

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

ANGELA M. MITCHELL,
Appellant,

vs.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

)
)
)
)
)
)
)
)
)

Vet. App. No. 19-2657

**MOTION FOR AWARD OF REASONABLE ATTORNEYS FEES UNDER 28
U.S.C. § 2412 AND DECLARATION IN SUPPORT OF MOTION**

Comes now, Appellant Angela M. Mitchell, through counsel, and files this motion for an award of reasonable attorneys fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (2012).

There has been a resolution in this action. On May 1, 2020, this Court issued a Memorandum Decision remanding part of the December 20, 2018, Board of Veterans' Appeals decision that denied service connection for headaches. The Court found that the Board erred when it failed to discuss potentially favorable evidence in the record.

An itemized statement of the services rendered and the 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 lead 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). Appellant is seeking fees for 17.2 hours of attorney time at a rate of \$196.81 per hour, as outlined in Exhibit A. We are also seeking fees for 8.5 hours of law clerk time, performed under the supervision of lead counsel, billed at \$75.00 per hour, which is less than the rate set forth in the USAO Attorney's Fees Matrix as set forth in Exhibit B, and should be considered reasonable. See *Sandoval v. Brown*, 9 Vet. App. 177 (1996). Appellant's legal counsel is not seeking reimbursement for photocopying and other miscellaneous expenses incurred in this action. The total amount of fees requested is \$4,022.63.

The prerequisites for an award of attorney fees and expenses pursuant to 28 U.S.C. § 2412 (2009) have been met, and are as follows:

- 1) Appellant is a prevailing party. *Shalala v. Schaefer*, 113 S.Ct. 2625 (1993);
- 2) The underlying action was a civil action. The term "civil action" includes proceedings seeking judicial review of administrative agency decisions. It did not sound in tort, there is no statute which prohibits or provides for such awards;
- 3) This Court has jurisdiction. 38 U.S.C. § 7252(a) (2009);
- 4) The position of the United States was not substantially justified as set forth in the Memorandum Opinion;
- 5) No special circumstances exist to make the award unjust and this

application is timely filed;

- 6) Appellant has submitted a declaration of net worth when the appeal was filed. Appellant did not have a net worth in excess of \$2,000,000 at such time;
- 7) The “United States” includes any agency and any official thereof acting in his official capacity, including the Secretary of Veterans Affairs;
- 8) The “position of the United States” for the purposes of deciding substantial justification means both the position taken by the United States in the civil action, and the action or the failure to act, by the agency against whom the civil action is based, and position was not justified;
- 9) No portion of time expended herein by appellant’s legal counsel has unreasonably protracted the proceedings; and
- 10) Appellant is qualified and eligible to receive attorneys fees and expenses pursuant to EAJA in this case. All of the provisions and prerequisites under the statute and governing case law have been met.

WHEREFORE, Appellant respectfully requests the Court award attorneys fees in the amount of \$4,022.63.

Respectfully submitted,

Angela M. Mitchell, Appellant

/s/ Stephani Bennett

Stephani Bennett, Esq.

BERRY LAW FIRM

6940 O Street, Suite 400

Lincoln, NE 68510

(402) 466-8444

(402) 466-1793 / Fax

stephani@jsberrylaw.com

Attorney for Appellant

BILLING RECORDS & REPORT [Attorney Time – Hours]

Re: ANGELA M. Mitchell, Appellant

USCAVC Case No. 19-2657

Preface:

On May 1, 2020, this Court issued a Memorandum Decision remanding part of the December 20, 2018, Board of Veterans' Appeals decision that denied service connection for headaches. The Court found that the Board erred when it failed to discuss potentially favorable evidence in the record.

DATE	SERVICES PERFORMED (By Stephani Bennett, unless otherwise indicated.)	HRS
4/8/19	Review Board decision, check docket, and review file docs for determination whether to appeal.	0.5
4/19/19	Appearance of Joseph Donnelly, John S. Berry, Stephani M. Bennett for appellant. Notice of appeal, etc. (Atty Donnelly)	0.1
4/22/19	Notice of Docketing for BVA's decision w/in 30 days; RBA w/in 60 days. (Atty Donnelly)	0.1
5/20/19	Board Decision transmittal. (Atty Donnelly)	0.1
6/17/19	Appearance of Natasha D. Reed, for OGC. (Atty Donnelly)	0.1
6/21/19	RBA Notice. (Atty Donnelly)	0.1
7/1/19	RBA review (law clerk)	2.8
7/11/19	Notice to file Appellant's brief. (Atty Donnelly)	0.1
7/31/19	Order scheduling briefing conference. Calendar. (Atty Donnelly)	0.1
8/11/19	Review RBA and draft SOI. (law clerk)	3.0
8/12/19	Finalize SOI, cite check (law clerk)	2.7
8/14/19	Review SOI, Rule 33 notice. (Atty Donnelly)	0.5
8/27/19	Review and reply to email from OGC re: rescheduling conference. (Atty Donnelly)	0.3
8/28/19	Prepare for conference, conference held; finish conference memo, update calendar, and email to attorneys. (Atty Donnelly)	1.7
9/25/19	Notice to withdraw of Atty Donnelly	0.1
9/25/19	Appearance of Stephani Bennett as lead counsel.	0.1
9/25/19	Appearance of Cameron Kroeger for Appellant	0.1
9/27/19	Email OGC re: Brief extension	0.1
9/30/19	Clerk's stamp granting motion to extend	0.1
11/10/19	Review RBA; outline Appellant's Brief	2.8

11/10/19	Research and draft arguments for Appellant's Brief	3.0
11/11/19	Draft Appellant's Brief	2.2
11/11/19	Review and finalize Appellant's Brief	2.0
1/13/20	Review and reply to email from OGC re: extension	0.2
2/27/20	Appellee Brief filed; calendar review	0.1
3/12/20	Review Appellee brief for reply	0.5
3/22/20	Record of Proceeding.	0.1
4/8/20	Assigned to Judge Schoelen.	0.1
5/1/20	Review memo decision.	0.5
5/12/20	Appearance of Margaret E. Sorrenti for OGC	0.1
5/26/20	Review Judgement.	0.1
7/28/20	Review Mandate.	0.1
8/24/20	Draft EAJA App	1.2

Total Hours: 25.7 hours

Attorney: 17.2 hours

Law clerk: 8.5 hours

Issues / Claims Being Remanded:

On May 1, 2020, this Court issued a Memorandum Decision remanding part of the December 20, 2018, Board of Veterans' Appeals decision that denied service connection for headaches. The Court found that the Board erred when it failed to discuss potentially favorable evidence in the record.

Billing General Case Management:

In this appeal, a portion of the hours spent in prosecuting the appeal are “general case management” hours. That is, time spent on tasks inherent to prosecuting an appeal regardless of the number of claims remanded compared to the number of claims appealed. These hours include review of records, preparation of documents and pleadings, *inter alia*. Although not directly related to a claim which was remanded, such time is billable time. See, *Elcyzyn v.*

Brown, 7 Vet. App. 170 (1994) (The time spent for general case management is inextricably linked to the preparation of an entire case. There is no basis or fair mechanism for equitably apportioning the time spent for general case management into billable and non-billable hours.)

Time Spent on the Issue Remanded:

The time spent in prosecuting this appeal was related to the issues remanded.

The Billing Formula Employed Herein:

A. The Hourly Rate:

The law provides effective for appeals filed after March 29, 1996, the hourly rate for EAJA purposes is \$125. This base amount is adjusted annually to reflect cost of living changes relative to 1996. The statutory formula provides the base hourly rate (\$125) is multiplied by the Consumer Price Index (CPI) for the appropriate mid-point date. The sum is then divided by \$151.70, which is the Midwest CPI for March 1996.

Under *Elczyn v. Brown*, 7 Vet. App. 170 (1994), the appropriate hourly rate for paralegals, law clerks, and law students is (1) the rate in the prevailing market in which the services were performed, or (2) the \$75 rate set forth in § 2412(d)(2)(a) plus a cost of living adjustment calculated under the Consumer Price Index. We are asking for \$75.00 per hour for law clerk time, which is less than that listed for law clerks under the USAO's Attorney's Fees Matrix.

B. The Mid-Point Date:

The mid-point date is one of three dates:

- (1). The date the appeal was filed;
- (2). The date the summary of issues was filed, or;
- (3). The date the brief was filed.

See *Elczyn v. Brown*, 7 Vet. App. 170 (1994) (The mid-point date should be the date of the appellant's principle brief, motion, or petition filed with the Court, which provides, "the capstone of the litigation process."); *Apodackis v. Nicholson*, 19 Vet. App. 91 (2005) (The midpoint of the litigation is the middle of the month where a majority of the work was performed.).

In this case, the appropriate mid-point date is in November 2019 – the date the appellant's brief was filed.

C. Consumer Price Index (CPI):

This Court has held the cost of living adjustment is determined by reference to the **CPI-All Index** in the region where the work is performed. *Elczyn v. Brown*, 7 Vet. App. 170 (1994). In this appeal, the work was performed in Nebraska.

Accordingly, the midwest urban region – in which Nebraska is grouped – is the appropriate region of the **CPI-All Index**.

The CPI Rate for the mid-point is 238.850. See, Bureau of Labor Statistics, CPI Tables for the midwest urban. See, *Elczyn v. Brown*, the rate is for the All-Items Index. See, <https://www.bls.gov/regions/midwest/data/xg-tables/ro5xg01.htm>

D. Hourly Rate For This Appeal:

The statutory formula results in the following calculations.

\$125.00	(Base Amount)
	(multiplied by)
\$238.85	(Midwest CPI in November 2019 midpoint date)
	(divided by)
\$151.70	(Midwest CPI in March 1996)
<hr/>	
\$196.81	(Adjusted Rate for attorney time)

CONCLUSION

Applying the statutory rate of \$196.81 to the 17.2 hours of attorney time equals \$3,385.13, and the rate of \$75.00 to the 8.5 hours spent by the law clerk equals \$637.50, for a total of \$4,022.63– the amount sought herein.

Respectfully submitted,

Angela M. Mitchell, Appellant

/s/ Stephani Bennett
Stephani Bennett, Esq.
BERRY LAW FIRM
6940 O Street, Suite 400
Lincoln, NE 68510
(402) 466-8444
(402) 466-1793 / Fax
stephani@jsberrylaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the foregoing was electronically served with the following:

Margaret E. Sorrenti, Esq.
Office of the General Counsel
Department of Veterans Affairs
810 Vermont Ave., NW
Washington DC 20420

On August 25, 2020.

/s/ Stephani Bennett
Stephani Bennett, Esq.