

JORGE DELGADO,)
)
 Appellant,)
)
 v.) Docket No. 19-4051
)
 ROBERT L. WILKIE,)
 Secretary of Veterans Affairs,)
)
 Appellee.)

Appellant hereby seeks an award of reasonable attorney fees and expenses under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), in the total amount of \$7,137.89. In support of this application, Appellant asserts (1) he was a prevailing party, (2) his net worth when he filed this appeal was less than \$2 million, and (3) the Secretary’s position in this case was not substantially justified. An itemized statement detailing the time spent and fees sought is attached.

In order to be granted EAJA fees, an appellant must establish that he is a prevailing party and eligible for the award, and must allege that the government's position was not substantially justified. *Bazalo v. Brown*, 9 Vet.App. 304 (1996). Because Appellant meets these requirements, the Court should grant his application.

“Prevailing party” status is achieved when an appellant’s claim is remanded due to

administrative error. *Zuberi v. Nicholson*, 19 Vet. App. 541, 544 (2006). The Court held in its May 15, 2020, Memorandum Decision that the Board of Veterans' Appeals (Board) had committed administrative error as to all of the claims on appeal: "Because the Board did not provide a statement of reasons or bases sufficient to allow meaningful judicial review, we will set aside its decision and remand this matter for further proceedings." (Memorandum Decision at 2). Judgment was entered on June 8, 2020. Accordingly, Appellant satisfies the first requirement for an EAJA fee award.

Appellant asserts that his net worth was less than \$2 million at the time he filed the appeal in this matter, as evidenced by his declaration of financial hardship.

The government's position in this case was not substantially justified. The Board has long been required to provide the reasons or bases for its decisions. Its failure to do so, as set forth above and detailed more fully in the Memorandum Decision, precludes a finding of substantial justification. Appellant thus satisfies the third criterion for an EAJA fee award.

Based upon the pleadings herein and the above discussion, an award of EAJA fees is appropriate herein. Attached to this application is counsel's affidavit, setting forth the time expended on this case, the hourly rate, and the expenses incurred. The hourly rate is determined by increasing the \$125/hour base rate for increases in the Consumer Price Index for the Washington, D.C. metropolitan area. December 2019, the date of filing Appellant's brief, is the midpoint. Since CPI data is not available for that month, November

2019 is used as the midpoint, yielding an hourly rate of \$209.14¹. *Elczyn v. Brown*, 7 Vet.App. 170, 179-181 (1994). Work in this case was performed by two attorneys - Kathy Lieberman and Ryan McClure. Any work performed by Attorney McClure is so designated with his initials (RM) after the entry. Any items not so designated are attributable to Attorney Lieberman. The total amount sought is \$7,137.89 which includes \$7,110.76 in legal fees and \$27.13 in expenses.

Respectfully submitted,

/s/ Kathy A. Lieberman

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¹ CPI data was obtained from the Bureau of Labor Statistics:
https://www.bls.gov/regions/mid-atlantic/news-release/consumerpriceindex_washingtondc.htm,
which identifies November 2019 as 265.026 and March 1996 (when the EAJA rate was raised to
\$125/hour) as 158.4.

AFFIDAVIT

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:		Hours
6/3/19	review Board decision for possible appeal	0.50
6/4/19	telephone call to client re appeal	0.10
	prepare court appeal paperwork for client	0.20
6/18/19	prepare notices of appeal/appearance	0.20
	telephone call to client re filing appeal	0.10
	review notice of docketing	0.10
	enter appearance (RM)	0.10
6/25/19	letter to client w/copy of agreement	0.30
7/17/19	review transmittal of BVA decision	0.10
8/13/19	review VA's notice of appearance - Mark Gore	0.10
8/16/19	review RBA notice	0.10
8/28/19	Rule 10 RBA review	2.20
	email VA attorney re RBA issue (RM)	0.10
9/4/19	draft, file RBA response (RM)	0.10
9/10/19	review amended RBA (RM)	0.10
9/16/19	review order staying proceedings	0.10
10/1/19	review VA's notice of appearance as co-counsel - Thomas Barnes	0.10
	Review VA's 10/1 response to court order - resolved	0.10
10/2/19	review order lifting stay, notice to file brief	0.10

10/10/19	letter to client w/copy of notice to file brief	0.30
11/1/19	review RBA, pages 1-1527, take notes (RM)	3.00
11/2/19	review RBA, pages 1527-1802, take notes (RM)	0.70
11/5/19	review RBA, pages 1803-4186, take notes (RM)	4.00
	review RBA, pages 4187-6255, take notes (RM)	2.00
11/6/19	legal research (<i>Gabrielson, Johnson, Tucker</i>) (RM)	0.30
	draft SOI (RM)	1.10
11/12/19	serve SOI, draft/file certificate of service (RM)	0.10
	letter to client w/copy of memo	0.30
11/26/19	review notes, prepare for briefing conference (RM)	0.30
	briefing conference (RM)	0.10
	telephone call to client re status, partial JMR offer	0.10
12/16/19	draft brief: facts section (RM)	3.00
	draft brief: Summary of Argument (RM)	0.20
12/18/19	case law research (<i>Robinson, Urban, Snuffer, Davidson, Buchanan, Tedesco</i>) (RM)	1.00
	draft brief: argument I (RM)	1.10
	draft brief: argument II (RM)	0.50
	draft brief: conclusion (RM)	0.10
	review and edit brief (RM)	0.30
12/24/19	edit brief based on partner's feedback (RM)	0.40
	finalize and file brief (RM)	0.20
	letter to client w/copy of brief (RM)	0.30
4/19/20	review Appellee's brief (RM)	0.30
	legal research (<i>Caffrey, Martin, Washington, Stefl</i>) (RM)	0.40
	draft reply brief: argument I (RM)	0.20
	draft reply brief: argument II (RM)	0.20
	draft reply brief: argument III (RM)	3.00

5/3/20	edit reply brief (RM)	0.20
5/4/20	review/finalize reply brief (RM)	0.40
	letter to client w/copy of reply brief	0.30
	review ROP	0.20
	draft, file ROP response (RM)	0.10
5/5/20	review email from CAVC - case assigned to Judge Allen	0.10
5/6/20	telephone call to client re status	0.10
5/15/20	review memdec, compare to brief	0.20
	telephone call to client re update	0.10
	letter to client w/copy of decision	0.30
5/18/20	finalize timesheet (RM)	0.40
6/8/20	review judgment	0.10
	letter to client w/copy of judgment	0.20
8/10/20	review mandate	0.10
	letter to client w/copy of mandate	0.30
9/3/20	prepare EAJA application	1.40
9/4/20	complete EAJA application	1.00
	letter to client w/copy of application	0.20

Total: 34 hours @ \$209.14/hour = \$7,110.76

Expenses:

Copies:	\$13.75 (55 @ \$0.25 each)
Fax/scan:	\$ 3.00 (3 @ \$1 each)
Postage:	\$ 6.50
Long distance:	\$ 3.88

Total: \$27.13

/s/ Kathy A. Lieberman
Kathy A. Lieberman