

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

SUSAN R. JOHNSTON,	)	
Appellant,	)	
	)	
v.	)	
	)	Vet App No. 19-1413
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 \$ 7114.75.

**SUMMARY OF PROCEEDINGS**

Ms. Johnston appealed the Board of Veterans’ Appeals’ decision, dated November 9, 2018, denying entitlement to a disability rating in excess of 70 percent for depression and an effective date prior to March 17, 2014 for a 30 percent disability rating for sinusitis. In November 2019, she filed a brief and replied to the Secretary’s brief. This court issued a memorandum decision, setting aside the Board’s decision on the sinusitis claim because it found that the

Board did not articulate adequate reasons and bases for its denial; the court affirming the remainder of the Board's decision. Judgment was issued on May 29, 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. The court held that the Board erred in its denial of entitlement to an earlier effective date for the 30 percent rating assigned for sinusitis.

Appellant filed the captioned appeal in her 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 on the claim for earlier effective date was

set aside 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 only for the claim prevailed, 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 November 2019.

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 \$205.51 per hour. <sup>1</sup>

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<sup>1</sup> See <http://data.bls.gov>: consumer price index for 11/1996 for Washington DC is 161.20 and for 11/2019 is 265.03. Adjusted hourly rate=\$125.00+(\$125.00 multiply by [(265.03 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 \$4.10.

### **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 \$ 7114.75 to Jeany Mark, counsel for Appellant.

Respectfully submitted,

/s/Jeany Mark

Jeany Mark

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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** (only on prevailed sinusitis claim;exercised billing judgment)

<b><u>Date</u></b>	<b><u>Actions</u></b>	<b><u>Time (hrs)</u></b>
02.18.19	Review decision for appeal	0.5
02.26.19	Communication with client: explain BVA decision	0.3
02.27.19	Communication with client re: appeal (pstg\$0.60;copies 5)	0.1
03.01.19	Communication with client	0.1
03.01.19	Prepare notice of appeal and appearance	0.4
03.04.19	Review court's notice	0.1
03.18.19	Review court's notice	0.1
04.03.19	Review court's notice	0.1
04.25.19	Review notice of appearance by OGC counsel	0.1
05.03.19	Review court's notice	0.1
05.06.19	Review RBA CD to ensure readability	0.1
05.08.19	Communication with OGC atty re: appellant's passing	0.1
05.09.19	Communication from OGC atty re: motion to substitute	0.1
05.13.19	Communication with Appellant's spouse re: substitution	0.1
05.14.19	Prepare Motion to Substitute (scan 2 pages)	0.3
05.15.19	Review court's notice	0.1
06.14.19	Review court's notice	0.1
07.29.19	Review Secretary's response to Court Order	0.1
08.19.19	Review court's notice	0.1
08.26.19	Review RBA for Rule 10 (6102 pages)	3.8
09.03.19	Prepare R. 10 response	0.1
09.04.19	Review court's notice	0.1
09.04.19	Drafted, filed Notice of Appearance (Ryan McClure-RM)	0.1
10.01.19	Review court's notice	0.1
10.01.19	Reviewed RBA, pages 1-830, took notes (RM)	2.5
10.02.19	Reviewed RBA, pages 831-1604, took notes (RM)	2.3
10.02.19	Reviewed RBA, pages 1605-3715, took notes (RM)	2.2
10.02.19	Reviewed RBA, pages 3716-4475, took notes (RM)	2.0
10.02.19	Reviewed RBA pages 4476-5709, took notes (RM)	2.1
10.02.19	Review notice of appearance by OGC counsel	0.1
10.03.19	Reviewed RBA pages 5710-6102, took notes (RM)	1.0
10.03.19	Legal research [Reg CFR 3.400] (RM)	0.3

10.08.19	Drafted SOI argument B (RM)	0.5
10.15.19	Edit and finalize SOI	0.1
10.29.19	Briefing conference (RM)	0.2
11.08.19	Telephone call with client re case status (RM)	0.1
11.13.19	Drafted facts sections (RM)	3.0
11.13.19	Legal research [ <i>Mittleider, Littke</i> , US Codes] (RM)	0.5
11.13.19	Drafted argument IB (RM)	0.9
11.14.19	Drafted argument IB (RM)	0.9
11.14.19	Drafted statement of issue (RM)	0.1
11.14.19	Drafted summary of argument (RM)	0.1
11.14.19	Drafted conclusion (RM)	0.1
11.14.19	Edited brief (RM)	0.3
11.14.19	Edited brief (RM)	0.2
11.18.19	Edited brief (RM)	0.5
11.26.19	Edited brief (RM)	0.8
11.26.19	Reviewed and finalized brief	0.5
11.26.19	Filed brief (RM)	0.1
11.26.19	Review court's notice	0.1
01.27.20	Review court's notice	0.1
03.12.20	Review court's notice	0.1
03.17.20	Reviewed Appellee brief (RM)	0.4
03.17.20	Drafted reply brief argument B (RM)	1.2
03.25.20	Reviewed and finalized brief	0.3
03.26.20	Filed reply brief (RM)	0.1
04.09.20	Review court's notice	0.1
04.09.20	Review ROP	0.2
04.09.20	Filed ROP response (RM)	0.1
04.13.20	Review court's notice	0.1
05.07.20	Review MemDec	0.4
05.09.20	Review court's notice	0.1
05.22.20	Finalized timesheet (RM)	0.3
07.30.20	Review court's notice	0.1
08.27.20	Scrub timesheet for billing judgment and prepare EAJA	2.4

Total: 34.6 hrs@ \$205.51/hr = \$7110.65



**Expenses:**

Postage		0.60
Copies		1.50
Scans		2.00
Total Expenses	\$	4.10

/s/ Jeany Mark  
Jeany Mark