

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

LARRY O. PENDLETON,)	
)	
Appellant,)	
)	
v.)	Vet.App. No. <u>18-3700E</u>
)	
ROBERT L. WILKIE,)	
Secretary of)	
Veterans Affairs,)	
)	
Appellee.)	
_____)	

**APPELLANT’S APPLICATION FOR AN AWARD OF ATTORNEY FEES,
COSTS AND OTHER EXPENSES UNDER THE EQUAL ACCESS TO
JUSTICE ACT**

Pursuant to U.S. VET.APP. R. 39 and 28 U.S.C.A. § 2412 (West 2014), Appellant Larry O. Pendleton, by and through his counsel, Jennifer A. Zajac and Linda E. Blauhut, hereby submits his application for an award of attorney fees, costs, and other expenses in the amount of \$12,819.33. This submission is timely, as it is within 30 days after the 60-day period following the issuance of the Court’s June 8, 2020, judgment. 28 U.S.C.A. § 2412(d)(1)(B); U.S. VET.APP. R. 39, 41.

1. The Appellant is a prevailing party. 28 U.S.C.A. § 2412(d)(1)(B). On March 30, 2018, the Board of Veterans’ Appeals (Board) denied Appellant’s claim for service connection for a low-back disability. The May 15, 2020, Memorandum Decision set aside the Board decision and remanded for further proceedings. As

such, Appellant is a prevailing party. *See Zuberi v. Nicholson*, 19 Vet.App. 541 (2006).

2. Appellant is a party eligible to receive an award. To be eligible to receive an award, an applicant must show that his net worth did not exceed \$2,000,000 (two million dollars) at the time the action was filed. 28 U.S.C.A. § 2412(d)(2)(b)(i). Appellant's net worth did not exceed \$2,000,000 at the time he filed his notice of appeal with this Court on July 10, 2018, as evidenced by the Court's acceptance of Appellant's Declaration of Financial Hardship that same day. As such, Appellant is a prevailing party eligible to receive an award.

3. Appellant is eligible to receive an award because VA's position was not substantially justified. 28 U.S.C.A. § 2412(d)(1)(B); *see Stillwell v. Brown*, 6 Vet.App. 291, 302 (1994) (setting standard for determining whether VA position was substantially justified). Appellant argued, and the Secretary conceded, that the May 2011 examination was inadequate. The Court agreed and offered specific information as to what the Court found inadequate about the examination. As such, the Secretary's position was not substantially justified.

4. No special circumstances exist that would make an award of attorney fees unjust. 28 U.S.C.A. § 2412(d)(1)(A).

5. A statement from counsel for Appellant is attached as Exhibit. Exhibit itemizes services rendered in this litigation, the time expended, and the rate

at which fees were computed. The time expended for all services is 60.15 hours. The hourly rate for Ms. Zajac is \$213.69. The hourly rate for Ms. Blauhut is \$208.54. The total amount claimed is \$12,819.33.

WHEREFORE, based on the foregoing, Appellant respectfully requests that the U.S. Court of Appeals for Veterans Claims award attorney fees in the amount of \$12,819.33, *jointly to Appellant and Paralyzed Veterans of America.*

Respectfully submitted,

/s/ Jennifer A. Zajac
JENNIFER A. ZAJAC
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September 2, 2020
Date

EXHIBIT

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)	
Appellant,)	
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v.)	Vet.App. No. <u>18-3700E</u>
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ROBERT L. WILKIE,)	
Secretary of)	
Veterans Affairs,)	
)	
Appellee.)	
_____)	

DECLARATION OF JENNIFER A. ZAJAC, ESQ.

I, Jennifer A. Zajac, make the following declaration in support of Appellant Larry O. Pendleton's application for an award of attorney fees, costs, and other expenses, in connection with the above-captioned appeal.

1. I was the lead attorney of record for Appellant in the proceedings before the U.S. Court of Appeals for Veterans Claims.
2. Linda Blauhut, PVA's Deputy General Counsel, offered supervisory review.
3. I have reviewed the combined billing statement and am satisfied that it accurately reflects the work performed by all representatives.
4. The following list itemizes certain services rendered and time expended leading to the May 15, 2020, Memorandum Decision, ordering the Board decision to be set aside and remanding for readjudication:

<u>DATE</u>	<u>TASK</u>	<u>HOURS</u>	<u>JAZ/LEB</u>
1/15/19	Review email from Consortium asking me to take over case. Review Consortium memo and Board decision. Email Consortium that I will be able to take case.	0.75	JAZ
2/5/19	Draft and file atty NOA. File signed retainer.	0.3	JAZ
2/12/19	Annotate RBA for Rule 33 purposes 1-850 (3.0). Continue to annotate RBA for Rule 33 purposes (851-2407) (1.5). Begin to draft Rule 33 memo: statement of facts, Board decision (1.0). Finish drafting Rule 33 memo: arguments (2.9). Send to L. Blauhut for supervisory review (0.1).	8.5	JAZ
2/12/19	Review Rule 33.	0.75	LEB
2/13/19	Add in argument for settlement. Finalize and email to CLS/VA. Draft and file Certificate of Service.	1	JAZ
2/28/19	Prepare for and attend Rule 33 conference. Send L. Blauhut email summarizing conference.	0.75	JAZ
2/28/19	Review email re: conference; reply.	0.2	LEB
3/1/19	Discuss case further with L. Blauhut. Begin to draft letter to client re: VA's offer for JMR and his options.	1	JAZ
3/1/19	Review and edit letter re: offer.	0.4	LEB
3/4/19	Finalize draft of letter. Send letter to L. Blauhut for comments/edits.	0.3	JAZ

3/5/19	Review comments/edits by L. Blauhut. Finalize and send to client.	0.75	JAZ
3/18/19	Listen to VM from client. Receive and review response to letter mailed 3/5/19. Client declines JMR offer.	0.2	JAZ
3/19/19	Phone call with client. Email to VA that client does not accept JMR offer.	0.3	JAZ
3/21/19	Begin to draft Appellant's Brief (2.0). Research "reasonable inference" (1.0). Research "prior inconsistent statement" (1.0).	4	JAZ
3/22/19	Research <i>Godfrey/Hensley/Douglas</i> .	1	JAZ
3/24/19	Continue to research relevant issues (1.5). Continue to draft arguments and edit (2.5).	4	JAZ
3/26/19	Continue to draft arguments. Send to L. Blauhut for supervisory review and specific questions re: two arguments.	3	JAZ
3/27/19	Research M-21. Draft additional argument re: clinical records. Send new draft to L. Blauhut.	3	JAZ
3/27/19	Begin Brief review.	0.5	LEB
3/29/19	Continue to review Brief, edit, research.	1.25	LEB
3/29/19	Review comments from L. Blauhut. Consider <i>Cushman</i> . Draft and file Motion for Extension.	1.1	JAZ
4/16/19	Draft <i>Cushman</i> argument. Edit to ensure within 30 pages. Send to L. Blauhut for supervisory review.	2	JAZ

4/22/19	Review and edit.	1.0	LEB
4/22/19	Review comments from L. Blauhut Email VA about potential extension. Edit. Create TOA/TOC/Record table. Ensure compliance with Court's rules.	2.6	JAZ
4/23/19	Finalize and send to L. Blauhut for filing.	0.5	JAZ
4/25/19	Send to L. Selfon ¹ for final review. Review L. Selfon's comments. Finalize and file.	1.0	LEB
6/27/19	Draft and file motion for extension to file Reply.	0.75	JAZ
6/27/19	Quick review of VA's filing.	0.25	LEB
7/22/19	Research Reply. Begin to draft Reply.	3	JAZ
7/23/19	Continue to research reply (1.5). Continue to draft Reply (3.0). Send to L. Blauhut for supervisory review.	4.5	JAZ
7/23/19	Review Reply.	.75	LEB
7/29/19	Review comments by L. Blauhut and edit accordingly. Add in summary of argument.	1	JAZ
8/2/19	Edit. Add in TOC, TOA, Record Table. Ensure compliance with Court's rules. Send to L. Selfon for final review.	2	JAZ
8/6/19	Edit based on L. Selfon's suggestions.	0.25	JAZ
8/9/19	Finalize and file Reply Brief.	1	JAZ
8/28/19	Review ROP for completeness. Draft and send update letter.	0.5	JAZ

¹ L. Selfon is Leonard Selfon, PVA's General Counsel.

9/20/19	Draft and send letter that the case is stayed pending <i>Smith</i> .	0.3	JAZ
11/15/19	Draft and send status letter.	0.3	JAZ
4/6/20	Phone call with client. Check docket in <i>Smith</i> .	0.5	JAZ
4/20/20	Draft and send status letter.	0.5	JAZ
4/27/20	Review decision in <i>Smith</i> .	0.5	JAZ
4/28/20	Review Court order lifting stay.	0.1	JAZ
5/15/20	Review Court's decision.	0.2	JAZ
6/8/20	Draft and send letter with copy of Court's decision and judgment.	0.6	JAZ
8/31/20	Draft EAJA application	3	JAZ

Total Hours: 60.15

JAZ: 54.05

LEB: 6.10

Rate:

JAZ: \$213.69

LEB: \$208.54

Total Billable fees: \$12,819.33

JAZ: \$11,547.24

LEB: \$1,272.09

5. Under 28 U.S.C.A. § 2412(d)(1)(D)(2), the applicable rate is \$125.00 per hour for appeals filed after March 29, 1996. Appellant filed his appeal in July 2018. An attorney may seek a rate in excess of \$125.00 per hour based on the increase in the cost of living since the EAJA was amended in March 1996. *See* 28 U.S.C.A. § 2412(d)(2)(A)(ii); *Mannino v. West*, 12 Vet.App. 242 (1999).

6. For Ms. Zajac: The \$125.00 attorney rate, adjusted for inflation for the West Region, was \$213.64 in March 2019, the month undersigned counsel drafted the majority of Appellant's Brief. *See* Bureau of Labor Statistics Data, CPI-U, at <http://www.bls.gov/cpi/home.htm> (last visited September 2, 2020). This rate was calculated by creating a ratio using the CPI-U for the West Region between March 1996 (\$156.4) and March 2019 (\$267.37), for the rate of \$100, and then applying that ratio for calculating the change for \$125. *See id.* The “**billable fees**” amount for Ms. Zajac was then calculated by multiplying the \$213.64 rate by the total number of hours spent working on the appeal (54.05), to equal \$11,547.24.

7. For Ms. Blauhut: The \$125.00 attorney rate, adjusted for inflation for the Washington Region, was \$208.54 in March 2019, the month counsel reviewed Appellant's Brief. *See* Bureau of Labor Statistics Data, CPI-U, at <http://www.bls.gov/cpi/home.htm> (last visited September 2, 2020). This rate was calculated by creating a ratio using the CPI-U for the Washington Region between March 1996 (\$158.4) and March 2019 (\$264.257), for the rate of \$100, and then applying that

ratio for calculating the change for \$125. *See id.* The “**billable fees**” amount for Ms. Blauhut was then calculated by multiplying the \$208.54 rate by the total number of hours spent working on the appeal (6.1), to equal \$1,272.09.

8. The “**total fees**” amount was then calculated by adding together the “**billable fees**” for Ms. Zajac and the “**billable fees**” for Ms. Blauhut (\$11,547.24+ \$1,272.09 = \$12,819.33).

9. I declare and state under penalty of perjury under U.S. laws that the information set forth in this declaration is true and correct.

Dated this 2nd day of September, 2020.

Respectfully submitted,

/s/ Jennifer A. Zajac

Jennifer A. Zajac
Counsel for Appellant