

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

| | | |
|--------------------------------|---|---------------------|
| FREDERICK L. PAYNE, |) | |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | Vet App No. 17-3439 |
| ROBERT L. WILKIE, |) | |
| Secretary of Veterans Affairs, |) | |
| Appellee. |) | |

**APPELLANT’S AMENDED 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 \$26525.18.

SUMMARY OF PROCEEDINGS

Mr. Payne appealed, through counsel, a September 26, 2017, Board decision that denied entitlement to an initial disability ratings in excess of 50 percent and 40 percent for hand arm vibration syndrome, right and left carpal tunnel syndrome, respectively. The Board also determined that no action was necessary with respect to entitlement to the following disability benefits: 1) a total disability rating based on individual unemployability prior to March 4, 2005; 2) erectile dysfunction as secondary to the service connected disabilities; and 3) special monthly compensation based on the loss of use of a creative organ.

Through counsel, Appellant filed a brief in March 2018 and replied to the Secretary's brief. The Court issued an Order for an oral argument to be held at the University of Miami and also for the parties to file supplemental memoranda of law. Following oral argument, the Court issued a panel decision, reversing the portions of the Board's decision that determined it lacked jurisdiction over the matters of entitlement to SMC (k) and TDIU rating prior to March 5, 2005 and remand those matters for further readjudication. In reversing, the Court held that the Board incorrectly applied the law when it declined jurisdiction to adjudicate Appellant's claims. The Court affirmed the portion of the Board's decision that denied entitlement to increased initial disability ratings for the upper extremity disabilities.

On January 30, 2020, Mr. Payne filed a Notice of Appeal to the Federal Circuit. The Circuit dismissed the pro se veteran's appeal on August 20, 2020, and entered judgment on that date. Mandate was issued on October 13, 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 is timely.

Appellant is a prevailing party for EAJA award on the claims he prevailed. The Court reversed the Board's decision to decline adjudicating Appellant's claims for a TDIU rating and for SMC (k), warranting remand of the claims appealed.

Appellant filed the captioned appeal in his 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 on the claims prevailed 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, in part, was reversed and the claims remanded because the Board did not properly apply the law. 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 on prevailing claims, and 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"); *Philips 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 September 2019, the approximate midpoint, to calculate the increase.

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 \$205.88 per hour. ¹

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, to include airfares, transportation, and hotel accommodations for oral argument held in Miami, totaling \$1716.64

CONCLUSION

¹ See <http://data.bls.gov>: consumer price index for 11/1996 for Washington DC is 161.20 and for 9/2019 is 265.50. Adjusted hourly rate=\$125.00+(\$125.00 multiply by [(265.50 minus 161.2)divided by 161.2]

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 \$26525.18 to Jeany Mark, counsel for Appellant.

Respectfully submitted,

/s/Jeany Mark

Jeany Mark

818 Connecticut Ave, N.W., Suite 502

Washington, D.C. 20006

Tel: 202-393-3020

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 (Exercised billing judgment-did not bill most of lead counsel's time; also only billed for work on prevailing claims)

| <u>Date</u> | <u>Actions</u> | <u>Time (hrs)</u> |
|--------------------|--|--------------------------|
| 09.28.17 | Review BVA decision | 0.5 |
| 09.29.17 | Discuss with client re: Appeal (scans 5) | 0.1 |
| 09.07.17 | Draft letter to client (copies 5, postg \$0.49) | 0.2 |
| 10.02.17 | Prepare notice of appeal and appearance (scan 2) | 0.3 |
| 10.03.17 | Sent consent form to OGC (scan 1) | 0.1 |
| 10.03.17 | Review court's notice | 0.1 |
| 10.04.17 | Communication with court re: filing fee (\$0.49, copies 1) | 0.1 |
| 10.05.17 | Review court's notice | 0.1 |
| 10.12.17 | Review court's notice | 0.1 |
| 10.12.17 | Review BVA decision transmittal to verify accuracy | 0.1 |
| 11.09.17 | Review notice of appearance by OGC counsel | 0.1 |
| 11.14.17 | Review communication from client and attachment sent | 0.5 |
| 11.30.17 | Review court's notice re: RBA notice | 0.1 |
| 11.30.17 | Enter appearance (Ethan Maron-EM) | 0.1 |
| 12.05.17 | Review RBA CD to ensure readability | 0.1 |
| 12.08.17 | Review RBA rule 10 review (large record:16707 pages) | 4.8 |
| 12.19.17 | Draft Rule 10 Response (EM) | 0.1 |
| 01.17.18 | Review court's notice | 0.1 |
| 01.22.18 | Review BVA decision and take notes (R. 1-37) (EM) | 2.1 |
| 01.22.18 | Review RBA and take notes (R 38-1037) (EM) | 2.0 |
| 01.22.18 | Review RBA and take notes (R. 1038-2045) (EM) | 2.1 |
| 01.23.18 | Review RBA and take notes (R. 2046-3050) (EM) | 2.0 |
| 01.23.18 | Review RBA and take notes (R. 3051-4044) (EM) | 1.9 |
| 01.23.18 | Review RBA and take notes (R. 4045-5181) (EM) | 2.2 |
| 01.24.18 | Review RBA and take notes (R. 5182-6283) (EM) | 2.0 |
| 01.24.18 | Review RBA and take notes (R. 6284-7300) (EM) | 2.1 |
| 01.24.18 | Review RBA and take notes (R. 7301-8375) (EM) | 1.9 |
| 01.25.18 | Review RBA and take notes (R. 8376-9399) (EM) | 2.0 |
| 01.25.18 | Review RBA and take notes (R. 9400-10396) (EM) | 2.0 |
| 01.25.18 | Review RBA and take notes (R. 10397-11500) (EM) | 1.9 |
| 01.26.18 | Review RBA and take notes (R. 11501-12600) (EM) | 2.1 |
| 01.26.18 | Review RBA and take notes (R. 12601-13699) (EM) | 2.0 |
| 01.26.18 | Review RBA and take notes (R. 13700-14689) (EM) | 2.0 |
| 01.29.18 | Review RBA and take notes (R. 14690-15690) (EM) | 2.1 |
| 01.29.18 | Review RBA and take notes (R. 15691-16707) (EM) | 2.0 |
| 01.29.18 | Legal research: scope of claim (EM) | 1.5 |

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| 01.30.18 | Draft pre-briefing memorandum (Part II) (EM) | 0.6 |
| 01.30.18 | Review and finalize memo | 0.2 |
| 01.31.18 | Draft certificate of service (EM) | 0.1 |
| 02.14.18 | Review notes/memo/RBA for briefing conference (EM) | 0.5 |
| 02.14.18 | Briefing conference (EM) | 0.3 |
| 02.14.18 | Emailed status update to client (EM) | 0.1 |
| 02.14.18 | Review court's notice | 0.1 |
| 03.14.18 | Draft principal brief (part I) (EM) | 1.6 |
| 03.15.18 | Draft principal brief (statement/facts/summary of case) (EM) | 3.5 |
| 03.16.18 | Review and edit brief | 1.4 |
| 03.16.18 | Finalize/edit principal brief (EM) | 1.0 |
| 03.16.18 | Review court's notice | 0.1 |
| 05.15.18 | Review court's notice | 0.1 |
| 05.25.18 | Review/take notes on Secretary's brief (EM) | 2.6 |
| 05.25.18 | Legal research: Bifurcation of TDIU claims (EM) | 2.9 |
| 05.25.18 | Legal research: CUE and reopening (EM) | 0.5 |
| 05.25.18 | Legal research: SMC(k) and scope of claim (EM) | 3.5 |
| 05.28.18 | Draft reply brief: Part I (EM) | 3.0 |
| 05.28.18 | Draft reply brief: Part II (EM) | 1.2 |
| 05.28.18 | Review and edit reply | 0.9 |
| 05.29.18 | Review court's notice | 0.1 |
| 06.08.18 | Review court's notice | 0.1 |
| 06.08.18 | Review ROP | 0.7 |
| 06.14.18 | Draft response to ROP (EM) | 0.1 |
| 06.29.18 | Review court's notice | 0.1 |
| 08.06.18 | Review court's notice | 0.1 |
| 08.14.18 | Review court's notice | 0.1 |
| 08.14.18 | Review Jt Motion for ext to file Supplemental memo | 0.1 |
| 08.16.18 | Review court's notice | 0.1 |
| 08.23.18 | Review court's notice | 0.1 |
| 09.24.18 | Legal research: standard of review for jurisdiction (EM) | 3.5 |
| 09.24.18 | Legal research: arguments in first instance (EM) | 2.4 |
| 09.24.18 | Legal research: statutory interpretation and SMC(k) (EM) | 3.0 |
| 09.24.18 | Legal research: M21 and scope of claim (EM) | 1.0 |
| 09.24.18 | Additonal Legal Research on Board's jurisdiction | 0.8 |
| 09.25.18 | Draft response to Court's 08.14.2018 order (Part 1) (EM) | 1.5 |
| 09.26.18 | Draft response to Court's 08.14.2018 order (Part 2a) (EM) | 1.6 |
| 09.26.18 | Draft response to Court's 08.14.2018 order (Part 2b) (EM) | 1.4 |
| 09.27.18 | Draft response to Court's 08.14.2018 order (Part 2c) (EM) | 0.5 |
| 09.27.18 | Draft response to Court's 08.14.2018 order (Part 3) (EM) | 0.6 |
| 09.27.18 | Draft response to Court's 08.14.2018 order (Part 4) (EM) | 1.4 |
| 09.27.18 | Review and finalize response | 1.2 |
| 09.27.18 | Review court's notice-Secretary's response to memorandum | 0.2 |

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| 11.27.18 | Review court's notice | 0.1 |
| 12.14.18 | Review Harper v. Wilkie, take notes (EM) | 0.8 |
| 12.14.18 | Draft notice of supplemental authority (EM) | 0.5 |
| 12.14.18 | Review court's notice | 0.1 |
| 12.20.18 | Review court's notice | 0.1 |
| 01.04.18 | Prepare for oral argument: Review BVA decision, briefs, other filings; take notes (EM) | 4.5 |
| 01.04.19 | Prepare for oral argument: outline talking points (EM) | 2.5 |
| 01.09.19 | Prepare for oral argument: revise outline, practice deliver (EM) | 2.0 |
| 01.17.19 | Moot court preparation and review briefs and memos | 1.8 |
| 01.17.19 | Moot Court/feedback session (EM) | 1.5 |
| 01.18.19 | Revise oral argument notes in response to feedback (EM) | 2.0 |
| 01.23.19 | Review RBA for oral argument | 2.8 |
| 01.24.19 | Prepare for oral argument: Review outline, notes, practice delivery (EM) | 3.0 |
| 01.25.19 | Pre-oral argument meeting with clerk (EM) | 0.8 |
| 01.25.19 | Oral argument (EM) | 1.3 |
| 01.27.19 | Return flight from Miami to DC (EM) | 2.8 |
| 03.13.19 | Review court's notice | 0.1 |
| 08.09.19 | Review Court's memorandum decision (EM) | 0.5 |
| 08.09.19 | Analysis to determine appeal to Circuit | 0.5 |
| 08.26.19 | Communication with client re: status | 0.3 |
| 08.27.19 | Communication with client re: status | 0.1 |
| 08.26.20 | Communication with client re: appearance (scan 2) | 0.1 |
| 09.11.20 | Prepare notice of appearance | 0.1 |
| 09.11.20 | Communication with client re: court representation | 0.1 |
| 10.13.20 | Review court's notice | 0.1 |
| 11.10.20 | Scrub timesheets for billing judgment and prepare EAJA | 3.6 |

Total: 120.50 hours @ \$205.88/hour = \$ 24808.54

Expenses:

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|--------------------------------|----|---------|
| Filing Fees | \$ | 50.00 |
| Postage | | 0.98 |
| Scan | | 3.00 |
| Copies | | 2.50 |
| Airfares (2): | | 622.81 |
| Hotel (2 rooms, 2 nights each) | | 972.35 |
| Ground transportation | | 65.00 |
| | | |
| Total Expenses | \$ | 1716.64 |

/s/ Jeany Mark

Jeany Mark