

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

DONALD A. DALLMAN,)	
Appellant,)	
)	
v.)	
)	Vet App No. 18-4075
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
Appellee.)	

**APPELLANT’S 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 \$8876.75.

SUMMARY OF PROCEEDINGS

Mr. Dallman appealed, through counsel, that portion of the April 4, 2018, Board of Veterans’ Appeals decision that denied an increased disability rating in excess of 30 percent for a right knee disability; and denied both an earlier effective date and an initial rating in excess of 10 percent for radiation proctitis with fecal urgency. In addition, the Board found that a December 1999 rating decision denying service connection for right thigh hematoma residuals was final. Thereafter, Appellant filed a brief in March 2019 and replied to Appellee’s brief.

The Court issued a memorandum decision in December 2019, vacating the Board decision regarding the disability claims appealed because the Board erred when it failed to consider all theories of entitlement to VA disability benefits raised, did not adequately apply 38 C.F.R. §3.400(o)(2), and failed to adequately explain how it met VA's duty to assist. The Court found that it lacked jurisdiction over the right thigh hematoma residuals claim because a final decision has not been issued with respect to that claim. Appellant sought reconsideration of the Court's memorandum decision and in the alternative by panel. After oral argument by the parties, the Court issued its panel decision, affirming the decision of the Court's December 2019 memorandum decision. Judgment was issued December 23, 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 filed within the thirty day time period, hence it is timely.

Appellant is a prevailing party for EAJA award to the extent the panel decision found that the Board erred when it denied Appellant's claims for an increased disability rating in excess of 30 percent for a right knee disability; and for an earlier effective date and an initial rating in excess of 10 percent for radiation proctitis with fecal urgency. Appellant did not bill for time expended for all legal work subsequent conducted when he sought reconsideration of the December 2019 memorandum decision that the Court lacks jurisdiction over the right thigh hematoma residuals claim.

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 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 Court set aside Board’s decision on the Appellant’s claims appealed, except for the jurisdiction matter, due to errors committed. 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, 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 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. Appellant chooses March 2019, the filing date of his brief.

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 \$204.92 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, in the total amount of \$3.71.

CONCLUSION

¹ See <http://data.bls.gov>: consumer price index for 11/1996 for Washington DC is 161.20 and for 03/2019 is 264.26. Adjusted hourly rate=\$125.00+(\$125.00 multiply by [(264.26 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 \$8876.75 to Jeany Mark, counsel for Appellant.

Respectfully submitted,

/s/Jeany Mark

Jeany Mark

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Appellant's Counsel

AFFIDAVITAppendix 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 (billing judgment; on prevailing claims; no appeal of memdec)

<u>Date</u>	<u>Actions</u>	<u>Time (hrs)</u>
04.18.18	Review decision for appeal	0.6
04.19.18	Communicate with client re: BVA decision	0.2
07.23.18	Communication with client re: appeal	0.2
08.02.18	Prepare notice of appeal and appearance	0.2
08.02.18	Review court's notice	0.1
08.02.18	Comm with client-appeal	0.1
08.10.18	Comm with OGC re: consent form	0.1
08.23.18	Review court's notice	0.1
08.23.18	Comm with client re: appeal documents	0.1
08.23.18	Review court's notice-stay lifts	0.1
09.05.18	Review court notice	0.1
09.19.18	Review notice of appearance by OGC atty: Rudy S.	0.1
10.01.18	Review notice of appearance by OGC atty: M.Kral	0.1
10.01.18	Enter appearance (Ethan Maron-EM)	0.1
10.04.18	Review court notice	0.1
10.09.18	Review RBA CD to ensure readability	0.1
10.16.18	Reviewed RBA rule 10 review (4638 pgs; 54 documents)	3.0
10.16.18	Communication with OGC atty re: RBA record	0.1
10.23.18	Draft Rule 10 response (EM)	0.1
10.23.18	Review court's notice	0.1
11.15.18	Review court's notice	0.1
11.28.18	Review Board decision and take notes (R. 1-31) (EM)	2.0
11.28.18	Review RBA and take notes (R. 32-1138)(EM)	2.2
11.29.18	Review RBA and take notes (R. 1139-2140)(EM)	2.0
11.29.18	Review RBA and take notes (R. 2141-3130)(EM)	2.0
11.30.18	Review RBA and take notes (R. 3131-4153)(EM)	2.1
11.30.18	Review RBA and take notes (R. 4154-4638) (EM)	1.0
12.03.18	Legal research: Board definitions of undefined terms (EM)	0.5
12.03.18	Draft pre-briefing memorandum (Part II) (EM)	0.6
12.03.18	Draft pre-briefing memorandum (Part III) (EM)	0.2
12.03.18	Draft pre-briefing memorandum (Part IV) (EM)	1.0
12.06.18	Draft certificate of service (EM)	0.1
12.06.18	Review court's notice	0.1

12.20.18	Review notes/memo/RBA for briefing conference (EM)	0.5
12.20.18	Briefing conference (EM)	0.4
12.20.18	Review court's notice	0.1
01.10.19	Communication with client re: status	0.5
03.04.19	Draft brief (Part I) (EM)	0.5
03.04.19	Draft brief (Part II) (EM)	1.0
03.04.19	Draft brief (Part III) (EM)	1.2
03.04.19	Draft brief (statement of facts/summary of case) (EM)	3.1
03.07.19	Edit brief (EM)	0.5
03.07.19	Review and finalize brief	1.2
03.07.19	Review court's order	0.1
04.30.19	Review Secretary's motion	0.1
05.01.19	Review court's notice	0.1
06.19.19	Review notice of appearance by OGC atty: Ed Cassidy	0.1
06.19.19	Review court's notice	0.1
07.29.19	Review Secretary's brief and take notes (EM)	2.1
07.29.19	Legal research: retro opinions post knee replacement (EM)	2.5
07.29.19	Legal research: Multiple ratings for single disability (EM)	0.8
07.31.19	Draft reply brief: Part I (EM)	2.0
07.31.19	Draft reply brief: Part II (EM)	1.5
08.05.19	Review and finalize reply brief	0.6
08.05.19	Review court's notice	0.1
08.07.19	Review court's notice	0.1
08.07.19	Review ROP	0.3
08.09.19	Review Amended ROP	0.2
08.09.19	Prepare ROP response	0.1
08.13.19	Review court's notice	0.1
10.22.19	Review court's notice	0.1
12.13.19	Review mem dec	0.4
01.02.20	Communication with client re: status (pstg \$0.71, copies 12)	0.2
12.18.20	Communication with client re: status	0.1
12.23.20	Review court's notice	0.1
02.23.21	Review court's notice	0.1
03.20.21	Finalize EAJA timesheet (EM)	1.0
03.23.21	Scrub timesheet for billing judgment and prepare EAJA	1.8

Total: 43.3 hrs@ \$204.92/hr = \$8873.04

Expenses:

Postage	0.71
Copies	3.00
Total Expenses	\$ 3.71

/s/ Jeany Mark
Jeany Mark