

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

JOHN I. RUTCHICK,)	
)	
Appellant,)	
)	
v.)	Vet.App. No. <u>19-3155E</u>
)	
DENIS 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 John I. Rutchick, 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 \$15,708.45. This submission is timely, as it is within 30 days after the 60-day period following the issuance of the Court's December 17, 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 7, 2019, the Board of Veterans' Appeals (Board) denied Appellant's claim for compensation under 38 U.S.C. § 1151. The May 13, 2020, Memorandum

Decision vacated that part of the Board decision which denied entitlement to benefits pursuant to 38 U.S.C. § 1151(a)(1)(B), 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 May 13, 2019, as evidenced by Appellant's Declaration. *See Exhibit 1*. 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 Court agreed, that the Board did not provide adequate reasons or bases for its determinations. 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 2.

Exhibit 2 itemizes services rendered in this litigation, the time expended, and the rate at which fees were computed. The time expended for all billable services is 72.55 hours. The hourly rate for Ms. Zajac is \$218.29. The hourly rate for Ms. Blauhut is \$209.14. The total amount claimed is \$15,708.45.

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 \$15,708.45, *jointly to Appellant and Paralyzed Veterans of America.*

Respectfully submitted,

/s/ Jennifer A. Zajac
JENNIFER A. ZAJAC
Attorney for Appellant
Paralyzed Veterans of America
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Oceanside, CA 92056
760-639-0765
jenniferz@pva.org

March 17, 2021

Date

EXHIBIT 1

ATTACHMENT D

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHN I. RUTCHICK,

Appellant,

v.

ROBERT L. WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Appellee.

Vet.App. No.

DECLARATION OF NET WORTH

I, JOHN I. RUTCHICK, declare that on the date this document was executed and the time my appeal to the United States Court of Appeals for Veterans Claims was filed, my estate, including all properties, monies, and possessions, did not exceed \$2,000,000 (TWO MILLION DOLLARS).

I certify under penalty of perjury that the foregoing is true and correct.

Signed: _____

Executed on: _____

(Date)

EXHIBIT 2

JOHN I. RUTCHICK,

Appellant,

v.

DENIS MCDONOUGH,
Secretary of
Veterans Affairs,

Appellee.

DENIS MCDONOUGH,
Secretary of
Veterans Affairs,

Appellee.

I, Jennifer A. Zajac, make the following declaration in support of Appellant John I. Rutchick'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 13, 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>
4/1/19	Review information from J. Fischl ¹ for representation.	0.4	LEB
4/1/19	Review information from L. Blauhut and J. Fischl requesting me to take the case.	1	JAZ
4/3/19	Review medical opinion. Let L. Blauhut and J. Fischl know that we can proceed.	0.25	JAZ
5/13/19	Draft atty NOA. File NOA, atty NOA, and retainer. Draft initial email to client.	0.75	JAZ
5/20/19	Draft and send letter, with copies of filed paperwork.	0.5	JAZ
7/15/19	Begin to annotate RBA for dispute purposes.	3	JAZ
7/16/19	Continue to annotate RBA for dispute purposes (3.0). Begin research of causation (2.5).	5.5	JAZ
8/9/19	Begin to draft Rule 33 Memo.	1.5	JAZ
8/19/19	Review email from CLS and VA re: rescheduling Rule 33 conference. Respond.	0.2	JAZ
8/21/19	Continue to draft Rule 33.	1	JAZ
8/22/19	Continue to draft Rule 33 (3.0). Research § 1151 (2.0). Re-read Board decision and medical opinions (1.0).	6	JAZ

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

8/26/19	Continue to draft Rule 33 - focus on medical opinions.	3	JAZ
8/27/19	Continue to draft Rule 33 - focus on causation.	3	JAZ
8/28/19	Finish draft and send to L. Blauhut for supervisory review.	2.75	JAZ
8/28/19	Initial quick review of Rule 33.	0.25	LEB
9/18/19	Review draft Rule 33.	0.5	LEB
9/19/19	Discuss procedural issue with J. Zajac.	0.25	LEB
9/19/19	Discuss procedural issue with L. Blauhut. Edit to reduce to 10 pages.	2.25	JAZ
9/20/19	Review comments from L. Blauhut (.25). Edit accordingly (2.5). Review file and respond to specific questions re: NME finding (1.0). Further research file to respond to LEB's reply (.75). Respond to email (.2).	4.7	JAZ
9/23/19	Send to L. Blauhut for final supervisory review. Respond to questions. Clarify private medical opinion and other medical information. Edit to stay within 10 pages.	3	JAZ
10/9/19	Prepare for and attend Rule 33 conference. Email L. Blauhut.	0.6	JAZ
10/9/19	Discuss Rule 33 conferences with J. Zajac.	0.25	LEB
10/15/19	Spoke to client re: JMR offer. Reject.	0.6	JAZ

10/21/19	Begin to draft Appellant's Brief (2.0). Research Federal Circuit cases on causation, VA General Counsel opinion (2.25). Research "but for" and other standards for establishing causation (2.0).	6.25	JAZ
10/25/19	Edit and send to L. Blauhut for supervisory review.	0.5	JAZ
10/25/19	Begin Brief review.	0.5	LEB
11/1/19	Continue to review Brief. Spoke with J. Zajac.	1.5	LEB
11/1/19	Spoke with L. Blauhut about order of arguments and additional arguments needed.	0.5	JAZ
11/3/19	Worked on additional arguments needed. Researched <i>Daubert</i> and other relevant cases.	3	JAZ
11/5/19	Continued to research relevant cases (1.5). Continued to work on additional arguments (1.75). Edit draft (1.0). Send to L. Blauhut for supervisory review (0.1).	4.35	JAZ
11/5/19	Review second draft.	1.0	LEB
11/6/19	Review comments/edits from L. Blauhut (1.75). Edit to bring within 30-page limit (2.0).	3.75	JAZ
11/7/19	Continue to edit to bring within 30-page limit (2.0). Review RBA to verify facts (.75). Research additional caselaw (1.0). Send to L. Selfon ² for final review (0.1).	3.85	JAZ

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

11/8/19	Finalize and file.	0.5	JAZ
2/24/20	Review Secretary's Brief.	0.5	JAZ
4/20/20	Draft and send status letter.	0.5	JAZ
5/1/20	Review email from client and respond.	0.2	JAZ
5/13/20	Review Court's decision. Discuss with L. Blauhut. Begin to consider whether Motion for Recon or Motion for Panel is appropriate. <i>[Deduct 0.5 for billing discretion]</i>	1	JAZ
5/13/20	Review decision.	0.5	LEB
5/20/20	Re-read decision (0.2). Email client about motions (0.3). Begin to draft motions (2.75). <i>[Deduct 3.25 for billing discretion]</i>	3.25	JAZ
5/28/20	Continue to draft motions/ambiguities. Send to LEB for supervisory review. <i>[Deduct 2.0 for billing discretion]</i>	2	JAZ
5/28/20	Discuss/review motions. <i>[Deduct 0.5 for billing discretion]</i>	0.5	LEB
5/30/20	Continue to draft motions. <i>[Deduct 2.0 for billing discretion]</i>	2	JAZ
6/1/20	Review, edit motions. <i>[Deduct 1.5 for billing discretion]</i>	1.5	LEB

6/1/20	Review email from client and respond. Edit motions in accordance with L. Blauhut's comments/edits. Send to L. Selfon for final review. <i>[Deduct 2.4 for billing discretion]</i>	2.4	JAZ
6/2/20	Finalize and file. Draft and send letter with copy of motion. <i>[Deduct 1.0 for billing discretion]</i>	1	JAZ
8/11/20	Status update. <i>[Deduct 0.2 for billing discretion]</i>	0.2	JAZ
11/25/20	Review Court's decision on motion for recon/panel. Email with L. Blauhut. <i>[Deduct 0.25 for billing discretion]</i>	0.25	JAZ
11/25/20	Review decision. Email with J. Zajac. <i>[Deduct 0.5 for billing discretion]</i>	0.5	LEB
12/23/20	Send client status email. Review response and respond.	0.5	JAZ
2/9/21	Review email from client and respond.	0.2	JAZ
2/22/21	Review email from client and respond.	0.5	JAZ
3/11/21	Review email from client and respond.	0.1	JAZ
3/12/21	Draft EAJA.	3	JAZ

Total Hours:

JAZ: 79.65

LEB: 7.4

Deductions for billing discretion:

JAZ: -12.0

LEB: -2.5

Billable hours:

JAZ: 67.65

LEB: 4.9

Rate:

JAZ: \$218.29

LEB: \$209.14

Total Billable fees: \$15,708.45

JAZ: \$14,767.32

LEB: \$941.13

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 May 2019. 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 \$218.29 in November 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 March 16, 2021). This rate was calculated by creating a ratio using the CPI-U for the West Region between March 1996 (\$156.4) and November 2019 (\$273.128), 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 \$218.29 rate by the total number of billable hours spent working on the appeal (67.65), to equal \$14,767.32.

7. For Ms. Blauhut: The \$125.00 attorney rate, adjusted for inflation for the Washington Region, was \$209.14 in November 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 March 16, 2021). This rate was calculated by creating a ratio using the CPI-U for the Washington Region between March 1996 (\$158.4) and November 2019 (\$265.026), 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 \$209.14 rate by the total number of billable hours spent working on the appeal (4.5), to equal

\$941.13.

8. The “**total fees**” amount was then calculated by adding together the “**billable fees**” for Ms. Zajac and the “**billable fees**” for Ms. Blauhut (\$14,767.32 + \$941.13 = \$15,708.45).

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 17th day of March, 2021.

Respectfully submitted,

/s/ Jennifer A. Zajac
Jennifer A. Zajac
Counsel for Appellant