

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

THOMAS C. GREEN,)	
Appellant,)	
)	
v.)	
)	Vet App No. 19-161
ROBERT L. WILKIE,)	
Secretary of Veterans Affairs,)	
Appellee.)	

**APPELLANT’S APPLICATION FOR AN AWARD
OF REASONABLE ATTORNEY FEES AND EXPENSES**

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) and U.S.Vet.App. R. 39, Appellant applies for an award of reasonable attorney’s fees and expenses in the amount of \$ 6327.86.

SUMMARY OF PROCEEDINGS

Mr. Green appealed, through counsel, a September 11, 2018, Board of Veterans’ Appeals decision, to the extent it denied entitlement to a rating in excess of 20 percent for degenerative arthritis of the lumbar spine with herniated discs for the period July 28, 2011 to October 13, 2014. Appellant submitted a brief and replied to the Secretary’s brief. In a memorandum decision, the Court set aside the unfavorable portion of the Board decision, finding the Board did not adequately explain why it relied upon an inadequate

medical examination to support the Board's decision. Judgment was issued May 21, 2020.

ARGUMENT

The Court may award reasonable attorney fees and expenses pursuant to 28 U.S.C. § 2412(d)(2)(F). In order for the Court to have jurisdiction over an EAJA application, it must be filed within the 30-day period set forth in 28 U.S.C. § 2412(d)(1)(B). The application must contain: (1) a showing that the applicant is a prevailing party within the meaning of the EAJA; (2) an assertion that the applicant is a party eligible for an award under the EAJA because the party's net worth does not exceed \$2,000,000 dollars; (3) an allegation that the position of the Secretary at the administrative level or in litigation was not substantially justified; and (4) an itemized statement of the fees and expenses sought. *See* 28 U.S.C. § 2412(d); *Cullens v. Gober*, 14 Vet.App. 234, 237 (2001)(*en banc*); *Chesser v. West*, 11 Vet.App. 497, 499 (1998); *Bazalo v. Brown*, 9 Vet.App. 304, 308 (1996)(*en banc*), *rev'd on other grounds sub nom. Bazalo v. West*, 150 F.3d 1380, 1384 (Fed. Cir. 1998). An award under EAJA is appropriate in this case.

An application for fees under EAJA is timely if filed within thirty days after the judgment becomes final. 28 U.S.C. § 2412(d)(1)(B). In the instant case, the application is filed within the thirty day time period, hence it is timely.

Appellant is a prevailing party for EAJA award. Finding the Board erred, the Court set aside the portion of the Board decision appealed and remanded the claim for development and readjudication.

Mr. Green filed the captioned appeal in his individual capacity. Therefore, in order to qualify as a "party" under EAJA, it must be shown that the party's "net worth did not exceed \$2,000,000 at the time the civil action was filed." 28 U.S.C. § 2412(d)(2)(B). Appellant asserts it does not and is unaware of circumstances which would make an award of fees unjust in this case.

The position of the United States was not substantially justified in this case. The Supreme Court has held that "substantially justified," as used in EAJA, means justified in substance, in the main, or to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988). In determining whether the Government's position was substantially justified, the Court must consider the underlying agency action.

"[P]osition of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings."

28 U.S.C. § 2412(d)(2)(D); *Felton v. Brown*, 7 Vet.App. 276, 289 (1994). As discussed above, the Board's decision was set aside and the claim remanded

because the Board did not articulate adequate reasons or bases for its decision. Under such circumstances, the Government's position should not be deemed substantially justified. The Government bears the burden of demonstrating that its position was substantially justified. *Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet.App.291, 301 (1994). The Secretary must show "that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." *Gavette v. OPM*, 808 F.2d 1456, 1467 (Fed. Cir. 1986).

This application is accompanied by an affidavit from Appellant's attorney, attached hereto as Appendix A. The affidavit includes an itemization of the number of hours expended on this litigation, after adjusting for billing judgment. The application demonstrates that, based upon the specific services performed, the fee sought is a reasonable one. In this circuit, an application for attorney fees is allowable where it is based on records that are substantially reconstructed and reasonably accurate. *P.P.G. Indus. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1570 (Fed.Cir. 1988). Here, the application is based upon contemporaneous time records.

Under 28 U.S.C. § 2412(d)(2)(A)(ii), attorneys may demonstrate that an increase in the cost of living justifies an increase in the statutory cap. *See Pierce*

v. Underwood, 108 S.Ct. 2553 (1988) (referring to a cap of \$75.00 per hour “adjusted for inflation”); *Phillips V. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991). An increase for cost of living is generally allowed. *Coup v. Heckler*, 834 F. 2d 313, 320 (3d Cir. 1987); *Baker v. Brown*, 839 F.2d 1075 (5th Cir. 1988) (allowed except in unusual circumstances).

In *Elczyn v. Brown*, 7 Vet.App. 170 (1994), this Court decided that an Appellant's attorney can petition for a fee in excess of the statutory cap based upon the Consumer Price Index. *Id.* at 179-181. This Court further directed attorneys, filing for an increased fee based upon the CPI, to choose a midpoint date in the litigation to establish the appropriate date for calculating the cost of living increase. *Id.* at 181. The Appellant chooses July 2019 _ filing date of brief.

Appellant submits that the Court should increase the \$125.00 per hour cap by the general inflationary index in the cost of living since March of 1996, as reflected by the CPI for all urban consumers in the United States. *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991); *Jones v. Lujan*, 887 F.2d 1096, 1101 n.8 (D.C. Cir. 1989) (increase in cost of living in Washington, D.C.). Calculations based on data from the Bureau of Labor Statistics reflect that compensation should be at the rate of \$205.62 per hour. ¹

¹ See <http://data.bls.gov>: consumer price index for 11/1996 for Washington DC is 161.20 and for 07/2019 is 265.17. Adjusted hourly rate=\$125.00+(\$125.00 multiply by [(265.17 minus 161.2)divided by 161.2]

In addition to attorney fees, Appellant is entitled to recover expenses. 28 U.S.C. § 2412(d)(1)(A); *Cook v. Brown*, 6 Vet.App. 226, 237-40 (1994). The affidavit referred to above includes an itemization of expenses incurred herein, in the total amount of \$56.45.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests the Court to order the Secretary of Veterans Affairs to pay reasonable attorney fees and expenses in the total amount of \$ 6327.86 to Jeany Mark, counsel for Appellant.

Respectfully submitted,

/s/Jeany Mark

Jeany Mark

818 Connecticut Ave, N.W., Suite 502

Washington, D.C. 20006

Tel: 202-393-3020

Appellant's Counsel

AFFIDAVIT

Appendix A

I hereby certify under penalty of perjury under the laws of the United States of America that the following itemization is true and accurate.

LEGAL SERVICES (exercised billing judgment)

<u>Date</u>	<u>Actions</u>	<u>Time (hrs)</u>
12.18.19	Review decision for appeal	0.5
01.07.19	Communication with client: explain BVA decision	0.3
01.08.19	Communication with client re: appeal	0.1
01.08.19	Communication from client re: appeal documents (scan:6)	0.1
01.08.19	Prepare notice of appeal and appearance	0.4
01.10.19	Review court's notice	0.1
01.15.19	Communication with clerk re: filing fee (pstg \$0.60, copies 2)	0.1
01.16.19	Communication with client re: status (copies 7, pstg \$0.60)	0.2
01.17.19	Review court's notice	0.1
02.08.19	Review court's notice	0.1
03.06.19	Review notice of appearance by OGC counsel	0.1
03.08.19	Review court's notice	0.1
03.12.19	Review RBA CD to ensure readability	0.1
03.18.19	Review RBA for Rule 10 (1060 pages)	2.4
03.27.19	Prepare R. 10 response	0.1
03.28.19	Review court's notice	0.1
04.12.19	Review court's notice	0.1
04.18.19	Prepared notice of appearance (Ryan McClure-RM)	0.1
04.18.19	Reviewed RBA, pages 1-300, took notes	1.0
04.18.19	Reviewed RBA, pages 301-600, took notes	1.0
04.19.19	Reviewed RBA, pages 601-1060, took notes	1.3
04.19.19	Legal research (<i>Correia, Barr, Kahana, Colvin, Chotta, Steck, Allday, Tucker</i>) (RM)	0.8
04.19.19	Drafted SOI, argument IA (RM)	0.4
04.19.19	Drafted SOI, argument IB (RM)	0.3
05.06.19	Edit and finalize SOI	0.4
05.06.19	Served SOI, drafted & file certificate of service (RM)	0.1
05.06.19	Review court's notice	0.1
05.20.19	Briefing conference (RM)	0.1
05.20.19	Review court's notice	0.1
05.20.19	Enter appearance (Ethan Maron-EM)	0.1
06.24.19	Legal research: VA musculoskeletal examinations (EM)	2.0
06.24.19	Legal research: retrospective medical opinions (EM)	1.0

06.28.19	Draft principal brief (part I) (EM)	2.0
06.28.19	Draft principal brief (Part II) (EM)	1.3
06.28.19	Draft principal brief (Facts/summary of case) (EM)	1.5
07.19.19	Review and edit brief	0.4
07.19.19	Finalize principal brief (EM)	1.0
07.19.19	Review court's notice	0.1
09.17.19	Review court's notice	0.1
09.27.19	Review court's notice	0.1
10.15.19	Review court's notice	0.1
12.09.19	Review/take notes on Secretary's brief (EM)	1.5
12.10.19	Legal research: Retrospective opinions, w/memdec's (EM)	2.0
12.12.19	Draft reply brief: Part I (EM)	0.5
12.12.19	Draft reply brief: Part II (EM)	1.0
12.12.19	Draft reply brief: Part III (EM)	1.0
12.12.19	Review and edit Reply	0.2
12.12.19	Finalize Reply brief	0.4
12.19.19	Review court's notice	0.1
12.19.19	Review ROP	0.3
12.19.19	Draft reply to ROP (EM)	0.1
12.30.19	Review court's notice	0.1
04.29.20	Review Court's memorandum decision (EM)	0.5
05.21.20	Review court's notice	0.1
07.21.20	Review court's notice	0.1
08.19.20	Scrub timesheet for billing judgment and prepare EAJA	2.2

Total: 30.5 hrs@ \$205.62/hr = \$ 6271.41

Expenses:

Filing Fee	50.00
Postage	1.20
Copies	2.25
Scans	3.00
Total Expenses	\$ 56.45

/s/ Jeany Mark
Jeany Mark