

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

GEORGE D. MILLHEISER,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 19-435
	)	
ROBERT L. WILKIE,	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

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

Appellant, through counsel, hereby makes application to the Court for an award of reasonable attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). The reasonable fee and total amount claimed is **\$9,260.00**.

**SUMMARY OF THE CASE**

Mr. George D. Millheiser (the Veteran *or* Appellant) appealed the September 26, 2018, Board of Veterans’ Appeals (Board) decision to the extent that the Board denied service connection for bilateral hearing loss. On May 11, 2020, the Court entered a memorandum decision which set aside that portion of the Board decision and remanded for readjudication.

## ARGUMENT

The Equal Access to Justice Act (EAJA) provides:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

....

(2) For the purposes of this subsection--

(A) “fees and other expenses” includes . . . reasonable attorney fees . . . .

....

(D) “position 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;

....

(F) “court” includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims.

28 U.S.C. § 2412. An award of fees requires that: (1) the claimant be a “prevailing party;” (2) the Government’s position was not “substantially justified;” (3) no

“special circumstances make an award unjust;” and (4) any fee application be submitted to the court within thirty days of final judgment in the action and be supported by an itemized statement. *Commissioner, INS v. Jean*, 496 U.S. 154, 158 (1990). An award is in order in this case.

The Veteran prevailed in his appeal. He sought to overturn the Board’s decision, inter alia, on an inadequate statement of reasons or bases. The Court agreed. *See Millheiser v. Wilkie*, No. 19-435, slip op. at 2-3 (U.S. Vet. App. May 11, 2020). It is irrelevant whether the Veteran will prevail on remand since he was successful in his “civil action” before the Court. *See Kelly v. Nicholson*, 463 F.3d 1349, 1354 (Fed. Cir. 2006). Appellant is a prevailing party for EAJA purposes, having established “entitlement to some relief on the merits of his claims, either in the trial court or on appeal.” *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980). An appellant to this Court obtains prevailing party status when the appeal achieves “some form of ‘judicially sanctioned change in the legal relationship of the parties.’” *Cycholl v. Principi*, 15 Vet. App. 355, 357 (2001) (quoting *Sumner v. Principi*, 15 Vet.App. 256, 260-61 (2001)). Appellant is a prevailing party because “where the plaintiff secures a remand requiring further agency proceedings because of alleged error by the agency, the plaintiff qualifies as a prevailing party (1) without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court.” *Halpern v. Principi*, 384 F.3d 1297, 1306 (Fed. Cir. 2004)

(quoting *Former Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360, 1366 (Fed. Cir. 2003)). This Court did not retain jurisdiction over the appeal on remand. Thus, the Veteran qualifies as a prevailing party for EAJA purposes regardless of the outcome of subsequent agency proceedings.

The position of the United States was not substantially justified in this case. The Supreme Court has held that “substantially justified,” as used in the EAJA, means justified in substance, in the main, or to a degree that could satisfy a reasonable person. *See 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). Once an appellant claiming fees and expenses alleges the absence of substantial justification, the burden shifts to the Secretary to establish that his position was substantially justified at both the administrative and judicial stages. *Cullens v. Gober*, 14 Vet.App. 234, 237 (2001) (en banc); *see Locher v. Brown*, 9 Vet.App. 535, 537 (1996).

Because Appellant has alleged the absence of substantial justification, the burden is on the Government to demonstrate that its position was substantially

justified. *Stillwell v. Brown*, 6 Vet.App. 291, 301 (1994). The Government 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) (emphasis in original). Government action should never be held substantially justified where it is contrary to statute, regulation or judicial precedent. See, e.g., *Stillwell v. Brown*, 6 Vet.App. 291, 301 (1994); *Gilbert v. Derwinski*, 1 Vet.App. 49, 56-57 (1990) (clear analysis and complete explanation required in Board’s statement of “reasons or bases”).

Appellant is unaware of any special circumstances which make an award of attorney fees unjust in this case.

Should the Government contest this application on any basis, Appellant reserves the right to supplement his application by requesting attorney fees for the addition time required to prepare a reply.

The Court entered judgment on June 3, 2020. An appeal to the United States Court of Appeals for the Federal Circuit would therefore have been timely if filed on or before August 3, 2020. No appeal having been filed, this application is timely if filed on or before September 2, 2020, the thirtieth day after judgment became final.

The Veteran brought the captioned appeal in his individual capacity. Therefore, in order to qualify as a “party” under the EAJA it must be shown that his “net worth did not exceed \$2,000,000 at the time the civil action was filed.”

28 U.S.C. § 2412(d)(2)(B). The requirement is satisfied in this case because Appellant filed a declaration of financial hardship with the Court. *See Bazalo v. Brown*, 9 Vet. App. 304, 309 (1996), *rev'd sub nom. on other grounds Bazalo v. West*, 150 F.3d 1380 (Fed. Cir. 1998). *See also* the Court's docket entry of January 24, 2019.

Also attached to this application is an affidavit from Appellant's lead attorney. The affidavit includes the number of hours expended on this litigation and establishes that based upon the specific services performed \$9,260.00 is a reasonable fee. 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). In this case, however, the application is based upon contemporaneous time records.

### CONCLUSION

For the foregoing reasons, the Court should order the Secretary of Veterans Affairs to pay reasonable attorney fees in the total amount of **\$9,260.00 jointly to George D. Millheiser and Finnegan, Henderson, Farabow, Garrett & Dunner, LLP (Finnegan)**. The name of the undersigned counsel, David T. Landers, who is not entitled to payment of fees in his individual capacity, should not appear on the check. The Court should order that a check be delivered to counsel within thirty days following the date of the Court's order awarding fees.

Respectfully submitted,

/s/ David T. Landers

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Attorney for Appellant

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**AFFIDAVIT OF DAVID T. LANDERS**

Now comes the undersigned, David T. Landers, and certifies the following to be true and correct.

1. My name is David T. Landers, and I am lead counsel in the captioned appeal. This affidavit is made in order to provide the Court with information in support of a claim for reasonable attorney fees in accordance with 28 U.S.C.

§ 2412(d).

2. The consolidated billing statement included in this affidavit encompasses all work performed on this appeal by lawyers for which fees are claimed.



3. The consolidated billing statement is based upon contemporaneous time records maintained during this appeal. DTL = David T. Landers, Esq.; TES = Thomas E. Sullivan, Esq.

4. Appellant has not claimed reimbursement for the time expended by support staff traveling to VA offices and verifying the content of the Record Before the Agency (RBA) served by the Secretary, as well as expenses, including local transportation, incurred in connection therewith.

<b>Date</b>	<b>Attorney</b>	<b>Hours</b>	<b>Nature of work</b>	<b>Hours Reduced</b>
01/22/2019	TES	0.3	Prepared and filed notice of appeal; reviewed notice of docketing and determined due dates.	
01/24/2019	TES	0.3	Prepared and filed notice of appearance as lead counsel; reviewed and filed declaration of financial hardship and retainer agreement..	
01/24/2019	DTL	0.2	Prepared and filed appearance as co-counsel.	0.2
02/21/2019	DTL	0.2	Reviewed BVA decision transmittal and copy filed with Court to compare with case file copy.	
03/07/2019	DTL	0.1	Reviewed appearance for Appellee.	
03/31/2019	DTL	0.2	Reviewed RBA notice and determined due date for response.	
04/10/2019	DTL	0.3	Prepared and filed appearance as lead counsel; reviewed briefing order and determined due date.	

04/26/2019	DTL	0.2	Reviewed order scheduling pre-briefing conference (PBC) and determined due date for memo.	
04/29/2019	DTL	0.3	Prepared and filed motion for leave to file out of time and motion for extension of time to respond to RBA since RBA disc not yet received from VA.	
04/30/2019	DTL	0.1	Reviewed order canceling PBC.	
05/01/2019	DTL	0.1	Reviewed order canceling briefing order.	
05/28/2019	DTL	0.2	Reviewed new briefing order and determined new due date.	
06/05/2019	DTL	0.2	Reviewed new PBC order and determined new due date for memo.	
06/14/2019	DTL	2.2	Reviewed and outlined RBA.	
06/16/2019	DTL	3.5	Prepared first draft, PBC memo.	
06/19/2019	DTL	3.1	Revised PBC memo and edited based on reviewer's comments; final proofing; e-mailed to CLS and VA counsel; prepared and filed R. 33 certificate of service.	
07/03/2019	DTL	0.5	Prepared for and participated in PBC.	
07/29/2019	DTL	0.3	Prepared and filed first motion for extension of time (MET) to file Appellant's opening brief (AOB).	0.3
08/22/2019	DTL	3.5	Refresher RBA review; commenced drafting AOB.	
08/23/2019	DTL	1.7	Completed first draft, AOB.	
08/25/2019	DTL	1.2	Revised first draft, AOB, and completed second draft.	
08/29/2019	DTL	0.3	Prepared and filed second MET to file AOB.	0.3
09/04/2019	DTL	1.1	Edited AOB based on reviewer's comments.	

09/05/2019	DTL	1.0	Prepared tables, final proofing and filing of AOB.	
11/15/2019	DTL	0.3	Prepared and filed MET to file reply brief (RB).	0.3
12/02/2019	DTL	2.7	Reviewed Appellee's brief; refresher RBA review; commenced drafting RB.	
12/03/2019	DTL	3.8	Completed first draft, RB.	
12/04/2019	DTL	2.6	Revised RB and completed second draft.	
12/12/2019	DTL	0.6	Edits to RB based on reviewer's comments.	
12/13/2019	DTL	0.8	Prepared tables, final proofing and filing of RB.	
01/10/2020	DTL	0.3	Prepared and mailed case status letter to client with copies of briefs.	
01/17/2020	DTL	0.1	Reviewed assignment of case to judge.	
01/22/2020	DTL	0.2	Telephone response to client inquiry re case.	
03/10/2020	DTL	2.2	Reviewed and analyzed mem. dec. affirmance. Preliminary research on potential R. 35 motion.	
03/31/2020	DTL	0.3	First MET to file R. 35 motion.	0.3
04/12/2020	DTL	1.2	Additional legal research; commenced drafting R. 35 motion.	
04/13/2020	DTL	0.3	Second MET to file R. 35 motion.	0.3
04/20/2020	DTL	2.2	Completed first draft, R. 35 motion.	
04/22/2020	DTL	2.5	Revised first draft and completed second draft, R. 35 motion.	
04/27/2020	DTL	1.0	Edits based on reviewer's comments, final proofing and filing of R. 35 motion.	

05/11/2020	DTL	0.8	Reviewed and analyzed mem. dec. granting R. 35 motion and withdrawing affirmance.	
05/13/2020	DTL	0.3	Telephone update to client re case status.	
05/16/2020	DTL	0.3	Prepared and mailed final case disposition letter to client.	
06/03/2020	DTL	0.2	Reviewed judgment and determined due date for EAJA application.	
08/12/2020	DTL	0.1	Reviewed mandate.	
08/30/2020	DTL	2.8	Prepared and filed EAJA application and affidavit.	0.8
Subtotal hours expended		46.7		
Hours reduced		2.5		
Total net hours claimed		44.2		

5. The rate at which fees are claimed for attorney services is based on the statutory rate of \$125.00 per hour plus the cost-of-living allowance, which is adjusted to the midpoint of the period during which work was performed. This results in a rate of \$209.52 per hour.<sup>1</sup> *See Levernier Constr., Inc. v. United States*, 947 F.2d 497, 504 (Fed. Cir. 1991) (“EAJA authorizes the award of the lower of either the prevailing market rate or [\$125.00] per hour plus a COLA”); *Elczyn v. Brown*, 7 Vet. App. 170, 181 (1994) (“[T]he Court will permit—and encourage—the selection of a single mid-point date, such as the date upon which an appellant’s

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<sup>1</sup> The rate of \$209.52 per hour was determined by multiplying the statutory rate of \$125.00 per hour by the consumer price index for September 2019, the month Appellant’s opening brief was filed.

principal brief . . . is filed with the Court, as the base for calculating a cost of living increase.”). Therefore, the reasonable fee for legal services in this matter is \$9,260.78 (rounded down to \$9,260.00), representing 44.2 hours expended at the rate of \$209.52 per hour.

5. I certify that I have reviewed the foregoing billing statement and am satisfied that it accurately reflects the work performed by all counsel and have considered and eliminated all time that is excessive or redundant.

/s/ David T. Landers  
DAVID T. LANDERS  
Finnegan

Attorney for Appellant