

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

PAT A. HATFIELD,
Appellant,

v.

DENIS MCDONOUGH
Secretary of Veterans Affairs,
Appellee.

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Docket No. 19-7165

**APPELLANT’S APPLICATION FOR AWARD OF
ATTORNEY FEES AND EXPENSES**

Appellant, Pat Hatfield, hereby applies to this honorable Court for an award of her attorney’s fees and expenses in the amount of **\$9,991.07**. This application is made pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), and this Court’s Rule 39.

I. Procedural History.

On October 10, 2019, the Board of Veterans’ Appeals entered a decision that denied entitlement to compensation benefits dependency and indemnity compensation under 38 U.S.C. § 1151 for the cause of the veteran’s death as a result of medical treatment provided by the VA. Hatfield, through her lawyer (whose fees this application is concerned), appealed the Board’s decision and filed a timely notice of appeal to this Court the same day. The lawyer also entered his appearance at the same time.

This case was fully litigated and resolved by a panel decision following oral argument that was held on January 7, 2021. This Court’s decision reversing the Board’s decision and awarding entitlement to the benefits sought was entered on March 8, 2021

and the Court's judgment was entered on March 30, 2021. Therefore, this application is early under 28 U.S.C. § 2412(d)(1)(B).

II. Averments.

Hatfield avers—

1. This matter is a civil action;
2. This action is against an agency of the United States, namely the Department of Veterans Affairs;
3. This matter is not in the nature of tort;
4. This matter sought judicial review of an agency action, namely the prior disposition of Hatfield's appeal to the Board of Veterans' Appeals;
5. This Court has jurisdiction over the underlying appeal under 38 U.S.C. § 7252;
6. Hatfield is a "party" to this action within the meaning of 28 U.S.C. § 2412(d)(2)(B);
7. Hatfield is a "prevailing party" in this matter within the meaning of 28 U.S.C. § 2412(d)(1)(a);
8. Hatfield is not the United States;
9. Hatfield is eligible to receive the award sought;
10. The position of the Secretary was not substantially justified; and
11. There are no special circumstances in this case which make such an award unjust.

Hatfield has attached an itemized statement of the fees and expenses for which she applies as Exhibit 1. The itemization shows the rates at which the fees and (where

applicable) the expenses were calculated. Accordingly, Hatfield contends that she is entitled to an award of attorney's fees and expenses in this matter in the total amount itemized.

III. Argument

The assessment of the "jurisdictional adequacy" of a petition for EAJA fees is controlled by the factors summarized and applied in, *e.g.*, *Cullens v. Gober*, 14 Vet. App. 234, 237 (2001) (*en banc*).

A. "Court"

This Court is a court authorized to award attorney's fees and expenses as sought herein. 28 U.S.C. § 2412(d)(2)(F). This Court has exclusive jurisdiction of this matter. 38 U.S.C. § 7252(a).

B. Eligibility: "Party"

Hatfield is a party eligible to receive an award of fees and expenses because her net worth does not exceed \$2 million. *See* 28 U.S.C. § 2412(d)(2)(B). The attached declaration establishes this allegation. It is attached to this application as Exhibit 2.

C. "Prevailing"

To be a "prevailing party" within the meaning of the statute, a party need only have succeeded "on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit." *Texas Teachers Association v. Garland Independent School District*, 489 U.S. 782, 791-92, 109A S.Ct. 1486, 1493, 103 L.Ed.2d 866, 876 (1989).

The "prevailing party" requirement is satisfied by a reversal. *Swiney v. Gober*, 14 Vet. App. 65, 68 (2000). Hatfield is a "prevailing party" entitled to an award of fees and

expenses because this Court reversed the Board's decision and remanded this case for the Secretary to assign an effective date for the benefits awarded and for any other actions necessary to effectuate the award of benefits, as she asked, on the basis of the issues that she argued.

This Court sharpened the criteria for "prevailingness" in *Sumner v. Principi*, 15 Vet. App. 256, 260-61 (2001) (*en banc*). "Prevailingness" depends on the presence of either a finding by the Court or a concession by the Secretary of "administrative error." Hatfield relies upon the following to satisfy the *Sumner* criteria:

1. Hatfield argued that the Board legally erred in misapplying 38 C.F.R. §§ 17.32 and 3.361 and the Court's holding in *McNair v. Shinseki*, 25 Vet. App. 98 (2011). She further argued that the Board's own findings regarding informed consent warrant reversal of the Board's decision. *See* Court's March 8, 2021 decision at 5-6.
2. The Court held that the Board committed legal error by incorrectly relying on *McNair* to create an alternative exception to establishing informed consent thus bypassing the requirements of 38 C.F.R. § 17.32. Court's March 8, 2021 decision at 11-12. The Court held that the *McNair* rule does not apply to situations, like Hatfield's, where no informed consent was obtained or attempted. Court's March 8, 2021 decision at 14.
3. The Court further noted that reversal, as Hatfield requested, is the appropriate remedy in this case because the Board unquestionably found that all the requirements for compensation were met and explicitly weighed the evidence such that no factual development remains. *See* Court's March 8, 2021 decision at 14-16.

The Court concluded that all three elements necessary to establish entitlement to compensation benefits under 38 U.S.C. § 1151 are met and reversed the Board's determination that Hatfield was not entitled to compensation for the cause of her husband's death and ordered the VA to award those benefits on remand. Court's March 8, 2021 decision at 16-17.

These statements in the Court's decision establish that the Board's decision contained "administrative errors" on which the Court's reversal was predicated.

D. The Position of the Secretary Was Not Substantially Justified

To defeat this application for fees and expenses the Secretary must show that the Government's position was "substantially justified." *Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994) (92-205), *appeal dismissed*, 46 F.3d 1111 (Fed. Cir. 1995) (94-7090). *See* 28 U.S.C. § 2412(d)(1)(B). The Government must show its position to have had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 563-68, 108B S.Ct. 2541, 2549-51, 101 LEd.2d. 503-506 (1988); *Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989). "Substantial justification" is in the nature of an affirmative defense: If the Secretary wishes to have its benefit, he must carry the burden of proof on the issue. *Clemmons v. West*, 12 Vet. App. 245, 246 (1999) (97-2138). It is sufficient for Hatfield simply to aver this element.

E. Itemized Statement of Fees and Expenses

Attached as Exhibit 1 is an itemized statement of the services rendered and the fees and expenses for which Hatfield seeks compensation. *See* 28 U.S.C. § 2412(d)(1)(B). The total attorney fee & expenses equals **\$9,991.07**.

According to the U.S. Department of Labor Bureau of Labor Statistics, the National Consumer Price Index for all Urban Consumers in the South Region, as of May 1996, the base year CPI-U was 153.220; as of July 2020 it was 248.619, a 61.63% increase. Applying this increase to the \$125.00 hourly rate provided by the Equal Access to Justice Act, the current hourly rate would be \$202.04.

Applying the rate computed above to the total time of 49.2 hours expended by counsel for Appellant, as shown in Exhibit 1, Appellant seeks a total attorney fee of **\$9,940.37**.

The lawyer has reviewed the itemization to correctly categorize each entry. The lawyer has also reviewed the itemization to exercise “billing judgment” by determining whether the activity or expense might be an overhead expense or, for any other reason, not properly billable. However, the lawyer will be grateful to have brought to his attention any mistakes which might remain.

For costs and expenses expended by counsel for Appellant, as shown in Exhibit 1, Appellant seeks a total reimbursement of **\$50.70**. Combining the total costs, expenses, and attorney fee results in a total award of **\$9,991.07**.

I declare and state under penalty of perjury under the laws of the United States of America that the information set forth in this declaration is true and correct.

/s/Adam Luck
Adam R. Luck
Attorney for Appellant
GloverLuck, L.L.P.
1910 Pacific Ave., Suite 13300
Dallas, TX 75201
Phone: 214-741-2005
Fax: 214-741-2007
Email: Adam@gloverluck.com

IV. Prayer for Relief

Hatfield respectfully moves for an order awarding to Appellant his attorney's fees and expenses in the amount of **\$9,991.07** to be made payable to "**Pat A. Hatfield, C/O Adam R. Luck**".

This application for attorney's fees and expenses is respectfully submitted for Hatfield by:

/s/Adam Luck
Adam R. Luck
Attorney for Appellant
GloverLuck, L.L.P.
1910 Pacific Ave., Suite 13300
Dallas, TX 75201
Phone: 214-741-2005
Fax: 214-741-2007
Email: Adam@gloverluck.com

Submitted by e-filing submission
On April 26, 2021.

Exhibit

1

Date	Description	Total Time
10/10/2019	Received and reviewed BVA decision dated 10-10-2019 denying DIC benefits under 38 U.S.C. 1151. Made initial review of Board's decision to evaluate whether an appeal should be filed.	1.00
10/10/2019	Drafted notes on possible appeal. Performed initial research on appeal of failure to follow Court's remand instructions and failure to address issues expressly raised by Appellant.	1.50
10/10/2019	Phone call with Appellant to discuss theories of appeal, offer representation at CAVC; potential timeline of appeal, and viability of claim on appeal. Discussed attorney-client agreement terms/limitations/fee structure/expenses, and scope of representation at CAVC.	0.50
10/11/2019	Drafted and filed, via USPS, Notice of Appeal, Notice of Appearance, and fee agreement with CAVC. Paid the Court's \$50.00 filing fee. Sent copies of documents to Appellant.	0.10
10/17/2019	Received ECF confirmation of case filing. Phone call to Appellant to inform her the case was filed and outlined the next steps of the appeal process.	0.30
11/18/2019	Downloaded copy of BVA decision filed by VA OGC to ensure it was complete and the same as the one Appellant received from the Board.	0.00
12/12/2019	Downloaded VA OGC appearance (James Drysdale), updated appellant's case file with OGC contact information	0.00
12/18/2019	RBA disk received. Performed cursory review for completeness to determine if dispute was necessary.	1.50
1/7/2020	Downloaded order regarding briefing deadlines. Calendared due dates.	0.00
2/26/2020	Phone call from Appellant for case updates.	0.30
2/27/2020	Reviewed, filed, and calendared court order on Rule 33 briefing conference.	0.00
3/2/2020	Email conversation with Court and OGC to reschedule CLS conference. All parties agreed on new time and date.	0.10
3/2/2020	Drafted and filed motion to reschedule CLS conference.	0.10
3/3/2020	Reviewed Court's order granting motion to reschedule CLS conference. Calendared new date.	0.00
3/17/2020	Reviewed RBA disk pages 1-1000, drafted notes on content for previously identified issues for appeal for Rule 33 memo and appellant brief. Prepared record citations with annotations of content.	4.00

3/18/2020	Reviewed RBA disk pages 1001-2066, drafted notes on content for previously identified issues for appeal for Rule 33 memo and appellant brief. Prepared record citations with annotations of content.	4.10
3/25/2020	Phone call from Appellant for case updates and venting about VA's delay.	0.30
3/30/2020	Began drafting CLS memo for briefing conference. Drafted argument for Board's incorrect application of 17.32 and McNair v. Shinseki. Inserted previous research and analysis of case law.	2.00
3/31/2020	Finished drafting CLS memo. Drafted arguments for Board's misinterpretation of evidence, reversal and proper remedy, and Board's inadequate R&B for its determination regarding pending/unadjudicated claims	2.00
4/1/2020	Finished drafting CLS memo. Final proofreading and Shepardizing. Attached relevant RBA documents cited.	0.50
4/1/2020	Emailed CLS memo to Court and OGC. Also drafted and filed certificate of service for memo.	0.10
4/16/2020	CLS conference held. OGC defending on all issues.	0.30
4/27/2020	Phone call with Appellant regarding CLS conference and impact on proceedings.	0.50
5/7/2020	Began drafting Appellant's brief. Drafted statement of the case, statement of the issues, summary of the argument, and standard of review.	2.00
5/12/2020	Continued drafting Appellant's brief. Performed additional research regarding common law negligence involving informed consent. Drafted arguments.	5.00
5/15/2020	Finished drafting Appellant's brief. Drafted argument regarding reversal as remedy. Cite checked authority used. Drafted table of contents, table of authorities, and conclusion. Filed with court.	3.00
6/13/2020	Email from OGC requesting position on 45-day extension. Responded as unopposed.	0.00
8/28/2020	Downloaded and reviewed OGC's brief. Drafted notes on points of argument. Calendared reply brief deadline.	2.20
9/8/2020	Began drafting Appellant's reply brief. Drafted response regarding the proper application of 3.361 and 17.32, common law regarding informed consent, and Board's misapplication of McNair.	4.00

9/10/2020	Finished drafting Appellant's reply brief. Drafted response regarding foreseeability in relation to informed consent and Board's misinterpretation of evidence and adverse credibility findings. Filed with court.	1.20
9/11/2020	Reviewed Court's rejection of reply brief for exceeding page limit. Edited reply brief and refiled.	0.00
9/18/2020	Downloaded and reviewed ROP filed by OGC.	0.50
10/28/2020	Downloaded and reviewed Court's order for panel decision and oral argument.	0.00
10/29/2020	Downloaded and reviewed Court's order setting oral argument. Calendared argument date.	0.10
1/6/2021	Participated in oral argument precall with the Court.	0.20
1/7/2021	Preparation for oral argument. Drafted points for opening and closing and made notes regarding potential questions from judges.	2.50
1/8/2021	Mock oral argument held. Reviewed feedback and critiques from colleagues and drafted responses to potential questions/issues raised during mock argument.	5.00
1/12/2021	Argued case before panel.	1.30
3/8/2021	Downloaded and reviewed Court's decision	0.50
3/8/2021	Phone call with Appellant to notify about the Court's decision and discussed next steps and timeline.	1.00
3/30/2021	Downloaded the Court's judgment.	0.00
4/26/2021	Drafted EAJA Petition, verified fees and eliminated time that was spent on issues not appealed or dismissed, duplicative, or not a benefit to appellant. Verified costs, reviewed and finalized petition and affidavit.	1.50
Total Time		49.20

Lead attorney is Adam R. Luck (2013 law graduate) - Rate \$202.04

Date	Description	Total Expense
10/11/2019	Appellant's payment of Filing Fee	\$50.00
10/11/2019	Postage for Notice of Appeal, Notice of Appearance, appellant's payment, and attorney's representation documents.	\$0.70
Total Expenses		\$50.70

Exhibit

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v.

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Docket No. 19-7165

DECLARATION OF NET WORTH

I, counsel for appellant, Pat A. Hatfield, hereby declare and state:

1. I am more than eighteen years of age, of sound mind, and fully competent to make this declaration. I have personal knowledge of the matters set forth below and they are all true and correct.
2. I am the counsel representing Appellant named in this appeal to the Court of Appeals for Veterans Claims (CAVC).
3. At the time this civil action was filed, Appellant's personal net worth did not exceed \$2,000,000 (two million dollars); nor did she own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7,000,000 (seven million dollars) and which had more than 500 employees.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 26, 2021.

Executed at: Dallas, Texas

Signed:



Adam R. Luck