGC to request 2 week extension to submit Appellant's reply brief and prepared Appellant's motion for extension of time to submit Appellant's reply brief.	0.5
2/14/2020	Amy	Began preparing Appellant's reply brief and formulating Appellant's response to the Secretary's assertions. Reviewed evidence cited to within the Secretary's brief.	2.0
2/20/2020	Amy	Began preparing and transferring complied table of contents data and began preparing the table of contents and table of authorities.	1.0
2/25/2020	Amy	Reviewed and revised merits of Appellant's reply.	1.0
2/25/2020	Amy	Prepared conclusion and statement of relief.	1.0
2/27/2020	Amy	Reviewed and prepared final revisions to Appellant's reply brief.	1.0
3/10/2020	Amy	Emailed client status update on case.	0.2
3/11/2020	Amy	Received and reviewed CAVC e-filing transmission regarding the record of the proceedings.	0.1
3/26/2020	Amy	Received and reviewed CAVC e-filing transmission regarding assignment of the case to Judge Meredith.	0.1

3/27/2020	Amy	Called and spoke with client about the case being assigned to a judge.	0.5
4/29/2020	Amy	Received and reviewed CAVC e-filing transmission regarding the Court's memorandum decision.	0.5
4/29/2020	Amy	Spoke to client regarding the Court's decision and what it meant for her VA appeal and what we needed to do next.	1.0
5/26/2020	Amy	Received and reviewed CAVC e-filing transmission regarding submission of the judgement and calendared EAJA due date.	0.2
7/5/2020	Amy	Began compiling CAVC billing information and pulled the Court's docket in preparation of Appellant's EAJA Application; reviewed CAVC memorandum decision and began preparing Appellant's EAJA application.	3.0
7/5/2020	Amy	Reviewed and complied final edits for EAJA submission.	1.0

<b><u>Total time billed:</u></b>	89.4
<b><u>Eliminated time:</u></b>	5.0
<b><u>Total time:</u></b>	<b><u>84.4</u></b>



## EXHIBIT B

### CPI Inflation Calculator

**CPI Inflation Calculator**

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### **CERTIFICATION**

As co-representative in this appeal, I, Amy S. Borgersen, was the sole attorney to prepare this appeal and have reviewed the combined billing statement above and I am satisfied that it accurately reflects the work performed. I have considered and eliminated all time I believe could be considered excessive or redundant.

Date: July 5, 2020

/s/ Amy S. Borgersen  
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