

THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

CASE FILE NO.: 19-41

PHILLIP L. POOLE,
Appellant,

v.

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

**APPELLANT'S APPLICATION
FOR AWARD OF
ATTORNEY'S FEES AND
EXPENSES**

Appellant, Mr. Poole, hereby applies to this honorable Court for an award of his attorney's fees and expenses in the amount of **\$2,681.91**. This application is made pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and this Court's Rule 39.

I. PROCEDURAL HISTORY

On October 10, 2018, the Board of Veterans' Appeals (Board) entered a decision that dismissed as moot the issue of entitlement to benefits for an acquired psychiatric disorder, including post-traumatic stress disorder (PTSD) and a mood disorder. A conference was held on June 20, 2019, the parties filed their written briefs, and the court issued a Memorandum Decision on May 4, 2020. The Court reversed the portion of the Board decision that dismissed as moot the issue of entitlement to benefits for an acquired psychiatric disorder, including PTSD and a mood disorder, and remanded that matter for further proceedings.

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

II. AVERMENTS

Mr. Poole 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. Poole'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. Poole is a "party" to this action within the meaning of 28 U.S.C. § 2412(d)(2)(B);
- (7) Mr. Poole is a "prevailing party" in this matter within the meaning of 28 U.S.C. § 2412(d)(1)(a);
- (8) Mr. Poole is not the United States;
- (9) Mr. Poole 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. Poole submits below an itemized statement of the fees and expenses for which he applies. The attached itemization shows the time counsel spent representing Mr. Poole on his appeal to the Court. Accordingly, Mr. Poole 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. Poole 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). The declaration set forth in paragraph 6A in the Attorney-Client Fee Contract filed with the Court and served upon the Secretary on January 7, 2020, establishes this fact.

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). 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. Poole is a “prevailing party” entitled to an award of fees and expenses. For this assertion, Mr. Poole relies upon the following to satisfy the *Sumner* criteria:

The Court found “the Board's dismissal of the appellant's claim for benefits for an acquired psychiatric disability was improper.” Specifically, the Court agreed with Mr. Poole’s argument that the Board erred when it determined that it did not have jurisdiction over his request for reconsideration of the January 1992 claim under 38 C.F.R. § 3.156(c). Memo Dec., at 9.

Ultimately, the Court reversed all issues dismissed by the Board and remanded them for further action by the Board. Because of the Court's order, the Board is required to perform additional action on remand. For these reasons Mr. Poole is a prevailing party.

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

E. Itemized Statement of Fees and Expenses

Annexed to this application are the required declaration of the lawyer, Exhibit A, and an itemized statement of the services rendered and the fees and expenses for which Mr. Poole seeks compensation, Exhibit B. See 28 U.S.C. § 2412(d)(1)(B).

Mr. Poole's counsel seeks compensation for attorney's fees and expenses incurred at the following rate and in the amounts shown¹ for representation in this Court:

Attorney & Administrative Services	Rate:	Hours:	Fee:	Totals:
Kenneth H. Dojaquez, Attorney	\$202.50	12.42	\$2,514.41	\$2,514.41
Paralegal	\$150.00	1.12	\$167.50	\$167.50
Total for Services				\$2,681.91
Total for Expenses				\$0.00
Total for Application				\$2,681.91

F. Calculation of Rate of Fees

The fees in this case were calculated using the maximum hourly rate permitted under EAJA.

I. Lawyer's Standard Rates.

At the Court, Mr. Dojaquez' standard fee agreement states he shall be entitled to the greater of 20% of the gross amount of any past due benefits recovered for the appellant or an award of attorneys fees under EAJA. At the agency level, Mr. Dojaquez similarly limits his fee to a 20% contingency fee. Mr. Dojaquez' practice is limited to veteran benefits law; thus, Mr. Dojaquez considers his standard hourly rate to be commensurate with the "EAJA" rate in effect at the time Mr. Dojaquez provides services. However, based upon his geographical area, years of practice, and experience in veterans benefits law, a reasonable hourly rate for his services in other types of cases would be at least \$200.00.

¹ The chart summarizes hours, fees, and expenses. The chart only reflects hours of work performed for which the applicant is seeking compensation. Exhibit B is an itemized list of all fees and expenses—even those for which the applicant is not seeking compensation.

2. Reasonableness of Lawyer's Rate.

Widely followed tabulations establish that the lawyer's hourly rate billed in this application is well below the prevailing rate. See the "*Laffey*² matrix" and a similar table attributed to the United States Attorney, both of which appeared in *Covington v. District of Columbia*, 839 F. Supp. 894, 904 (D.D.C.) in 1993; and see a similar version of the "*Laffey* matrix" from BARTON F. STICHMAN & RONALD B. ABRAMS, THE VETERANS BENEFITS MANUAL, p. 1634 (2009). The *Covington* and VBM versions of the "*Laffey* matrix" have been adjusted for inflation. One readily finds that the lawyer's rate for attorney fees in this case is well below the rates shown in the tabulations.

Also, in Exhibit A, the applicant's lawyer declares the billing rate utilized in Mr. Poole's case is less than the prevailing market rate for similar services performed by attorneys in Columbia, South Carolina.

3. Calculation of "EAJA Cap."

As the Court is aware, the statutory maximum rate for lawyer fees under EAJA is now \$125.00 per hour. 28 U.S.C. § 2412(d)(2)(A). It may be adjusted for inflation by using the United States Department of Labor's Consumer Price Index for All Urban Consumers (published by the Bureau of Labor Statistics) appropriate to the region, *Mannino v. West*, 12 Vet. App. 242, 244 (1999) (97-784), for the approximate mid-point of the representation. For this case, we used the date on which the Appellant's brief was filed, September 5, 2019, as the mid-point of representation. *Elczyn v. Brown*, 7

² *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983).

Vet. App. 170, 181 (1994). Exhibit C. The rate-cap for the fees for lawyer services used in this application has been calculated as follows:

$$\begin{array}{l} \$125 \times \frac{\text{CPI-U [Southern Region, (September 2019)]}^3}{\text{CPI-U (Southern Region, March 1996)}} = \$125 \times \frac{246.891}{152.4} = \$202.50 \end{array}$$

4. *Rate Applied.*

Mr. Dojaquez is the only person who performed work on this case, so only one billing rate was used.

5. *Billings Herein & “Billing Judgment.”*

The lawyer has also reviewed the itemization to exercise “billing judgment” by determining whether the activity or expense might be an overhead expense or, for any other reason, not properly billable. In particular, the lawyer did not charge for work done on theories that either were not a basis for remand, or were related to issues that are not billable (e.g. inextricably intertwined). The lawyer also seeks to assure sound “billing judgment” by reducing the number of billable hours of work performed that might be considered excessive and by seeking less than the “EAJA-CPI rate.” However, the lawyer will be grateful to have brought to his attention any mistakes which might remain.

³ The CPI-U is available at the Internet web site of the Bureau of Labor Statistics, <http://www.bls.gov/ro3/cpiso.htm>
The graph used for this application was found at:
http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=dropmap&series_id=CUUR0300SA0,CUUS0300SA0

G. Expenses

All expenses are claimed at the actual cost incurred, with no “mark ups” or premiums.

H. Reasonableness of the Fee

Finally, it is necessary to show the reasonableness of the award sought on the basis of the 12 factors summarized in *Hensley v. Eckerhart*, 461 U.S. 424, 430 n. 3, 103A S.Ct. 1933, 76 L.Ed.2d 40 (1983):

1. *The time and labor* required is reported in the attached itemization.
2. *The novelty and difficulty of the questions.* This factor did not affect this engagement.
3. *The skill requisite to perform the legal service properly.* Veterans disability is a species of law of its own, requiring specialization, continuing education, and experience.
4. *The preclusion of employment by the attorney due to acceptance of the case.* This factor did not affect this engagement.
5. *The customary fee.* There are no lawyers known to the applicant and counsel who accept clients in veterans’ benefits matters on the basis of a “flat rate” or “customary fee.”
6. *Whether the fee is fixed or contingent.* The engagement agreement in this case is contingent upon sufficient success on the merits. Pursuant to the agreement, the attorney shall be entitled to an award of attorneys fees under EAJA.

7. *Time limitations imposed by the client or the circumstances.* This engagement was not affected by unusual urgency.

8. *The amount involved and the results obtained.* The amount for which the application is made is stated earlier. The amount of the veteran's benefits in controversy is not regarded by the applicant as relevant for the purposes of this application.

9. *The experience, reputation, and ability of the attorney.* The lawyer whose fees are sought is now in his eighth year in the practice of veteran's benefits law. He is a member and an active participant in the National Organization of Veterans' Advocates.

10. *The "undesirability" of the case.* This engagement was not affected by this factor.

11. *The nature and length of the professional relationship with the client.* Undersigned counsel has represented Mr. Poole since December 2015 through the filing of this appeal and will represent him on the remand to the Board.

12. *Awards in similar cases.* EAJA awards in veterans benefits cases are not collected in a counterpart of a jury award digest, but decisions of this Court reveal awards over \$20,000.00. *E.g., Perry v. West*, 11 Vet. App. 319 (1998) (\$20,430 award approved); *Ussery v. Brown*, 10 Vet. App. 51 (1997) (93-0696) (approved application for \$21,898).

I. Wrap-Up Application

Mr. Poole recognizes that the Secretary is privileged to oppose this application. Such a dispute may require that Mr. Poole file responsive pleadings. In those instances, Mr. Poole asks that he be permitted to supplement this application with a single, final “wrap-up” application which would include fees and expenses incurred after the date of this application.

IV. Prayer for Relief

Mr. Poole 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. Poole by:

/s/ Kenneth H. Dojaquez

Kenneth H. Dojaquez, Esq.
Attorney for Appellant
Carpenter Chartered
P. O. Box 2099
Topeka, KS 66601
Telephone: 785-357-5251
Email: kenny@carpenterchartered.com

ANNEXED

Exhibit A Lawyer’s Declaration

Exhibit B Itemized List of Services, Fees, and Expenses

Exhibit C CPI-U Chart

Exhibit D.....*Laffey Matrix*

THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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**ATTORNEY'S
DECLARATION
RE: ITEMIZATION OF
FEES AND EXPENSES**

Kenneth H. Dojaquez, attorney for the appellant, hereby declares and states:

1. I am the lawyer who represents the appellant named in this appeal. This declaration is based upon my personal knowledge as stated herein.

2. On December 26, 2018, the appellant signed an engagement agreement for me to represent him with a pending appeal before the Court. I have represented appellant in this matter continuously since that date. I entered my appearance in this case on January 4, 2019.

3. I worked on this case for a period of time before filing the Notice of Appeal in expectation that an appeal to the court would be filed, and that work is itemized in the attached statement of fees and expenses.

4. The engagement agreement in this case is contingent upon sufficient success on the merits. Pursuant to the agreement, I will be entitled to an award of attorneys fees under EAJA. I explained to Mr. Poole that, if we were successful at the Court, I would apply for my fees under EAJA.

5. To ensure my billing rates are reasonable, I consulted with other practitioners. Based upon my personal experience at a private firm in Columbia, South Carolina, and inquiry to other practitioners, the billing rates charged by me in Mr. Poole's case are consistent with or less than the prevailing market rates for similar services performed by attorneys in Columbia, South Carolina.

6. The attached itemization of fees and expenses is based on entries made contemporaneously with the work or expenditure. Fees for time are based on measured time or reasonably accurate estimates sometimes rounded to hundredths of an hour. I have reviewed the itemized billing statement of fees and expenses to ensure they are correct. I am satisfied that the statement accurately reflects the work I performed. I know of no errors or misrepresentations in the statement. I have considered and eliminated all time that is excessive or redundant.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed in Columbia, South Carolina, this the following date: August 26, 2020

/s/ Kenneth H. Dojaquez

Kenneth H. Dojaquez, Esq.
Attorney for Appellant
Carpenter Chartered
P. O. Box 2099
Topeka, KS 66601
Telephone: 785-357-5251
Email: kenny@carpenterchartered.com

Appellant Phillip Poole CAVC (19-41)

	Start	End	Time	Hours	
2018					
19-Nov			0:00	0.50	Estimate: Review BVAD for issues to appeal
6-Dec	13:30	14:06	0:36	0.60	phone call with vet to discuss representation and appeal process
2019					
12-May	6:00	7:50	1:50	1.83	RBA review
5-Jun	8:19	8:40	0:21	0.35	Review file and outline arguments. Draft R33 memo facts
	8:40	9:08	0:28	0.47	Draft R33 memo argument
7-Jun	9:44	9:59	0:15	0.25	Paralegal: prepare and redact RBA cites in memo
20-Jun	10:05	10:20	0:15	0.25	Prep R33 conf
	10:30	11:00	0:30	0.25	R33 conf call
1-Jul	15:00	15:18	0:18	0.30	Call with client to update on appeal
5-Sep	6:00	6:26	0:26	0.43	Draft brief: facts
	6:26	6:58	0:32	0.53	Draft brief: argument
	6:58	7:54	0:56	0.93	Draft brief: argument
	7:54	8:10	0:16	0.27	Draft brief: TOC/TOA
	8:10	8:23	0:13	0.22	Draft brief: edit and revise
2020					
13-Feb	10:44	11:30	0:46	0.77	Review Sec Brief and outline arguments
	13:27	14:30	1:03	1.05	Draft reply brief: argument 2 definition of benefit
	14:30	15:00	0:30	0.50	Call with KMC to discuss legal theories and arguments
14-Feb	9:30	10:50	1:20	1.33	Call with KMC to discuss legal theories and arguments
	10:50	11:23	0:33	0.55	Draft reply brief: argument 2 definition of benefit
	11:23	11:50	0:27	0.45	Draft reply brief: argument 3 effective date
	11:50	12:12	0:22	0.37	Draft reply brief: edit and revise
	12:12	12:40	0:28	0.47	Draft reply brief: TOC/TOA
18-Mar	16:46	16:59	0:13	0.22	Paralegal: review ROP
26-Aug	10:28	11:07	0:39	0.65	Paralegal: prepare EAJA application
				12.42	Total Hours (Attorney)
				202.50	Rate
				2514.41	Total Fee (Attorney)
				1.12	Total Hours (Paralegal)
				150.00	Rate
				167.50	Total Fee (Paralegal)
				2681.91	Total Fee
Expenses					
				0.00	Postage
Total for application					
				2681.91	Total

Start and end times are depicted as in the 24 hr clock

Time is depicted as hour:minutes

Hours depicted as fractions of hours (e.g. 1.25 is one hour 15 minutes)



Databases, Tables & Calculators by Subject

Change Output Options:

From: 2010

To: 2020

GO

☐ include graphs ☐ include annual averages

[More Formatting Options](#)

Data extracted on: August 21, 2020 (11:30:49 AM)

CPI for All Urban Consumers (CPI-U)

Series Id: CUUR0300SA0,CUUS0300SA0
Not Seasonally Adjusted
Series Title: All items in South urban, all urban consumers, not seasonally adjusted
Area: South
Item: All items
Base Period: 1982-84=100

Download: [xlsx](#)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
2010	210.056	210.020	211.216	211.528	211.423	211.232	210.988	211.308	211.775	212.026	211.996	212.488	211.338	210.913	211.764
2011	213.589	214.735	217.214	218.820	219.820	219.318	219.682	220.471	220.371	219.969	219.961	219.469	218.618	217.249	219.987
2012	220.497	221.802	223.314	224.275	223.356	223.004	222.667	223.919	225.052	224.504	223.404	223.109	223.242	222.708	223.776
2013	223.933	225.874	226.628	226.202	226.289	227.148	227.548	227.837	227.876	227.420	226.811	227.082	226.721	226.012	227.429
2014	227.673	228.664	230.095	231.346	231.762	232.269	232.013	231.611	231.762	231.131	229.845	228.451	230.552	230.302	230.802
2015	226.855	227.944	229.337	229.957	230.886	232.026	231.719	231.260	230.913	230.860	230.422	229.581	230.147	229.501	230.793
2016	229.469	229.646	230.977	231.975	232.906	233.838	233.292	233.561	234.069	234.337	234.029	234.204	232.692	231.469	233.915
2017	235.492	236.052	236.154	236.728	236.774	237.346	236.942	237.892	239.649	239.067	238.861	238.512	237.456	236.424	238.487
2018	239.772	241.123	241.595	242.486	243.279	243.770	243.776	243.605	243.640	244.163	243.484	242.150	242.737	242.004	243.470
2019	242.547	243.856	245.554	246.847	246.667	246.515	247.250	246.953	246.891	247.423	247.385	247.289	246.265	245.331	247.199
2020	248.005	248.412	248.136	246.254	245.696	247.223	248.619							247.288	

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USAO ATTORNEY'S FEES MATRIX — 2015-2019

Revised Methodology starting with 2015-2016 Year

Years (Hourly Rate for June 1 – May 31, based on change in PPI-OL since January 2011)

Experience	2015-16	2016-17	2017-18	2018-19
31+ years	568	581	602	613
21-30 years	530	543	563	572
16-20 years	504	516	536	544
11-15 years	455	465	483	491
8-10 years	386	395	410	417
6-7 years	332	339	352	358
4-5 years	325	332	346	351
2-3 years	315	322	334	340
Less than 2 years	284	291	302	307
Paralegals & Law Clerks	154	157	164	166

Explanatory Notes

1. This matrix of hourly rates for attorneys of varying experience levels and paralegals/law clerks has been prepared by the Civil Division of the United States Attorney's Office for the District of Columbia (USAO) to evaluate requests for attorney's fees in civil cases in District of Columbia courts. The matrix is intended for use in cases in which a fee-shifting statute permits the prevailing party to recover "reasonable" attorney's fees. *See, e.g.*, 42 U.S.C. § 2000e-5(k) (Title VII of the 1964 Civil Rights Act); 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act); 28 U.S.C. § 2412(b) (Equal Access to Justice Act). The matrix has not been adopted by the Department of Justice generally for use outside the District of Columbia, or by other Department of Justice components, or in other kinds of cases. The matrix does **not** apply to cases in which the hourly rate is limited by statute. *See* 28 U.S.C. § 2412(d).
2. A "reasonable fee" is a fee that is sufficient to attract an adequate supply of capable counsel for meritorious cases. *See, e.g., Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010). Consistent with that definition, the hourly rates in the above matrix were calculated from average hourly rates reported in 2011 survey data for the D.C. metropolitan area, which rates were adjusted for inflation with the Producer Price Index-Office of Lawyers (PPI-OL) index. The survey data comes from ALM Legal Intelligence's 2010 & 2011 Survey of Law Firm Economics. The PPI-OL index is available at <http://www.bls.gov/ppi>. On that page, under "PPI Databases," and "Industry Data (Producer Price Index - PPI)," select either "one screen" or "multi-screen" and in the resulting window use "industry code" 541110 for "Offices of Lawyers" and "product code" 541110541110 for "Offices of Lawyers." The average hourly rates from the 2011 survey data are multiplied by the PPI-OL index for May in the year of the update, divided by 176.6, which is the PPI-OL index for January 2011, the month of the survey data, and then rounding to the nearest whole dollar (up if remainder is 50¢ or more).
3. The PPI-OL index has been adopted as the inflator for hourly rates because it better reflects the mix of legal services that law firms collectively offer, as opposed to the legal services that typical consumers use, which is what the CPI-