

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

DONALD STEVEN GIPSON,
Appellant

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee

19-1007 EAJA

APPELLANT’S APPLICATION FOR ATTORNEY FEES AND EXPENSES

TABLE OF CONTENTS

Application for Attorney Fees and Expenses	1
Appendix - Itemized Combined Billing Statement	8
Appendix - Applicant’s Declaration of Net Worth and Request for EAJA Fees	11
Appendix - Consumer Price Index – All Urban Consumers	12

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Pursuant to Court Rule 39(a), Mr. Gipson, through counsel, moves for \$10,127 in attorney fees and costs of \$50 for the Court’s filing fee, for a total award of \$10,177. *See* 28 U.S.C. § 2412(d).

STATEMENT OF FACTS

Mr. Gipson appealed a November 9, 2018, Board of Veterans’ Appeals (Board) decision that denied his motion to reopen his previously denied claim for entitlement to service connection for bilateral hearing loss

Mr. Gipson timely filed a notice of appeal to the U.S. Court of Appeals for Veterans Claims (Court), and this matter was litigated.

The Secretary served a Record Before the Agency (record) covering 3,859 pages. Mr. Gipson, through counsel, reviewed the record, and pursuant to Court Order, did draft and serve upon the Secretary’s counsel a summary of the issues based on a review of the record, an analysis of the legal issues, and legal research.

Thereafter, the parties participated in a briefing conference mediated by the Court's Central Legal Staff. The parties each filed a brief with the Court, and Mr. Gipson, through counsel, filed a reply brief.

By decision dated May 7, 2020, the Court vacated the Board's decision based upon administrative error and remanded the matter for further action consistent with its decision. The Court subsequently entered judgment and issued mandate.

AVERMENTS

Mr. Gipson was a prevailing party, the Secretary's position in this matter was not substantially justified, and Mr. Gipson's net worth at the time the appeal was filed did not exceed \$2. million. Itemized statements detailing the time spent and fees sought on the case are attached. Mr. Gipson meets all of the criteria under the statute, and the Court should award fees as requested. *See* 28 U.S.C. § 2412(d).

ARGUMENT

A. Prevailing Party and Substantial Justification

A "prevailing party" is one who obtains relief in the form of a remand or reversal predicated upon administrative error, *Sumner v. Principi*, 15 Vet.App. 256, 264 (2001)(*en banc*). By decision dated *May 7, 2020*, this Court vacated and remanded the Board's decision in this matter based upon administrative error. Thus, appellant meets the first requirement for a fee award.

Mr. Gipson avers that the position of the United States in this case was not substantially justified. *Groves v. Shinseki*, 23 Vet.App. 90,93 (2009). In particular, neither the government's administrative nor its litigation position are substantially justified.

In its decision, the Court held that remand was warranted because the Board's statement of reasons or bases for declining to reopen Mr. Gipson's claim for entitlement to service connection for bilateral hearing loss was inadequate. Memo Decision at 2-4. Here, the Court wrote, in pertinent part:

In his Notice of Disagreement (NOD) with the rating decision starting the road to this appeal, as well as in his Substantive Appeal following the issuance of a Statement of the Case, appellant explained that he suffered from hearing loss while in service even though he did not have hearing loss before he joined the military[] Strangely, the Board did not mention these statements at all in its decision concerning hearing loss. Instead, it stated that "[e]vidence received since [the unappealed November 2006 rating decision] includes audiological treatment records that show the [v]eteran has a hearing loss disability."[] That might be so, but the evidence also included these lay statements that the Board entirely ignored.

...

The Secretary attempts to defend the Board's decision by arguing, in part, that the Board is presumed to have considered all the evidence and is under no obligation to discuss every pieces of evidence.[] That is certainly true.[] But the evidence that the Board did not discuss here was the central evidence for determining whether appellant's claim for service connection for hearing loss should be reopened. No matter how deferential our standard of review, we can't *review* the Board's determination that appellant's lay statements were not new and material evidence if the Board never makes such a determination in the first place. []

Id. The Secretary's litigation position defending the Board's decision was not substantially justified because there was no legal basis upon which the Board's decision could be defended.

B. Net Worth and Itemized Statement

Mr. Gipson must establish that his net worth at the time of filing the appeal did not exceed \$2. million. Attached to this petition is Mr. Gipson's declaration that he meets the net worth requirement for an award of fees and expenses under the EAJA.

Itemized statements detailing the time spent and fees sought on the case are attached.

C. Calculation of Attorney Rate

Attached is counsel's itemized statement describing the claim for \$10,127 in fees, based on 45.5 hours of attorney work, at a rate of \$222.59 per hour (\$125/hour plus a COLA using the CPI-U for Miami, Florida). The midpoint of the litigation is *October 2019* (*the month in which appellant's principal brief was filed*), and the applicable CPI-U is attached.

The attorney fee formula used to compute the attorney's hourly rate is:

$\$125 \times \text{CPI-U} / \text{CPI-U March 1996} = \text{attorney fee}; \text{CPI-U } \textit{October 2019} = 271.381$

$\$125 \times 271.381 / 152.4 = \222.59 per hour

$\$125 \times 1.7807 = \222.59 per hour

D. Attorney-Client Communication

An attorney must keep his or her client informed as to the status of the case, inform the client of the strategy undertaken to achieve the client's objectives, respond to requests by the client for information, obtain informed consent, and explain matters to the extent necessary to permit the client to make an informed decision regarding the representation. *See American Bar Association (ABA) Model Rules of Professional Conduct (2010), Rule 1.4, Communication..*

The purpose of all communication itemized in this matter has been consistent with Rule 1.4 of the ABA Model Rules of Professional Conduct.

Specifically, counsel kept his client informed as to the status of the case, informed the client of the strategy undertaken to achieve the client's objectives, responded to requests by the client for information, obtained informed consent, and explained matters to the extent necessary to permit the client to make an informed decision regarding the representation.

The attorney-client privilege is "the client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney." *Black's Law Dictionary*, 7th Edition, 975. *See also American Bar Association Model Rules of Professional Conduct, Rule 1.6 - Confidentiality Of Information (2009).*

The work-product rule is "the rule providing for qualified immunity of an attorney's work product from discovery or other compelled disclosure." *Black's Law Dictionary*, 8th Edition, 1639. "The exemption was primarily established to protect an attorney's litigation strategy." *Id.* *See also Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385 (1947). *See also ABA Model Rules of Professional Conduct, Rule 1.6 - Confidentiality Of Information (2009).*

Mr. Gipson asserts that attorney-client communication and attorney work-product are privileged and protected from disclosure under the EAJA. *Argoustis v. Shinseki*, 639 F.3d. 1340 (Fed.Cir.2011). In addition, most entries for client correspondence are correlated to particular stages or key events during the litigation by reference to the Court's docket.

E. The Exercise of Reasonable Billing Discretion

1. Reductions Based on Sound Billing Judgment

Counsel for Mr. Gipson has exercised sound billing judgment and has made significant reductions in the billing itemization. Detailed itemizations clearly indicate where charges have been reduced or eliminated altogether.

All time spent reviewing court orders or routine pleadings filed with the Court has been reduced. Further, all time spent drafting and filing motions for an extension of time has been eliminated. When more than one person discussed an issue related to this matter, the time for only one person was billed.

No time has been billed for work performed on unreasonable motions; work performed at the administrative level subsequent to a Court remand; work performed prior to the existence of an attorney-client relationship; for any argument made in a reply brief which repeats the same argument in the principal brief; for work spent on activities that are not required for preparation of the billed pleading; for irrelevant work; for any clerical work; and for efforts spent on obtaining or withdrawing Board reconsideration.

2. Reductions Based on Unsuccessful Efforts

In general, “no fee may be awarded for services on [an] unsuccessful claim.” *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Mr. Gipson was not unsuccessful in any argument or effort advanced in the course of seeking judicial review. Consequently, no time has been reduced based for unsuccessful efforts.

CONCLUSION AND PRAYER

Mr. Gipson prays that this Court find and conclude that he is entitled to reasonable legal fees and expenses in the amount of \$10,177 pursuant to the EAJA.

Respectfully submitted,

/s/ Sean A. Ravin

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Date: August 26, 2020

Initiate Appeal or Initial Consultation

3/15/2019, Review Board decision (12 pp.) for appeal advice to client (SAR).....	0.5
Analyze questions presented for appeal (SAR)	0.2
Draft letter – offer to represent, case theory, goals of litigation (SAR)	0.5
3/19/2019, Phone client – discuss appeal, answer questions (SAR)	0.5
3/29/2019, Review client correspondence re. representation offer (SAR)	0.1
4/2/2019, Draft notice of appearance (SAR) (deleted 0.1)	0.0
Draft letter - inform client, appearance filed, appeal timeline (SAR)	0.5

Rule 10(b) Review of RBA and Orders

4/15/2019, Review RBA notice (SAR) (deleted 0.1).....	0.0
Draft letter - inform client of RBA and related issues (SAR).....	0.1
6/14/2019, Review RBA (3,859 pp.) for pagination and content (SAR)	1.0
6/25/2019, Review notice to file brief (SAR)(deleted)	0.0
Draft letter - inform client of notice to file brief (SAR)	0.1

Prepare Central Legal Staff Summary

7/3/2019 Review RBA p.. 1-25 for drafting summary (SAR)	1.0
Review RBA p. 3,859-3,533 (chronologically) for summary (SAR)	2.0
Review RBA p. 3,532-3,194 (chronologically) for summary (SAR)	2.0
Review RBA p. 3,193-2,825 (chronologically) for summary (SAR)	2.0
7/5/2019, Review RBA p. 2,824-2,505 (chronologically) for summary (SAR)	2.0
Review RBA p. 2,504-2,145 (chronologically) for summary (SAR)	2.0
Review RBA p. 2,144-1,522 (chronologically) for summary (SAR)	2.0
7/8/2019, Review RBA p. 1,521-1,033 (chronologically) for summary (SAR)	2.0
Review RBA p. 1,032-26 (chronologically) for summary (SAR).....	2.0
Analyze legal questions presented for appeal (SAR)	0.2
7/9/2019, Draft outline of pertinent facts from the RBA (SAR)	1.0
Draft summary of issues (SAR)	2.0
Review and revise 1 st draft of summary (SAR)	0.6
7/17/2019, Review order - CLS (SAR)(deleted 0.1)	0.0
Draft letter - inform client of order, summary and conference (SAR)	0.1
7/24/2019, Review and revise 2 nd draft of summary (SAR)	0.6
Serve summary, file service (SAR)(deleted)	0.0
Draft letter - inform client of summary of issues (SAR).....	0.3

Participate in Central Legal Staff Conference

8/12/2019, Review summary and RBA prior to conference (SAR)	1.0
Draft pre-conference notes, issues for further research (SAR).....	0.3
Participate in CLS conference (SAR).....	0.2
Draft post conference notes to file re. VA position, arguments, etc. (SAR)	0.3

Review VA email re. position – VA rejects JMR offer (SAR)	0.1
Draft letter - inform client of conference outcome (SAR)	0.6

Draft and File Initial Brief

10/25/2019, Review summary and notes for drafting brief (SAR)	0.3
Analyze legal questions presented for appeal (SAR)	0.2
Review RBA p. 1-3,59 for drafting statement of facts (SAR)	1.0
Draft statement of facts (SAR)	1.0
Legal research: inadequate r&b (analysis of lay evidence) (SAR)	1.0
Draft argument A inadequate reasons or bases intro (SAR)	0.2
Draft argument A(1) Board failed to analyze lay statements (SAR)	2.0
Draft argument A(2) Board's error was prejudicial (SAR)	0.1
Draft summary of argument (SAR)	0.2
Draft statement of issues presented (SAR)	0.1
Proof and revise 1 st draft of brief (SAR)	1.0
10/28/2019, Proof and revise 2 nd draft of brief (SAR)	1.0
Format brief and mark citations (SAR)(deleted)	0.0
Draft letter - inform client re. brief and arguments (SAR)	0.5

Review and Analyze VA Brief

2/10/2020, Review and annotate VA brief (9 pp.) (SAR)	0.5
2/11/2020, Review initial brief and record for analysis of reply (SAR)	1.0
Analyze issues presented for reply w/ notes to file (SAR)	0.2
Draft letter - inform client re. VA brief and arguments (SAR)	0.8

Draft and File Reply Brief

4/8/2020, Review VA brief (9 pp.), initial brief/notes to draft reply (SAR)	0.5
Analyze issues presented for reply (SAR)	0.2
Draft argument A, Secretary's arguments unpersuasive(SAR)	0.3
Draft argument A(1) Board failed to analyze statements (SAR)	0.8
Draft argument A(2) Board's error is prejudicial (SAR)	0.8
Proof and revise reply (SAR)	0.5
Format reply and mark citations (SAR)(deleted)	0.0
Draft letter - inform client re. reply brief and arguments (SAR)	0.7

Review and Analyze Memo Decision

5/7/2020, Review memo decision and briefs filed with court (SAR)	1.0
Draft letter to inform client of decision and consequences (SAR)	0.3

Review Orders – Draft EAJA Application

6/1/2020, Review Judgment (SAR) (deleted 0.1)	0.0
Draft letter to inform client of judgment and consequences (SAR)	0.1
8/4/2020, Review Mandate (SAR) (deleted 0.1)	0.0
Draft letter to inform client of mandate and consequences (SAR)	0.1

8/26/2020, Review client folder to draft and revise EAJA (reduced 0.5) (SAR) 0.5
Draft and revise EAJA application (reduced 0.3) (SAR) 0.5
Draft letter to inform client of EAJA filing and consequences (SAR) 0.3

Certificate of Compliance with Rule 39

In compliance with Rule 39 of the Court's Rules of Practice and Procedure, I hereby certify that (1) I have reviewed the combined billing statement, and I am satisfied that it accurately reflects the work performed by all counsel and non-attorney practitioners, and (2) I have considered and eliminated all time that is excessive or redundant.

/s/ Sean A. Ravin

SEAN A. RAVIN, ESQ.

ATTORNEY OF RECORD

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Date: August 26, 2020

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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Appellant/Petitioner

No. 19-1007

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

APPELLANT'S DECLARATION AND REQUEST FOR ATTORNEY FEES

I, **Donald Steven Gipson** certify under penalty of perjury under the laws of the United States of America that my net worth did not exceed U.S. currency of Two Million Dollars (\$2,000,000.00) at the time I filed my appeal with the United States Court of Appeals for Veterans Claims.

I assert that I am eligible to have attorney fees paid to my attorney under the Equal Access to Justice Act, and I hereby request that my attorney file an application for attorney fees and expenses for this matter. I understand that these fees are paid by the U.S. government to allow persons access to an attorney when they otherwise would not be able to afford one. I also understand that these attorney fees and expenses will not be taken out of any retroactive award or payment owed to me by the Department of Veterans Affairs.


Donald Steven Gipson

Date



Databases, Tables & Calculators by Subject

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From: 1996 ▼

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Data extracted on: August 26, 2020 (12:59:44 PM)

CPI for All Urban Consumers (CPI-U)

Series Id: CUURS35BSA0, CUUSS35BSA0

Not Seasonally Adjusted

Series Title: All items in Miami-Fort Lauderdale-West Palm Beach, FL, all urban consumers, not seasonally adjusted

Area: Miami-Fort Lauderdale-West Palm Beach, FL

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
1996	152.0		152.4		152.6		152.4		154.6		156.4		153.7	152.4	154.9
1997	158.1		158.5		157.9		157.9		158.5		159.5	159.3	158.4	158.2	158.7
1998		160.2		160.2		160.2		160.8		161.1		161.1	160.5	160.1	160.9
1999		161.4		161.7		161.3		162.3		164.1		164.8	162.4	161.4	163.4
2000		165.9		166.9		168.0		168.4		169.6		169.5	167.8	166.7	169.0
2001		171.9		172.8		173.5		173.5		174.2		173.1	173.0	172.4	173.6
2002		175.0		175.0		174.4		175.2		177.0		177.9	175.5	174.7	176.4
2003		180.3		180.6		179.4		180.9		181.6		181.6	180.6	180.0	181.2
2004		183.6		185.2		185.6		185.1		187.0		188.6	185.6	184.5	186.6
2005		190.6		193.2		192.6		195.6		198.8		197.4	194.3	191.8	196.9
2006		202.2		203.8		203.8		205.6		204.8		205.4	203.9	202.7	205.1
2007		207.989		210.904		212.820		213.127		215.159		217.319	212.390	209.955	214.826
2008		219.082		221.324		225.079		225.473		223.699		218.324	222.119	221.180	223.059
2009		220.589		220.740		221.485		221.306		222.416		222.943	221.387	220.674	222.100
2010		222.505		222.625		222.390		222.803		223.631		224.907	223.062	222.553	223.570
2011		227.451		231.503		231.197		232.749		232.141		231.794	230.851	229.524	232.178
2012		234.043		236.095		233.991		236.110		236.793		235.023	235.207	234.526	235.889
2013		238.524		238.124		237.815		237.438		238.858		239.417	238.179	237.921	238.437
2014		242.268		244.073		243.428		243.124		244.130		242.676	243.147	242.921	243.372
2015		243.283		245.195		246.245		246.348		246.789		246.597	245.419	244.327	246.511
2016		247.126		248.741		250.208		250.263		251.571		253.629	249.790	248.156	251.424
2017		256.890		255.708		255.134		255.898		258.456		258.238	256.681	255.916	257.446
2018		264.990		264.696		265.973		265.062		267.280		265.731	265.065	264.152	265.978
2019		268.288		270.553		269.119		270.176		271.381		270.918	269.776	268.974	270.578
2020		272.044		269.237		271.072								270.644	

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