

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

JAMES R. WELCOME,)	
)	
Appellant,)	
)	
v.)	Vet.App. No. <u>18-4601E</u>
)	
DENNIS MCDONOUGH,)	
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 James R. Welcome, 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 \$24,520.47. This submission is timely, as it is within 30 days after the issuance of the Court’s January 22, 2021, mandate.

1. The Appellant is a prevailing party. 28 U.S.C.A. § 2412(d)(1)(B). On August 2, 2018, the Board of Veterans’ Appeals (Board) denied benefits under the Veterans Retraining Assistance Program (VRAP), finding that authority to make payments under the VRAP ended on March 31, 2014. In its October 29, 2020, decision, the Court held that Veterans Retraining Assistance Program assistance

“was expressly tied to the veteran’s program of education, and his payment should have corresponded to the full extent of his eligibility,” not just the end of his semester. 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 August 10, 2018, as evidenced by the Court’s acceptance of his Declaration of Financial Hardship the same day. 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 Board held that Appellant was not entitled to the full 12 months of VRAP benefits, as the VOW to Hire Heroes Act had expired before Appellant had taken courses for a year. The Court rejected the Board’s analysis, holding that the amount of benefits to be paid was “tied to the program of education.”

The Federal Circuit has made clear that “EAJA requires that the record must

supply the evidence of the Government's substantial justification." *White v. Nicholson*, 412 F.3d 1314, 1316 (Fed. Cir. 2004). Moreover, the "totality of the circumstances" should be considered.

Here, the Secretary's position during proceedings before the Agency and in Court was not reasonable, either in law or in fact, and accordingly, the Secretary's prior position was not substantially justified. *See Groves v. Shinseki*, 23 Vet.App. 90, 93 (2009) (explaining Appellant need only allege that 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 113.7 hours. The hourly rate for Ms. Zajac is \$216.80 and the hourly rate for Ms. Blauhut is \$209.39. The total amount claimed is \$24,520.47.

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 \$24,520.47, ***jointly to Appellant and Paralyzed Veterans of America.***

Respectfully submitted,

February 12, 2021
Date

/s/ Jennifer A. Zajac
JENNIFER A. ZAJAC
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EXHIBIT

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DENIS MCDONOUGH,)	
Secretary of)	
Veterans Affairs,)	
)	
Appellee.)	
_____)	

DECLARATION OF JENNIFER A. ZAJAC, ESQ.

I, Jennifer A. Zajac, make the following declaration in support of Appellant James R. Welcome'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 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 October 29, 2020, decision:

<u>DATE</u>	<u>TASK</u>	<u>HOURS</u>	<u>JAZ/LEB</u>
1/29/19	Review file from Consortium. Draft and file atty NOA. File Retainer. Draft and send intro letter.	1	JAZ
4/19/19	Annotate new RBA for VRAP claim. Email VA that dispute is resolved.	1	JAZ
4/24/19	File atty NOA.	0.25	LEB
5/14/19	Begin to draft Rule 33.	1	JAZ
5/15/19	Finish drafting Rule 33 and send to L. Blauhut for supervisory review.	3	JAZ
5/15/19	Review Rule 33	0.75	LEB
5/16/19	Review comments from L. Blauhut and edit accordingly.	0.75	JAZ
5/20/19	Finalize and email Rule 33 to VA/CLS. Draft and file certificate of service.	1	JAZ
6/5/19	Prepare for and attend Rule 33 conference. Discuss with L. Blauhut.	0.5	JAZ
6/5/19	Discuss conference with J. Zajac	0.25	LEB
6/10/19	Draft and send letter to client re: offer for JMR. Draft stay to give client time to review JMR offer. Send to L. Blauhut for supervisory review. Review comments. Finalize and file.	1.75	JAZ
6/10/19	Review stay.	0.4	LEB
6/18/19	Receive and review response from client, rejecting JMR.	0.1	JAZ

6/19/19	Review email from VA and inform VA that client rejecting offer for JMR.	0.1	JAZ
7/17/19	Begin to draft brief (1.5). Research <i>Overton Park</i> (2.5).	4	JAZ
7/18/19	Research APA/informal adjudication (3.0). Continue to draft brief (2.5).	5.5	JAZ
7/19/19	Research CAVC cases on arbitrary (1.25). Continue to draft brief (3.0).	4.25	JAZ
7/22/19	Email L. Blauhut. Review comments/concerns/answer questions.	0.75	JAZ
7/22/19	Review draft and edit.	1.5	LEB
7/24/19	Revise draft to work under the framework of “absurd” result/ alternative interpretation (3.0). Research relevant case law related to this new framework (3.0).	6	JAZ
7/26/19	Edit draft (1.5). Continue to research relevant case law (2.0).	3.5	JAZ
7/29/19	Edit draft and research relevant standards. Send to L. Blauhut for supervisory review.	2	JAZ
7/29/19	Review revised draft and edit.	1	LEB
7/30/19	Edit. Send to L. Selfon ¹ for final review.	1	JAZ
8/2/19	Create TOC, TOA, Record Citation table. Ensure compliance with Court's rules. Finalize and file.	1	JAZ
11/11/19	Review Secretary’s Brief.	0.2	JAZ

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

11/13/19	Review Secretary's Brief (0.5). Draft outline for Reply (0.5). Research relevant issues for Reply (3.0). Draft rough Reply (2.0).	6	JAZ
11/14/19	Edit rough draft. Send to L. Blauhut for supervisory review.	1	JAZ
11/14/19	Review Reply and edit.	0.5	LEB
11/19/19	Review comments from L. Blauhut and edit accordingly.	3	JAZ
11/22/19	Finalize Reply Brief (2.0). Create TOC/TOA/Record Citation Table (.75). Ensure compliance with Court's Rules (.25). Send to L. Selfon for final review (.1). Make necessary edits and file (.2).	3.3	JAZ
12/9/19	Draft and send letter with copies of briefs.	0.3	JAZ
4/20/20	Draft and send email with update that oral argument has been scheduled.	0.2	JAZ
6/15/20	Draft and file motion to reschedule time of argument. Review VA's website for relevant information.	1.3	JAZ
6/18/20	Prepare for oral argument: review cases cited in Briefs (1.25); research other issues which might come up during argument (3.0).	4.25	JAZ
6/22/20	Review <i>Bostock</i> decision (.75). Research issues relevant to that decision and applicability to current case (2.2).	2.95	JAZ
6/25/20	Prepare for oral argument: review canons of interpretation and other statutory interpretation issues.	3	JAZ

6/29/20	Confer with colleagues on new oral argument procedures (0.7). Research <i>Solze</i> ; draft notice and send to L. Blauhut for supervisory review (1.0). Prepare for oral argument: practice arguments, work on outline (2.0).	3.7	JAZ
6/29/20	Review <i>Solze</i> notice. Set up moots.	0.75	LEB
6/30/20	Finalize and file <i>Solze</i> notice (0.6). Prepare for oral argument: listen to prior arguments (2.0).	0	JAZ
7/1/20	Phone call with VA counsel re: <i>Solze</i> notice. Phone call with L. Blauhut. Prepare for oral argument: listen to prior argument.	1.5	JAZ
7/1/20	Review VA response/opposition, discuss with J. Zajac.	.75	LEB
7/2/20	Prepare for oral argument: practice arguments, work on outline.	2	JAZ
7/6/20	Prepare for oral argument: practice arguments (1.25), review case law (2.0), review briefs (1.0).	4.25	JAZ
7/7/20	Prepare for moot. Moot with PVA's Deputy General Counsel, Appellate Services, and Government Relations. Discuss case afterward.	3	JAZ
7/7/20	Moot J. Zajac.	1.5	LEB
7/8/20	Prepare for oral argument: address issues that came up in moot.	3	JAZ

7/9/20	Phone call with Court (.2). Prepare for moot (1.0). Moot with outside attorneys, D. Myers ² , L. Selfon, L. Blauhut (1.0). Discuss case afterward (.5). Research issues that came up (1.2).	3.9	JAZ
7/9/20	Moot J. Zajac with outside attorneys, D. Myers, L. Selfon.	1.0	LEB
7/10/20	Prepare for oral argument: phone call with L. Blauhut to discuss additional research issues (1.0). Research Board decisions discussing VRAP (1.0). Research overpayment (.75). Research APA issues (1.0). Research other possible programs (1.0).	4.75	JAZ
7/10/20	Phone call with J. Zajac.	1.0	LEB
7/13/20	Prepare for oral argument: practice delivery (2.0). Discuss case with colleagues (1.0). Research sunset provisions (1.0). Finalize outline (.6).	4.6	JAZ
7/14/20	Setup for oral argument. Participate in oral argument. Discuss afterward with L. Blauhut. Confer with colleagues on whether additional action should be taken.	2.9	JAZ
7/14/20	Prep, assist, and attend argument.	2.0	LEB
10/29/20	Review decision. Discuss with colleagues.	0.5	JAZ
11/2/20	Email client.	0.2	JAZ
11/4/20	Leave VM for client.	0.1	JAZ

² D. Myers is David Myers. Mr. Myers works in PVA's Appellate Services, but was not able to participate in the earlier moot.

11/5/20	Phone call with client to discuss decision and answer questions.	0.2	JAZ
11/10/20	Draft and send letter to client memorializing phone call and explaining next steps.	1	JAZ
11/15/20	Review email from client. Respond.	0.3	JAZ
11/20/20	Email Appeals and NSO.	0.25	JAZ
12/2/20	Review emails from Appeals and NSO.	0.1	JAZ
1/25/21	Email Appeals and NSO.	0.1	JAZ
2/9/21	Begin to draft EAJA.	2	JAZ

Total Hours Billed: 113.7

Total hours for JAZ: 102.05

Total hours for LEB: 11.65

Rate:

Rate for JAZ: \$216.80

Rate for LEB: \$209.39

Total Billable Fees: \$24,520.47 (see Paragraph 8, below)

Billable fees for JAZ: \$22,081.08

Billable fees for LEB: \$2,439.39

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. Welcome filed his appeal

with the Court in August 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 \$216.80 in August 2019, the month undersigned counsel filed Appellant's Brief. *See* Bureau of Labor Statistics Data, CPI-U, at <http://www.bls.gov/cpi/home.htm> (last visited February 9, 2021); *Elczyn v. Brown*, 7 Vet.App. 170, 181 (1994) (suggesting the date Appellant's Brief is filed as an appropriate "mid-point"). This rate was calculated by creating a ratio using the CPI-U for the West Region between March 1996 (\$156.4) and August 2019 (\$271.264), 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 \$rate by the total number of hours Ms. Zajac spent working on the appeal (101.85), to equal \$22,081.08.

7. For Ms. Blauhut: The \$125.00 attorney rate, adjusted for inflation for the Washington Region, was \$209.39 in August 2019, the month co-counsel filed Appellant's Brief. *See* Bureau of Labor Statistics Data, CPI-U, at <http://www.bls.gov/cpi/home.htm> (last visited February 9, 2021); *see Elczyn*, 7 Vet.App. at 181. This rate was calculated, first, by taking the average of the CPI-U for the

Washington Region for July 2019 (\$265.170) and September 2019 (\$265.5) to establish a rate for August 2019 (\$265.335). Next, a ratio was created using the CPI-U for the Washington Region between March 1996 (\$158.4) and August 2019 (\$265.335), 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 \$209.39 rate by the total number of hours spent working on the appeal (11.65), to equal \$2,439.39.

8. The two “**billable fees**” amounts were then added together to obtain the “**total billable fees**” amount of \$ $(\$22,081.08 + \$2,439.39 = \$24,520.47)$.

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 12th day of February, 2021.

Respectfully submitted,

/s/ Jennifer A. Zajac

Jennifer A. Zajac
Counsel for Appellant