

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

MARGARET E. RATHKA,)
)
 Appellant,)
)
 v.)
)
ROBERT L. WILKIE,)
 Secretary of Veterans Affairs,)
)
 Appellee.)

Vet. App. No. 19-3419

**APPELLANT’S PETITION FOR ATTORNEY FEES
AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, and the Court’s Rule 39, Appellant, through counsel, moves this Court for an award of reasonable attorney fees and expenses in the amount of \$8,465.25.

Grounds For An Award

This Court identified four elements that are required to award attorney’s fees to an eligible party pursuant to the EAJA: (1) a showing that appellant is a prevailing party; (2) a showing that appellant is eligible for an award; (3) an allegation that the Government’s position is not substantially justified; and (4) an itemized statement of the fees sought. U.S.C. § 2412(d)(1)(A) and (B), *see Owens v. Brown*, 10 Vet. App. 65, 66 (1997). As demonstrated below, Appellant satisfies each of these requirements.

1. Appellant is the prevailing party, pursuant to 28 U.S.C. § 2412(d)(1)(A). This Court laid out the following three-part test relating to when an appellant is considered a prevailing party under the EAJA:

An appellant who secures a remand to an administrative agency is a prevailing party under the EAJA if (1) the remand was necessitated by or predicated upon administrative error, (2) the remanding court did not retain jurisdiction, and (3) the language in the remand order clearly called for further agency proceedings, which leaves the possibility of attaining a favorable merits determination. *Blue v. Wilkie*, 30 Vet. App. 61 (2018), No. 15-1844(E).

Given this test, Appellant is the prevailing party. On April 27, 2020, this Court issued a memorandum decision vacating and remanding the decision of the Board of Veterans' Appeal. This Court found that the Board failed to provide an adequate statement of reasons or bases in its decision dated April 2, 2019. This Court entered judgment on May 19, 2020. Based on the foregoing, Appellant is a prevailing party.

2. Appellant is eligible for an attorney fee award because she is an individual whose net worth does not exceed two million dollars at the time of filing this action, as evidenced by the affidavit attached to this application as Exhibit A. 28 U.S.C. § 2412(d)(2)(B). Therefore, Appellant is eligible to receive this award and no special circumstances make an award unjust nor is there a reason or special circumstance to deny this EAJA Application.

3. The Secretary's position was not substantially justified because the Board failed to provide an adequate statement of reasons or bases explaining material findings and conclusions as required by the legal framework. 38 U.S.C. § 7104(d)(1). Specifically, the Board erred when it failed to address all theories of entitlement raised by Appellant

for service connection for the Veteran's cause of death, in violation of the Board's rules and regulations.

4. An itemized statement is attached to this petition. Appellant has claimed a reasonable amount for attorneys' fees, predicated upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Ussery v. Brown*, 10 Vet. App. 51, 53 (1997). Jacqueline M. McCormack, Esq. represented Appellant in this matter. Mrs. McCormack is an attorney at the Law Offices of Peter S. Cameron, APC, which is located in California. Barbara Harper, Esq., a contract attorney at the Law Offices of Peter S. Cameron, APC, assisted in this case. Mrs. Harper is licensed to practice law in California and works remotely from her private residence, which is also located in California. An itemized statement of the fees sought is attached as Exhibit B.

This Court Should Award Appellant Reasonable

Attorney's Fees of \$8,465.25

The fees and expenses requested are reasonable and should be awarded. The EAJA contemplates a reasonable hourly rate for attorney fees of \$125.00 per hour, but that the Court may determine that an increase in the cost of living justifies a higher award. 28 U.S.C. § 2412(d)(2)(a)(11). The United States Courts for the Ninth Circuit has set the statutory maximum rate under the EAJA for work performed in the first half of 2019 as \$204.25. 28 U.S.C. § 2412(d)(2)(A), *Thangaraja v. Gonzales* 428 F.3d 870, 874-77 (9th Cir. 2005), and Ninth Circuit Rule 39-1.6. Appellant's counsel is located in California and all work performed in this appeal was performed in California. As such, an hourly fee of \$205.25 is reasonable.

Therefore, Appellant should be granted attorney fees of \$8,415.25, for the 41.0 hours of work performed at the rate of \$205.25 per hour.

The undersigned has reviewed the billing statement and is satisfied that it accurately reflects the work performed. The undersigned considered and eliminated any time he believed to be either excessive or redundant.

The only expense for this appeal consists of the Court's filing fee of \$50.00.

WHEREFORE, Appellant requests that this Court grant an award of attorney fees and costs under the Equal Access to Justice Act in the total amount of \$8,465.25

DATE: June 18, 2020

Respectfully Submitted by:

/s/ Jacqueline McCormack
JACQUELINE M. MCCORMACK
Counsel for Appellant

Law Offices of Peter S. Cameron, APC
4003 Wabash Ave.
San Diego, CA 92104
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Email: jackie@veteranappeal.com

**DECLARATION OF APPELLANT’S COUNSEL,
JACQUELINE M. MCCORMACK**

In support of Appellant’s application for attorney’s fees under 28 U.S.C. § 2412(d), I, Jacqueline M. McCormack, hereby declare as follows:

1. I am an attorney licensed in Maryland since 2010, accredited by the Department of Veterans Affairs and admitted to practice before the United States Court of Appeals for Veterans Claims.

2. I am the lead attorney representing Appellate in this proceeding.

3. I visited the website of the United States Court for the Ninth Circuit and ascertained that the statutory maximum rates under the EAJA for work performed 2019 is \$205.25.

4. Barbara Harper, Esq. is a contract attorney with the Law Offices of Peter S. Cameron, APC. Ms. Harper is an attorney licensed in California since 2001 and admitted to practice before the United States Court of Appeals for Veteran’s Claims. Ms. Harper works at her private residence, which is located in Glendale, CA.

5. I visited the website of the United States Court for the Ninth Circuit and ascertained that the statutory maximum rates under the EAJA for work performed in 2019 is \$205.25.

6. Certificate of Net Worth: At no time during the course of his appeal to the Court

Exhibit A

of Appeals for Veterans Claims did Appellant have a net worth of, or in excess of, \$2,000,000.00. At the time of commencing representation, I confirmed with Appellant that she did not have a net worth of \$2,000,000 during the pendency of this appeal.

Appellant's financial situation has not improved during the pendency of this appeal

7. I have reviewed the attached Itemization of Time and Expenses and am satisfied that it accurately reflects the work performed and expenses incurred in the representation of Appellant in this appeal, audited and the hours decreased to ensure reasonableness.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

DATE: June 18, 2020

Respectfully Submitted by:

/s/ Jacqueline M. McCormack
JACQUELINE M. MCCORMACK
Counsel for Appellant

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Exhibit B
Rathka - Itemization of Time and Expenses

ITEMIZATION OF TIME

Date	Description of Work	Attorney	Time Spent	Time Charged
04/16/2019	Intake w/potential CL re potential CAVC representation.	JA	0.3	0.0
04/18/2019	Received BVA decision via mail. Scanned and emailed to attorney for review	Legal Staff	0.1	0.1
04/22/2019	Reviewed BVA decision from potential CL. Called and agreed to take case. Assigned legal staff to mail out representation docs.	JMM	0.6	0.6
4/22/2019	Drafted and mailed rep docs to potential client.	Legal Staff	0.2	0.0
05/03/2019	Received representation docs from CL. Opened file and processed forms to VA.	Legal Staff	0.4	0.0
05/13/2019	Drafted CAVC appeal documents w/check. Assigned to legal staff for mailing.	JMM	0.2	0.2
05/22/2019	Rec'd notice of docketing. Updated case calendar.	JMM	0.1	0.1
07/16/2019	Email w/ clerk re missing consent form. Call to CL; left message.	JMM	0.1	0.1
07/17/2019	Call w/CL re consent form and updated status.	JMM	0.2	0.2
07/22/2019	Email w/oppos counsel re status of consent form. Agree to motion for extension.	JMM	0.1	0.1
07/25/2019	Rec'd signed consent form from CL; scanned and emailed to oppos counsel	JMM	0.2	0.2
09/08/2019	Reviewed RBA; outline of issues and relevant evidence.	JMM	2.1	2.1
09/08/2019	Assigned BH to begin drafting Rule 33 memo	JMM	0.1	0.1
09/09/2019	Review of JMM notes and instructions. Analyze BVA decision and begin review of the record.	BH	1.2	1.2

Exhibit B

Rathka - Itemization of Time and Expenses

09/10/2019	Continued review of the record, specifically as to the records referenced in the BVA Order to begin outline for summary of the case/timeline. Begin outline of issues on appeal.	BH	2.0	2.0
09/11/2019	Drafted and submitted response to RBA	JMM	0.1	0.1
09/11/2019	Continued review of the file; initial preparation of Statement of the Facts for Rule 33 memo	BH	0.8	0.8
09/12/2019	Rec'd notice to file brief; updated case calendar	JMM	0.1	0.1
09/18/2019	Continued preparation of Statement of the Facts; continued review of the record; research re issues to be addressed in memo	BH	1.0	1.0
09/20/2019	Preparation and drafting of Issue 1(a) - Board did not address veteran's treating doctor's opinion	BH	1.4	1.4
09/20/2019	Preparation and drafting of Issue 1(b) Board did not address appellant's for direct service-connection for death	BH	1.0	1.0
09/24/2019	Preparation and initial drafting Issue 2(a) whether the Board erred when it failed to provide an adequate statement and mischaracterized Veteran's statement.	BH	1.0	1.0
09/25/2019	Final preparation of Rule 33 memo, specifically Issues 2(b) whether Board did not adequately weigh lay evidence, and (c), Board's failure to address appellant's contention and assertions	BH	2.0	2.0
10/11/2019	Rec'd staff conference scheduling; updated case calendar.	JMM	0.1	0.1
10/21/2019	Final review of memo and additional edits.	JMM	2.0	0.0
10/21/2019	Drafted certificate of service; filed w/Court; emailed memo to oppos counsel and CLS	JMM	0.2	0.2
11/04/2019	Email from CLS attorney re additional docs for conference. Adobe edits to	JMM	0.5	0.5

Exhibit B

Rathka - Itemization of Time and Expenses

	cut, save, and upload requested docs as attachment to email.			
11/06/2019	CLS conference; defend	JMM	0.2	0.2
11/08/2019	Assigned Brief to BH for drafting	JMM	0.1	0.0
11/08/2019	Receipt and review Rathka Rule 33 Memo; preparation of format for appellate brief	BSH	0.8	0.8
11/12/2019	Begin review of the record, focusing on most pertinent documents; initial research	BSH	1.8	1.8
11/14/2019	Initial preparation of brief, specifically section regarding denial of direct service-connection; begin research re what constitutes "adequate statement of reasons or bases"	BSH	1.2	1.2
11/20/2019	Review of other sections of Rule 33 Memo; statement of facts	BSH	0.8	0.8
11/21/2019	Continued preparation of various sections of brief	BSH	2.1	2.1
11/23/2019	Continued review of record; review other issues to determine what needs further briefing	BSH	1.3	1.3
11/24/2019	Continue research and drafting issue re failing to address contention for direct service connection of hard parachute landings	BSH	3.5	3.0
11/25/2019	Finalize issue re service connection for leg issue	BSH	1.1	1.1
11/27/2019	Finalize other issues; draft Relief Requested; draft Statement of the Issues	BSH	2.3	2.3
11/29/2019	Formatting brief, table of contents and table of cases	BSH	1.4	1.4
12/01/2019	Formatting of and identifying record cites; finalize Statement of the Case	BSH	1.3	1.3
12/05/2019	Review of brief; reorganizing and edits.	JMM	2.0	0.0
12/06/2019	Case calendar one day off; drafted motion for leave to file brief; filed w/Court; filed brief w/Court	JMM	0.3	0.0

Exhibit B

Rathka - Itemization of Time and Expenses

02/13/2020	Return call to CL re status update. Left message	JMM	0.1	0.1
02/21/2020	Spoke w/CL; provided status update	JMM	0.2	0.2
02/26/2020	Rec'd Appellee's Brief; updated case calendar	JMM	0.1	0.1
03/10/2020	Thorough review of Appellee's brief; outlining arguments and weak points	JMM	0.4	0.4
03/10/2020	Drafted rebuttal argument A.	JMM	2.5	2.5
03/10/2020	Drafted rebuttal argument B.	JMM	2.0	2.0
03/10/2020	Formatting; index; table of authorities; final edits.	JMM	2.1	1.0
03/11/2020	Final proofread/edits of reply brief; filed w/Court	JMM	2.0	0.3
04/27/2020	Rec'd Court decision; reviewed and called CL to discuss.	JMM	0.5	0.5
05/19/2020	Rec'd Court's judgment; updated case calendar.	JMM	0.1	0.1
06/18/2020	Reviewed time log; removed redundant/excessive time; drafted EAJA app; filed w/Court.	JMM	1.2	1.2
			49.5	41.0

ITEMIZATION OF EXPENSES

Court Filing Fee: \$50.00



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Statutory Maximum Rates Under the Equal Access to Justice Act

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (d)(2)(A), Thangaraja v. Gonzales, 428 F.3d 870, 876-77 (9th Cir. 2005), and Ninth Circuit Rule 39-1.6, the applicable statutory maximum hourly rates under EAJA, adjusted for increases in the cost of living, are as follows:

For work performed in:

2019:	\$205.25
2018:	\$201.60
2017:	\$196.79
2016:	\$192.68
2015:	\$190.28
2014:	\$190.06
2013:	\$187.02
2012:	\$184.32
2011:	\$180.59
2010:	\$175.06

If no rate is posted for the period in which your work was performed, please use the rate that is posted for the previous period.

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