

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

JOHN A. ABRAHAMAS,)	
)	
Appellant,)	
)	
v.)	Vet.App. No. <u>18-7067E</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 John A. Abrahams, 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 \$17,249.94. This submission is timely, as it is within 30 days after the issuance of the August 5, 2020, judgment and mandate. 28 U.S.C.A. § 2412(d)(1)(B) (West 2014); U.S. VET.APP. R. 39, 41.

1. The Appellant is a prevailing party. 28 U.S.C.A. § 2412(d)(1)(B). On November 27, 2018, the Board of Veterans’ Appeals (Board) held the creation of a \$4,176.00 debt was valid. The Appellant and the Secretary entered into a Joint Motion for Termination and a Stipulated Agreement, wherein the Secretary agreed

to release Appellant from any obligation to repay \$4,176 and to refund any amount already collected. The Court's August 5, 2020, order granted this motion.

Therefore, 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 December 6, 2018, as evidenced by the Court's acceptance of his Declaration of Financial Hardship on January 15, 2019. Therefore, 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).

The Secretary and Appellant agreed that the Secretary would release the Appellant from any obligation to repay \$4,176 and to refund any amount already collected. Therefore, the Secretary's prior 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 79.4 hours. The hourly rate for Ms. Zajac is \$217.86 and the hourly rate for Ms. Blauhut is \$209.70. The total amount claimed is \$17,249.94.

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 \$17,249.94, *jointly to Appellant and Paralyzed Veterans of America.*

Respectfully submitted,

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

EXHIBIT

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Appellant,)	
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v.)	Vet.App. No. <u>18-7067E</u>
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ROBERT L. WILKIE,)	
Secretary of)	
Veterans Affairs,)	
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Appellee.)	
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DECLARATION OF JENNIFER A. ZAJAC, ESQ.

I, Jennifer A. Zajac, make the following declaration in support of Appellant John A. Abrahams' 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 E. Blauhut, Deputy General Counsel, provided 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 August 5, 2020, order, granting the Joint Motion to Terminate the Appeal and Stipulated Agreement:

<u>DATE</u>	<u>TASK</u>	<u>HOURS</u>	<u>JAZ/LEB</u>
2/14/19	Email with Consortium about the case.	0.1	JAZ
2/28/19	Email with Consortium about the case.	0.1	JAZ
3/5/19	Draft and file Atty NOA. File Retainer. Draft and file introductory letter.	1	JAZ
4/12/19	Begin annotating the RBA for dispute purposes.	1.75	JAZ
4/15/19	Finish annotating the RBA for dispute purposes. Email VA counsel about potential dispute issues.	2.5	JAZ
6/7/19	Draft and send status letter to client.	0.5	JAZ
7/16/19	Email with VA that new CD only provided copy of NOD, it didn't address the two issues actually raised by the dispute. VA counsel said he will continue the dispute process then.	0.2	JAZ
7/22/19	Draft and send second status letter to client.	0.5	JAZ
7/29/19	Email with VA about dispute.	0.1	JAZ
8/2/19	Draft and send potential JMR argument to VA.	1	JAZ

8/19/19	Review initial response from VA. Follow up with questions about issue that was referred. Review mail from client.	0.3	JAZ
8/26/19	Email client's Public Defender.	0.1	JAZ
8/29/19	Draft and send letter to client.	0.75	JAZ
9/25/19	Email VA about issue that was referred.	0.1	JAZ
10/2/19	Research overpayment/burdens of proof (2.5). Draft Rule 33 (2.8). Send to L. Blauhut for supervisory review (.1).	5.4	JAZ
10/3/19	Review comments/questions/edits from L. Blauhut (.75). Respond (.25). Research burdens of proof (1.0). Edit draft accordingly (2.5).	4.5	JAZ
10/3/19	Review Rule 33, discuss case with J. Zajac via email.	1.5	LEB
10/7/19	Finalize draft (.75). Put together RBA pages (1.5). Email CLS/VA (.1). Draft and file Certificate of Service (0.5).	2.85	JAZ
10/7/19	Email with VA and CLS about rescheduling Rule 33 due to surgery.	0.2	JAZ
10/22/19	Prepare for and attend Rule 33 conference. Send follow up email re: stay due to waiver. Discuss with L. Blauhut.	0.7	JAZ
10/22/19	Discuss strategy with J. Zajac.	0.25	LEB

11/3/19	Send follow up email re: stay.	0.1	JAZ
11/5/19	Review response from VA re: stay. Draft stay.	1	JAZ
11/5/19	Review stay.	0.25	LEB
12/9/19	Email VA about waiver. Email L. Blauhut.	0.3	JAZ
12/10/19	Email with J. Fischl ¹ about Committee on Waivers and process when there is a claim of non-receipt of a check.	0.5	JAZ
12/11/19	Research M-21 provisions (1.25). Convert Rule 33 memo to Appellant's Brief (1.0). Draft argument regarding M-21 (.75). Revise arguments made in Rule 33 (2.0).	5	JAZ
12/12/19	Continue to work on Appellant's Brief. Send to L. Blauhut for supervisory review.	3	JAZ
12/16/19	Review and discuss brief.	1.25	LEB
12/16/19	Review comments and questions from L. Blauhut (.75). Research tracing issue raised by record (2.0). Research unpaid checks (1.25). Revamp arguments to coincide with information obtained (2.25).	6.25	JAZ

¹ J. Fischl is James Fischl, PVA's Senior Appellate Operations Manager.

12/17/19	Continue to strengthen arguments (2.5). Research “validity of debt” (1.0). Research payments (1.25). Send to L. Blauhut for supervisory review (.1).	4.85	JAZ
12/18/19	Final supervisory review of Appellant’s Brief.	0.4	LEB
12/18/19	Review comments from L. Blauhut and edit accordingly. Send to L. Selfon ² for final review.	1.6	JAZ
12/19/19	Ensure compliance with Court’s rules. Finalize and file.	1.9	JAZ
12/20/19	Draft and send letter with copy of Appellant’s Brief.	0.5	JAZ
4/3/20	Review Secretary’s Brief. Email L. Blauhut ideas for Reply.	0.5	JAZ
4/3/20	Review Secretary’s Brief.	0.25	LEB
4/4/20	Outline ideas for Reply.	0.8	JAZ
4/7/20	Begin to draft Reply. Research case law.	2	JAZ
4/8/20	Continue to draft Reply (2.0). Continue to research case law (1.9). Send to L. Blauhut for supervisory review (0.1).	4	JAZ
4/14/20	Review Reply.	0.75	LEB

² L. Selfon is Leonard Selfon, PVA’s General Counsel.

4/15/20	Review comments from L. Blauhut, edit accordingly (1.1). Review old notes on U.C.C. (.5). Research risk of loss (2.75). Draft argument regarding risk of loss to government (1.25). Edit remaining arguments (1.6). Send to L. Blauhut for second review (.1).	7.3	JAZ
4/16/20	Final supervisory review of Reply.	0.5	LEB
4/16/20	Review comments from L. Blauhut and edit accordingly. Ensure compliance with Court rules. Send to L. Selfon for final review.	2	JAZ
4/17/20	Finalize and file.	2	JAZ
4/20/20	Draft and send letter with copy of Appellant's Reply Brief.	0.5	JAZ
6/1/20	Review order from Court for oral argument. Email L. Selfon and L. Blauhut.	0.25	JAZ
6/1/20	Discuss oral argument order.	0.25	LEB
6/11/20	Review order from Court scheduling oral argument. Email L. Selfon and L. Blauhut.	0.2	JAZ
6/24/20	Review email from VA counsel re: settlement. Respond.	0.4	JAZ
6/25/20	Draft and send letter to client re: settlement offer. Email with VA counsel. Email with L. Blauhut.	1	JAZ
6/25/20	Discuss settlement offer.	0.25	LEB

6/26/20	Email with VA counsel.	0.1	JAZ
7/7/20	Review letter from client accepting offer. Email VA counsel.	0.5	JAZ
7/15/20	Review reply email from VA counsel.	0.1	JAZ
7/23/20	Email VA counsel with info from Court.	0.1	JAZ
7/24/20	Review email from VA counsel re: money already recouped and will be refunded. Respond. Review JMT and stipulated agreement.	0.5	JAZ
7/24/20	Review settlement.	0.25	LEB
7/27/20	Email with VA counsel.	0.1	JAZ
8/6/20	Draft and send letter to client with copy of Joint Motion to Terminate and Stipulated Agreement.	0.5	JAZ
8/29/20	Draft EAJA application.	3	JAZ

Total Hours: 79.4

Total hours for JAZ: 73.5

Total hours for LEB: 5.9

Rate:

Rate for JAZ: \$217.86

Rate for LEB: \$209.70

Total Fees: **\$17,249.94** (see Paragraph 8, below)

Billable fees for JAZ: \$16,012.71

Billable fees for LEB: \$1,237.23

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. Mr. Abrahams filed his appeal with the Court in December 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 \$217.86 in December 2019, the month undersigned counsel drafted 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 December 2019 (272.584), for the rate of \$100, and then applying that ratio for calculating the change for \$125. *See id.* The “**billable fees**” amount was calculated, then, by multiplying the \$217.86 rate by the total number of hours spent working on the appeal (73.5), to equal \$16,012.71.

7. For Ms. Blauhut: The \$125.00 attorney rate, adjusted for inflation for the Washington Region, was \$209.70 in December 2019, the month Ms. Blauhut

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, first, taking the average between the November 2019 rate (\$265.026) and the January 2020 rate (\$266.433), to establish the December 2019 rate (\$265.73). Next, a ratio was created using the CPI-U for the Washington Region between March 1996 and December 2019, for the rate of \$100, and then applying that ratio for calculating the change for \$125. *See id.* The “**billable fees**” amount was calculated, then, by multiplying the \$209.70 rate by the total number of hours spent working on the appeal (5.9), to equal \$1,237.23.

8. The two “**billable fees**” amounts were then added together to come up with the “**total fees**” ($\$16,012.71 + \$1,237.23 = \$17,249.94$).

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