

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

LOUIS P. KNIPP,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 18-4434
)	
ROBERT L. WILKIE,)	
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, the appellant, Louis P. Knipp, applies for an award of reasonable attorneys’ fees and expenses in the amount of **\$11,636.75** Mr. Knipp has expressly authorized this application.

PROCEDURAL HISTORY

The Appellant, Louis P. Knipp, served on active duty in the United States Army from October 2005, until August of 2007, with additional periods of service in the Army Reserve. Record Before the Agency (“R”) 1770 (1770) (DD214); R. 1819 (1819) (DD214). Mr. Knipp served in Iraq during his term of active service and was honorably discharged. R. 4133 (4133) (2013 Statement in Support of

Claim); R. 1819 (1819) (DD214).

During Mr. Knipp's active service in Iraq, he fell approximately ten feet off the back of a truck and struck his head on a turret. R. 4034 (4034) (2006 Statement of Medical Examination and Duty Status); R. 392 (391-92) (2013 Patient Advocate Note) (stating "veteran shared he had an incident on a Humvee where he was working on the gun turret with another Soldier and slipped on the turret, falling on the right side of his face, which hit moveable armored barrier, causing a cut that needed a number of stitches on the right side of his face. Veteran shared that his head 'whiplashed' back to his back left, and he almost LOC.").

In April of 2013, Mr. Knipp had foraminotomy surgery for his cervical spine disability, which was characterized as "severe" in nature. R. 2186 (2186-88) (2013 Discharge Summary). On March 12, 2013, Mr. Knipp applied for benefits associated with his cervical spine disability as well as radiculopathy of his left arm. R. 4131 (4131-32) (2013 Application for Disability Compensation). To evaluate Mr. Knipp's claims, the Department of Veterans Affairs ("VA") provided a Compensation and Pension ("C&P") exam on July 1, 2013, which found that Mr. Knipp's cervical spine disability and radiculopathy of his left arm were not related to his time in service. R. 4064 (4052-65) (2013 C&P Exam).

After the July 2013 C&P exam, VA denied Mr. Knipp's claims for his cervical spine disability and radiculopathy of his left arm in a July 18, 2013 rating

decision. R. 4043 (4043-46) (2013 Rating Decision). After this denial, Mr. Knipp appealed his claim to the Board. R. 2832 (2832) (2014 Form 9).

In addition to his own statements, one of Mr. Knipp's fellow soldiers submitted a statement on June 17, 2015, describing that he "witnessed Louis fall off of a vehicle while [i]nstalling the frag J T Cup Turret window kitts [sic]." R. 2115 (2115) (2015 Statement in Support of Claim). The statement went on to explain:

Louis fell off hitting his face on a plate of steel. He hit very hard, his head flew backwards and he landed and twisted his body at the same time. He had a gash on his right cheek bone by his right eye. He was taken to the TMC but his pain continued after the fact. He complained of back neck and arm pain. There were no x-rays taken at the time we had no access to them.

R. 2115 (2115) (2015 Statement in Support of Claim).

On June 19, 2015, during a hearing before the Board, Mr. Knipp testified consistent with the evidence of Record that he fell off the back of a truck approximately ten feet off the ground and hit his head. R. 2118 (2116-31) (2015 Hearing Transcript). Further, when asked by the Judge, "And then you, you kind of had like, like a whiplash type of event with this?" Mr. Knipp responded, "Yeah, I hit that and my head just snapped back really bad." R. 2119 (2116-31) (2015 Hearing Transcript). On August 7, 2018, the Board denied Mr. Knipp's claims for his neck and arm injuries relying on the July 2013 C&P exam and a

determination that Mr. Knipp's "more recent assertions of a whiplash or neck injury during the 2006 accident are not credible." R. 10 (5-16) (2018 BVA Decision).

On April 30, 2020, the Court issued a memorandum decision that set aside and remanded the Board's August 7, 2018 decision for further development and readjudication.

FACTUAL AVERMENTS

Mr. Knipp avers as follows:

- (1) This matter is a civil action;
- (2) This action is against an agency of the United States, namely the U.S. 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. Knipp'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. Knipp is a "party" to this action within the meaning of 28 U.S.C. § 2412(d)(2)(B);
- (7) Mr. Knipp is a "prevailing party" in this matter within the meaning of 28 U.S.C. § 2412(d)(1)(a);

- (8) Mr. Knipp is not the United States;
- (9) Mr. Knipp is eligible to receive the reward of fees sought;
- (10) The position of the Secretary as to Mr. Knipp 's claim was not substantially justified;
- (11) There are no special circumstances in this case which make such an award unjust;
- (12) At the time this civil action was filed, Mr. Knipp 's personal net worth did not exceed \$2,000,000; nor did he own any unincorporated business, partnership, corporation, association, unit of local government, or organization, the net worth of which exceeded \$7,000,000 and which had more than 500 employees. This is further evidenced by the declaration of hardship filed by Mr. Knipp at the outset of the appeal; and,
- (13) Mr. Knipp submits 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. Knipp contends that he is entitled to an award of attorneys' fees and expenses in this matter in the total amount itemized below.

ARGUMENT

Pursuant to 28 U.S.C. § 2412(d) "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in

a civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought . . . 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.” As supported by the factual averments above, Mr. Knipp meets the criteria established under EAJA; therefore, the Court must award the fees and other expenses incurred in connection with this matter.

I. MR. KNIPP IS A PREVAILING PARTY AND ELIGIBLE TO RECEIVE AN AWARD.

To obtain “prevailing party” status, a party need only have obtained success “on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.” *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993). Mr. Knipp is a prevailing party entitled to an award of fees and costs because the Court vacated the Board’s decision based on a material error and remanded the case for further adjudication in accordance with its decision. *See Zuberi v. Nicholson*, 19 Vet. App. 541, 544-45 (2006); *Sumner v. Principi*, 15 Vet. App. 256, 261-62 (2001) (*en banc*). The Court-ordered relief in this matter creates the “material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.” *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep’t of Health and Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989)).

Further, to be eligible, an appellant's net worth must not exceed \$2,000,000 (two million dollars) at the time the action was filed, nor may the appellant have owned any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7,000,000 (seven million dollars), and which had more than 500 employees. 28 U.S.C. § 2412(d)(2)(B). Mr. Knipp meets these requirements -- as evidenced by the declaration of financial hardship filed on August 17, 2018. *See Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996) (Appellant's counsel, as an officer of the court, may assert facts necessary to establish eligibility pursuant to 28 U.S.C. § 2412(d)(2)(B)) *overruled on other grounds by Bazalo v. West*, 150 F.3d 1380); *see also Owens v. Brown*, 10 Vet App. 65, 66 (1997) (eligibility may be inferred from the court's waiver of its filing fee).

II. THE POSITION OF THE SECRETARY OF VETERANS AFFAIRS AS TO MR. KNIPP'S CLAIMS WAS NOT SUBSTANTIALLY JUSTIFIED.

The Secretary of Veterans Affairs can defeat Appellant's application for fees and costs only by demonstrating that the government's position was substantially justified. *See Brewer v. Am. Battle Monuments Comm'n*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The Supreme Court has held that for the position of the government to be substantially justified, it must have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *accord, Beta Sys. Inc. 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 his benefit, he must carry the burden of proof on the issue. *Clemmons v. West*, 12 Vet. App. 245, 246 (1999) *appeal dismissed*, 206 F.3d 1401 (Fed. Cir. 2000), *rehearing and rehearing en banc denied* (May 2, 2000). However, in cases where the appellant achieves mixed success, the “court should award only that amount of fees that is reasonable in relation to the results obtained.” *Smith v. Brown*, 8 Vet. App. 327 (1995) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983)).

FEES AND EXPENSES

I. ITEMIZATION OF PROFESSIONAL SERVICES AND EXPENSES

The appellant is required to submit an itemized statement from his attorney of the services rendered and the reasonable fees and expenses for which compensation is sought. 28 U.S.C. § 2412(d)(1)(B). Mr. Knipp’s attorney has: (1) reviewed the itemized statement below and is satisfied that it accurately reflects the work performed by all counsel; and, (2) as discussed below, considered and eliminated all time that is excessive or redundant. *Id.*; *see also Baldridge v. Nicholson*, 19 Vet. App. 227, 240 (2005).

Date	Activity	Staff	Attorney Time	Paralegal Time
10/25/2018	Begin reviewing RBA for completeness and drafting summary of the same (pg. 1-446).	Walker		1.6

10/26/2018	Continue reviewing RBA for completeness and drafting summary of the same (pg. 447-864).	Walker		1.5
10/29/2018	Continue reviewing RBA for completeness and drafting summary of the same (pg. 865-1,144).	Walker		1.0
10/30/2018	Continue reviewing RBA for completeness and drafting summary of the same (pg. 1,145-1,620).	Walker		1.7
10/31/2018	Continue reviewing RBA for completeness and drafting summary of the same. (pg. 1,621-1,956).	Walker		1.2
11/01/2018	Continue reviewing RBA for completeness and drafting summary of the same (pg. 1,957-2,937).	Walker		3.5
11/01/2018	Continue reviewing RBA for completeness and drafting summary of the same (pg. 2,938-2,993).	Walker		0.2
11/02/2018	Continue reviewing RBA for completeness and drafting summary of the same (pg. 2,994-3,693).	Walker		2.5
11/03/2018	Continue reviewing RBA for completeness and drafting summary of the same (pg. 3,694-3,890).	Walker		0.7
11/06/2018	Finish reviewing RBA for completeness and drafting	Walker		2.2

	summary of the same (pg. 3,891-4,450).			
11/06/2018	Draft Notice of Appearance for TJW.	Walker		0.1
11/06/2018	Draft Notice of Appearance for JCH.	Walker		0.1
11/12/2018	Review Record Before the Agency for completeness.	Heiden	1.2	
12/13/2018	Review and respond to request from opposing counsel to reschedule Rule 33 conference.	West	0.1	
01/10/2019	Contact OGC and CLS to reschedule briefing conference.	Heiden	0.2 0.0	
01/10/2019	Draft motion to reschedule briefing conference.	Walker		0.2 0.0
01/10/2019	E-file Motion to Reschedule Briefing Conference.	Walker		0.1 0.0
01/15/2019	Call clerk to check on status of motion to reschedule briefing conference and e-mail to opposing counsel and CLS regarding the same.	Heiden	0.2 0.0	
02/04/2019	Draft fact section of Appellant's Rule 33 memo (2.9). Draft reasons and bases argument for the Board's credibility determination (3.0). Draft reasons and bases argument for the Board's use of "Lapse of Time" (1.4).	Heiden	7.3	

02/05/2019	Draft argument concerning Board's reliance on an inadequate medical exam from 2013 (1.4). Edit and proof memo for filing (0.7). Review Record to determine if veteran has a claim for respiratory illness other than rhinitis (0.5).	Heiden	2.6	
02/06/2019	Review and revise Rule 33 memorandum.	West	0.5	
02/06/2019	Final review, edit and case cite check of Appellant's Rule 33 memo for filing.	Heiden	1.4 0.0	
02/06/2019	Draft Certificate of Service for Rule 33 Memo.	Walker		0.1
02/06/2019	Serve Rule 33 Memo on opposing counsel and e-file Certificate of Service of Rule 33 Memo.	Walker		0.1 0.0
02/20/2019	Confer with CLS and opposing counsel for the purpose of rescheduling Rule 33 conference as a consequence of inclement weather in DC.	West	0.1	
02/27/2019	Prepare for Rule 33 conference.	Heiden	0.5	
02/27/2019	Represent Veteran at Rule 33 Conference.	Heiden	0.1	
03/04/2019	Left voicemail for Mr. Knipp regarding the status of his appeal.	Heiden	0.1 0.0	
03/04/2019	Phone call with Mr. Knipp to discuss remand offer.	Heiden	0.2	

03/04/2019	E-mail to opposing counsel regarding Mr. Knipp's acceptance of remand offer.	Heiden	0.1	
05/24/2019	Contact opposing counsel concerning the status of the JMR.	Heiden	0.1	
05/29/2019	Respond to e-mail from OGC concerning JMR.	Heiden	0.1	
05/29/2019	Review JMPR sent by opposing counsel.	Heiden	0.2	
05/29/2019	Phone call and e-mail to Mr. Knipp seeking his consent to file the JMPR.	Heiden	0.2	
05/29/2019	Draft and file motion for extension of time.	Heiden	0.4 0.0	
05/30/2019	Called and left voicemail for Mr. Knipp concerning JMR.	Heiden	0.1 0.0	
05/31/2019	Phone call with Mr. Knipp concerning status of JMR and appeal.	Heiden	0.4	
05/31/2019	Draft and file motion for 7-day extension.	Heiden	0.4 0.0	
06/03/2019	Phone call with opposing counsel concerning Mr. Knipp's position on receiving an exam.	Heiden	0.1	
06/07/2019	Draft motion for 36-day extension for Appellant's brief.	Heiden	0.1 0.0	
06/07/2019	E-file 36-day extension request for Appellant's brief.	Walker		0.1 0.0
07/12/2019	Review RBA and outline arguments for Appellant's brief (1.2). Review and draft	Heiden	3.8	

	fact section (0.8). Research and draft legal standard (1.2). Draft introductory sections of brief (0.6).			
07/12/2019	Phone call with Mr. Knipp to discuss status of appeal.	Heiden	0.2	
07/14/2019	Analyze and research case law regarding <i>Maxson v. Gober</i> (1.7). Draft argument section III (2.7).	Heiden	4.4	
07/15/2019	Research and draft argument section IV (1.7). Research and draft argument section V (1.1). Create tables (0.7). Review and edit Appellant's brief (1.0).	Heiden	4.5 3.8	
07/15/2019	Review July 2013 C&P Exam and corresponding evidence of record.	Heiden	4.5 1.0	
07/15/2019	Review and revise appellant's brief	West	0.5	
10/24/2019	Review and analyze Appellee's brief.	Heiden	0.6	
11/04/2019	Draft motion for extension of time to file Appellant's reply brief.	Cunningham		0.3 0.0
11/20/2019	Phone call with Mr. Knipp to answer questions concerning status of appeal.	Heiden	0.1	
12/03/2019	Complete review of Appellee brief in preparation for reply brief (1.1). Outline reply brief (0.9). Draft argument I (0.3).	Heiden	4.6	

	Research and draft argument II(A) (2.3).			
12/04/2019	Research and draft argument section II(B) (1.2). Start draft of argument section III (2.3).	Heiden	3.5	
12/05/2019	Finish draft of argument section III (0.5). Draft introduction (0.2). Review and revise reply brief (2.1).	Heiden	2.8	
12/06/2019	Review and revise reply brief.	Heiden	0.3	
12/09/2019	Draft motion for extension to file appellant's reply brief.	Cunningham		0.1 0.0
12/18/2019	Create tables for reply brief.	Cunningham		1.7 0.0
12/26/2019	Review and revise reply brief.	Heiden	1.5	
01/16/2020	Review Record of Proceedings.	Cunningham		0.4
08/11/2020	Draft EAJA Petition.	Flores		1.4
08/11/2020	Draft EAJA Petition.	Flores		0.5
08/14/2020	Review and revise EAJA petition.	Heiden	1.8	
08/14/2020	Final Review of EAJA petition.	West	0.2 0.0	
	Totals		42.7	18.7

II. CALCULATION OF FEES

Pursuant to 28 U.S.C. § 2412(d)(2)(A), the Appellant may recover the lesser of (1) the prevailing market rate for the kind and quality of the services furnished or (2) \$125 per hour plus an adjustment for cost of living increase since March 1996.

A. Market Rates for Attorney and Paralegal Assistance in Wisconsin

Mr. Knipp's lead counsel, Travis James West, has been admitted to practice law in the State of Wisconsin since February 12, 2007. He is currently a partner at the firm of West & Dunn, practicing nationally but based in southern Wisconsin, where for the 2019 calendar year his billable rate is \$295 per hour for the kind and quality of similar services. Mr. West was additionally assisted by Jonathan C. Heiden, who has been admitted to practice law in the State of Wisconsin since May 30, 2018. Mr. Heiden is an associate attorney at the firm of West & Dunn, where for the 2019 calendar year his billable rate is \$200.00 per hour for the kind and quality of similar services. *See Willis v. U.S. Postal Serv.*, 245 F.3d 1333, 1340-1341 (Fed. Cir. 2001) (attorneys "should be presumed to be knowledgeable and truthful" regarding market rate for the kind and quality of similar services).

B. Statutory Attorneys' Fees

Attorneys' fees are set at \$125 per hour by the Equal Access to Justice Act; however, rate in excess of \$125 per hour is justified based on the increase in the

cost of living since the EAJA was amended in March 1996. *See* 28 U.S.C. §2412(d)(2)(A)(ii). The \$125 attorney fee rate, adjusted for inflation for the Midwest Region, is \$196.74 in August, 2019, a midpoint in the litigation of the above-captioned matter. *See* Bureau of Labor Statistics Data, CPI-U at http://data.bls.gov/pdq/SurveyOutputServlet?data_tool=dropmap&series_id=CUUR0200SA0,CUUS0200SA0. This rate was calculated by multiplying the statutory rate for attorneys' fees under the EAJA by the quotient of the CPI-U for the Midwest Region in August, 2019, by the CPI-U for the Midwest Region for March 1996, as required by the Federal Circuit. *Mannino v. West*, 12 Vet. App. 242, 243-44 (1999).

$$\begin{array}{r} \$125 \times \frac{\$238.79}{\$151.70} = \$196.76 \end{array}$$

C. Fees for Paralegal Services

An appellant may also recover fees for work performed by paralegals that assist attorneys with a case before the court. *See Wilson v. Principi*, 16 Vet. App. 509, 514 (2002) *rev'd on other grounds*, 391 F.3d 1203 (Fed. Cir. 2004). Here, Mr. West and Mr. Heiden were assisted by three non-attorney paralegals. Historically, the Court has relied upon the Laffey Matrix, published by the Office for the U.S. Attorney in the District of Columbia, as a guide for determining the market rates for paralegals. *See Wilson*, 16 Vet. App. at 513. *See also Sandoval v. Brown*, 9 Vet. App. 177, 181 (1996). Pursuant to the Laffey Matrix the paralegal

rate for the years 2019-2020 is \$173 per hour. See <https://www.justice.gov/usao-dc/page/file/1189846/download>. All work performed by Emily Walker, Samantha Cunningham, and Laura Flores, occurred during 2019 and 2020; accordingly, the rate for this work is \$173.00 per hour.

D. Calculation of Fees and Costs to be Awarded

Because the \$295 per hour market rate for Mr. West and the \$200 per hour market rate for Mr. Heiden exceeded the \$196.76 per hour statutory rate during the relevant time period, the fees to be awarded must be based upon the statutory calculation. See *Covington v. District of Columbia*, 839 F. Supp. 894, 904-05 (D.D.C. 1993), *aff'd*, 58 F.3d 1101 (D.C. Cir. 1995). Accordingly, in this petition Mr. Knipp seeks payment of attorneys' fees for Mr. West and Mr. Heiden's time at \$196.74 per hour, and paralegal fees at \$173.00 per hour.

As reflected in Section I above, counsel has eliminated 7.3 hours of attorney time and 2.6 hours of paralegal time from this petition in the exercise of professional judgment and/or because such time was unrelated to the claims upon which Mr. Knipp prevailed.

Accordingly, Mr. Knipp seeks attorney's fees at the following rates for representation in the Court of Appeals for Veterans Claims, which amounts are supported by the itemized statement and calculations set forth above:

Professional	Hours	Rate	Total
Jonathan C. Heiden	41.5	\$196.76	\$8,165.54
Travis James West	1.2	\$196.76	\$236.11
Emily Walker	16.4	\$173.00	\$2,837.20
Samantha Cunningham	0.4	\$173.00	\$69.20
Laura Flores	1.9	\$173.00	\$328.70
Total:			\$11,636.75

WHEREFORE, Mr. Knipp respectfully requests that the Court award attorney's fees and expenses in the total amount of **\$11,636.75**.

Respectfully submitted this 17th day of August, 2020.

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