

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JIM A. ADAMS,

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Appellee.

U.S.C.A.V.C. Case No. 18-6606

APPELLANT’S APPLICATION FOR AWARD OF ATTORNEY’S FEES & EXPENSES

Appellant, Mr. Jim A. Adams, hereby applies to this honorable Court for an award of his attorney’s fees and expenses in the amount of \$ 9,595.48. This application is made pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and this Court’s Rule 39. Mr. Adams has expressly authorized this application.

I. Procedural History.

On July 31, 2018, the Board of Veterans Appeals declined to revise a March 9, 2005, regional office (RO) decision based on clear and unmistakable error (CUE). Mr. Adams filed a timely notice of appeal to this Court on November 27, 2018. The lawyer (with respect to whose fees this application is concerned) entered his appearance on November 27, 2018.

This case was litigated. It was necessary for Mr. Adams to (A) examine, inventory, and analyze the claim file; (B) review and inventory the Secretary's Record of Before the Agency and (C) a comparison and analysis of the contents of the record on appeal, (D) preparation of a pre-briefing memorandum and participation in conference with the Court's Central Legal Staff, (E) file an opening brief, (F) reviewed for response the appellee's brief, and (G) file a reply brief. This Court's decision was dated May 15, 2020, about 18 months after counsel entered his appearance.

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

II. Averments.

Mr. Adams 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. Adams's appeal to the Board of Veterans' Appeals;
- (5) This Court has jurisdiction over the underlying appeal under 38 U.S.C. § 7252;

- (6) Mr. Adams is a “party” to this action within the meaning of 28 U.S.C. § 2412(d)(2)(B);
- (7) Mr. Adams is a “prevailing party” in this matter within the meaning of 28 U.S.C. § 2412(d)(1)(a);
- (8) Mr. Adams is not the United States;
- (9) Mr. Adams 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. Adams submits below an itemized statement of the fees and expenses for which he applies. The itemization shows the rates at which the fees and (where applicable) the expenses were calculated. Accordingly, Mr. Adams 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. Adams 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). Mr. Adams’s declaration establishes this allegation. It is annexed to this application as Exhibit 1.

Mr. Adams’s eligibility may also be inferred from this Court’s waiver of its filing fee. *See Owens v. Brown*, 10 Vet. App. 65 (1997) (93-1106); *Bazalo v. Brown*, 9 Vet. App. 304 (1996) (en banc) (93-660); *Jensen v. Brown*, 8 Vet. App. 140 (1996) (*per curiam* order) (90-661).

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). Mr. Adams is a “prevailing party” entitled to an award of fees and expenses because this Court vacated the Board’s decision and remanded this case for adjudication anew, as he asked, on the basis of the issues that he argued.

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. Adams relies upon the following to satisfy the *Sumner* criteria:

1. Mr. Adams argued in his opening brief, that the provisions of 38 C.F.R. § 3.156(c)(2005) apply when reviewing a 2005 VA rating decision for clear and unmistakable error; that VA makes a clear and unmistakable error when it fails to reconsider under 38 C.F.R. § 3.156(c)(2005) upon receipt of supplemental service department records and, instead, reopens under 38 C.F.R. § 3.156(a) and the outcome would have been manifestly different had VA reconsidered VA's March 2005 rating decision, as required by the provisions of 38 C.F.R. § 3.156(c)(2005). Opening Brief, pp. 7-25.
2. The final dispositive decision in this appeal, Exhibit A, reports at p. 1, “We agree with Mr. Adams that the Board applied the wrong version of

§ 3.156(c). In discussing CUE, the Board repeatedly referred to §§ 3.156(c)(1) and (c)(3) and addressed cases that were based on those subsections. At the time of the RO's 2005 decision, however, there were no numbered subsections to § 3.156(c). Compare 38 C.F.R. § 3.156(c) (2019) with 38 C.F.R. § 3.156(c) (2005); see *Cline v. Shinseki*, 26 Vet.App. 18, 22–23 (2012). Subsections 3.156(c)(1) and (c)(3) were not added until 2006. See *Cline*, 26 Vet.App. at 22-23. The Board did not acknowledge the version of the regulation applicable in 2005, or explain why it relied on cases based on the current regulation.” Court’s decision p. 3.

These statements in the order establish that the Court “recognized” and entered findings as to the “administrative errors” on which the remand was predicated. Thus, the quoted passages from this Court’s order in Mr. Adams’s case establish that the remand of his appeal was predicated on a finding of administrative error.

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, 101 L.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), *rebrg denied*, _ F.3d _ (May 2, 2000). It is sufficient for Mr. Adams simply to aver this element.

E. Itemized Statement of Fees and Expenses

Set out below are the required declaration of the lawyer, and an itemized statement of the services rendered and the fees and expenses for which Mr. Adams seeks compensation. *See* 28 U.S.C. § 2412(d)(1)(B).

Attorney Time, Costs and Other Expenses

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
8/3/18	Received on 8/3/18 the Board 7/31/18 decision and made an initial review of Board’s decision to evaluate whether an appeal should be filed.	1.00	
8/27/18	Made a more thorough review of the Board’s decision, identifying possible bases for an appeal. This review included an examination of prior decisions on the VA and the Board in this case as well as consideration of current decisions of this court and the Federal Circuit.	2.00	
9/24/8	Letter to veteran indicating a willingness to proceed with and appeal and enclosing the required initial paperwork needed to be signed to initiate the appeal.	n/c	P
11/19/18	Received and review paperwork from veteran	n/c.	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
11/27/18	Reviewed the documentation prepared for the filing of the appeal; E-filed notice of appeal; notice of appearance, motion to waive filing fee; fee agreement; filed BVA/VARO fee agreement; ltr. to VAGC w/consent form; ltr. to client w/copies	1.00	P
3/31/19	Based on the reviews made of the Board's decision and the potential errors identified and the possible issues to be argued, I prepared written instructions to the paralegal for preparation of annotated record citations needed for both procedural and evidentiary records required in this case. The paralegal based on these instructions reviews the RBA contents of 3,457 pages, organizes relevant records in chronological order, compares the records in the RBA with records submitted by the claimant or his or her representative, also to previously obtained copies of records in either hard copy or electronic records and the makes verbatim annotations of those records organizing those annotations in chronological order for review by the attorney. This process has evolved over the more than 25 years of my practice. The RBA as provide by the Secretary is not in chronological order and contains numerous duplicates which must be carefully examined to confirm that these are duplicates and look for handwritten notations. This requires careful and focused attention and is a very time consuming process but is both reasonable and necessary. By having a paralegal perform these tasks the governmental is saved the costs of these tasks being performed by the attorney and billed accordingly. I have not increased the hourly rate for these paralegal services based on a cost of living adjustment. The paralegal is instructed to first extract and examine all procedural records and after completing this examination and making verbatim annotations of these records the paralegal		

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
	then is instructed to extract and examine all evidentiary records. These are separate and distinct tasks which are both reasonable and necessary for the attorney to identify potential errors in the Board decision based on both procedural as well as factual mistakes made by the Board. These are not duplicative tasks because each task has a separate and necessary purpose.	1.00	
4/15/19	Paralegal reviewed pages 1 through 864 in the RBA, organizing the relevant procedural events in chronological order.	1.00*	
	Paralegal compared pages 1 through 864 in the RBA, with records submitted by the claimant or his or her representative as well as with previously obtained copies of records in either hard copy or electronic records.	1.00*	
	Paralegal made verbatim annotations of pages 1 through 864 in the RBA and as well as any additional relevant procedural events not found in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
4/16/19	Paralegal reviewed pages 865 through 1,729 in the RBA, organizing the relevant procedural events in chronological order.	1.00*	
	Paralegal compared pages 865 through 1,729 in the RBA, with records submitted by the claimant or his or her representative as well as with previously obtained copies of records in either hard copy or electronic records.	1.00*	
	Paralegal made verbatim annotations of pages 865 through 1,729 in the RBA as well as any additional relevant procedural events not found in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
4/17/19	Paralegal reviewed pages 1,730 through 2,594 in the RBA, organizing the relevant procedural events in chronological order.	1.00*	
	Paralegal compared pages 1,730 through 2,594 in the RBA, with records submitted by the claimant or his or her representative as well as with previously obtained copies of records in either hard copy or electronic records.	1.00*	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
4/18/19	Paralegal made verbatim annotations of pages 1,730 through 2,594 in the RBA as well as any additional relevant procedural events not found in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
	Paralegal reviewed pages 2,595 through 3,467 in the RBA, organizing the relevant procedural events in chronological order.	1.00*	
	Paralegal compared pages 2,595 through 3,467 in the RBA, with records submitted by the claimant or his or her representative as well as with previously obtained copies of records in either hard copy or electronic records.	1.00*	
4/19/19	Paralegal made verbatim annotations of pages 2,595 through 3,467 in the RBA as well as any additional relevant procedural events not found in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
	Paralegal reviewed pages 1 through 864 in the RBA, organizing the relevant evidence in chronological order.	1.00*	
	Paralegal compared pages 1 through 864 in the RBA, with relevant evidence submitted by the claimant or his or her representative as well as with previously obtained copies of relevant evidence in either hard copy or electronic records.	1.00*	
4/20/19	Paralegal made verbatim annotations of pages 1 through 864 in the RBA as well as any additional relevant evidence not found in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
	Paralegal reviewed pages 865 through 1,729 in the RBA, organizing the relevant procedural events in chronological order.	1.00*	
	Paralegal compared pages 865 through 1,729 in the RBA, with records submitted by the claimant or his or her representative as well as with previously obtained copies of records in either hard copy or electronic records.	1.00*	
	Paralegal made verbatim annotations of pages 865		

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
	through 1,729 in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
4/21/19	Paralegal reviewed pages 1,730 through 2,594 in the RBA, organizing the relevant procedural events in chronological order.	1.00*	
	Paralegal compared pages 1,730 through 2,594 in the RBA, with records submitted by the claimant or his or her representative as well as with previously obtained copies of records in either hard copy or electronic records.	1.00*	
	Paralegal made verbatim annotations of pages 1,730 through 2,594 in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
4/23/19	Paralegal reviewed pages 2,595 through 3,467 in the RBA, organizing the relevant procedural events in chronological order.	1.00*	
	Paralegal compared pages 2,595 through 3,467 in the RBA, with records submitted by the claimant or his or her representative as well as with previously obtained copies of records in either hard copy or electronic records.	1.00*	
	Paralegal made verbatim annotations of pages 2,595 through 3,467 in the RBA and prepared a document containing those annotations in chronological order for review by the attorney.	2.00*	
4/24/19	Attorney's review of the record citations and annotations prepared by the paralegal to confirm that the relevant documents had been located and to review the content of annotations prepared by the paralegal.	2.00	
4/27/19	Began preparation of the CLS memo by identifying and framing the potential issues to be presented in the memo based on the prior reviews of the Board decision and the annotations prepared by the paralegal.	2.00	
4/28/19	Drafted statement of facts and relevant proceedings.	2.00	
4/29/19	Wrote the argument sections of the memo.	2.00	
5/7/19	E-mailed pre-briefing conference memo.	n/c	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
5/11/19	Prepared for CLS conference; VAGC indicated that the VA would defend the Board's decision.	2.00	
7/27/19	Began preparation for writing the opening brief by researching and reviewing pertinent statutes; regulations, and caselaw. Reviewing the CLS memo and reexamining the issues and statement of the case.	3.00	
7/28/19	Began drafting of the opening brief focusing on the arguments to be presented.	2.00	
7/29/19	Completed final revisions to draft of brief	2.00	
7/30/19	Made final edits of brief before filing; cc: client	1.00	P
11/8/19	Rcv'd. and reviewed Appellee's Brief f. 11/7/19.	2.00	
11/21/19	Reply Brief prep. - drafted Argument.	2.50	
12/22/19	Edit and refine Argument.	2.00	
1/3/20	Completed final revisions to draft of reply brief	2.00	
5/15/20	Rec'd and reviewed e-notice dtd 5/15/20 of CAVC Opinion, which VACATED the Board's July 31, 2019 decision and REMANDED for readjudication consistent with this decision.	1.00	
8/5/29	Prepared and filed EAJA Application; cc: client	1.50	P

32 hours were performed by paralegal
and are billed at \$ 90.00 per hour = \$ 2,880.00
34 hours x \$ 196.74 per hour = \$ 6,689.16
Attorney Fee Requested: \$ 9,569.16

Expenses

UPS:	\$.00
Postage:	8.32
Copying: (72 x \$.25)	<u>18.00</u>
Total Expenses:	\$ 26.32

Total attorney fee & expenses: \$ 9,595.48

According to the U.S. Department of Labor Bureau of Labor Statistics, the

National Consumer Price Index for all Urban Consumers in the Midwest Region, as of March 29, 1996, the base year CPI-U was 151.7; as of July 2019 it was 238.76, a 57.39 % increase. Applying this increase to the \$ 125.00 hourly rate provided by the Equal Access to Justice Act, the current hourly rate would be \$ 196.74.

Applying the rate computed above to the total time expended by counsel for Appellant, Appellant seeks a total attorney fee of \$ 9,569.16.

The lawyer has reviewed the itemization to correctly categorize each entry. The lawyer has also reviewed the itemization to exercise “billing judgment” by (A) determining whether the activity or expense might be an overhead expense or, for any other reason, not properly billable and by (B) assigning to each task a rate appropriate to the work involved, using the three rates described above. However, the lawyer will be grateful to have brought to his attention any mistakes which might remain.

For costs and expenses expended by counsel for Appellant, Appellant seeks a total reimbursement of \$ 26.32, for a total attorney fee, costs and expense award of \$ 9,595.48.

I declare and state under penalty of perjury under the laws of the United States of America that the information set forth in this declaration is true and correct.

/s/Kenneth M. Carpenter
Kenneth M. Carpenter
CARPENTER, CHARTERED
Counsel for Appellant

IV. Prayer for Relief

Mr. Adams 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. Adams by:

/s/Kenneth M. Carpenter
KENNETH M. CARPENTER
Counsel for Appellant
1525 Southwest Topeka Boulevard
Post Office Box 2099
Topeka, Kansas 66601

Submitted by e-filing submission
On August 12, 2020

Exhibit 1

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Jim A. Adams,

Appellant,

v.

Robert L. Willkie,
Secretary of Veterans Affairs,

Appellee.

U.S.C.A.V.C. Case No.: 18-6606

DECLARATION OF NET WORTH

Appellant, Jim A. Adams, hereby declares and states:

1. I am the appellant named in this appeal. This declaration is based upon my personal knowledge.
2. At the time this civil action was filed, my personal net worth did not exceed \$2,000,000 (two million dollars); nor did I own any unincorporated business, partnership, corporation, association, unit of local government, or organization, the net worth of which exceeded \$7,000,000 (seven million dollars) and which had more than 500 employees.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: November 27, 2018.

Executed at: Lebanon, OR

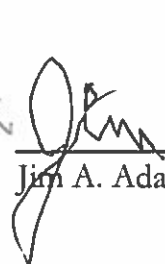
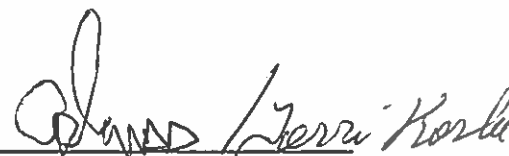
X  
Jim A. Adams

EXHIBIT 1