

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

TIMOTHY W. HARRIS)	
)	
Appellant)	
)	No. 19-9045
v.)	
)	
DENIS R. MCDONOUGH)	
Secretary of Veterans Affairs,)	
)	
Appellee)	

APPLICATION FOR AN AWARD OF ATTORNEY FEES AND EXPENSES
UNDER 28 U.S.C. § 2412(d).

Pursuant to the Equal Access to Justice Act (“EAJA”), the appellant petitions this court for an award of reasonable attorney fees and expenses in the amount of \$ 8,571.13 for litigating the merits of this appeal, and drafting this petition.

I. THE APPELLANT MEETS THE STATUTORY REQUIREMENTS FOR AN AWARD OF ATTORNEY’S FEES AND EXPENSES

In order to be eligible for an award of attorney’s fees under EAJA 28 U.S.C. § 2412(d), the party must (1) be a “prevailing party and [be] eligible to receive an award under this subsection;” (2) the position of the United States must not have been “substantially justified;” and (3) there must be no special circumstances which would make an award unjust.

The appellant is a prevailing party because the Court of Veterans granted the parties' joint motion to terminate the appeal, reversing a finding that a July 16, 2017, VA form 9 was untimely. *See Sumner v. Principi*, 15 Vet. App. 256, 261-264 (2001).

Appellant had a net worth under \$2,000,000.00 on the date this action was commenced. (See Exhibit B). Moreover, Appellant was not a business entity. Therefore, Appellant is eligible to receive this award. *See* 28 U.S.C. § 2412(d)(2)(B)(i), (ii).

The government's position precipitating this litigation was not "substantially justified" because, as the Secretary agreed, the form 9 was timely filed. *See Pierce v. Underwood*, 108 S. Ct. 2541, 2549-50 (1988); *Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

There is no reason or special circumstance to deny this Fee Petition. *See Martin v. Heckler*, 772 F.2d 1145, 1150 (11th Cir. 1985); *Taylor v. United States*, 815 F.2d 249, 253 (3d Cir. 1987).

II. THE COURT SHOULD AWARD APPELLANT REASONABLE ATTORNEY FEES AND EXPENSES OF \$ 8,571.13.

The fees and expenses requested are reasonable and should be awarded. 28 U.S.C. §§ 2412(d)(1)(A), (d)(2)(A). Three attorneys expended time litigating the merits of this case. That time was limited to actions necessary to litigate this matter. In the exercise of sound billing judgment, no payment is requested for time spent on purely administrative or clerical matters such as copying, filing, or research into matters that were unnecessary or otherwise unrelated to the disposition of the case. In this regard,

the undersigned notes that the Court submitted this matter to a panel for decision, scheduled oral argument and requested supplemental briefing. Counsel asserts that it was both necessary and reasonable to spend time researching and preparing for oral argument as well as for the court-ordered supplemental briefing, including preparing initial drafts.

The statutory \$125.00 hourly fee should be increased in light of the increase in the cost of living as demonstrated by the Consumer Price Index¹. See *Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988), *Elcyzyn v. Brown*, 7 Vet. App. 170, 179-181 (1994); 28 U.S.C. § 2412(d)(2)(A)(ii). Appellant chooses July 2020, the date the Appellant's brief was filed, for calculating the CPI increase. *Elcyzyn* at 181.

Based upon all of the foregoing, Appellant requests fees and expenses as follows¹: \$6,229.82 based upon 31.2 hours of work at the rate of \$199.67 per hour; and \$ 2,341.31

¹ The rates for each attorney who billed time on this matter were determined based upon the location where that attorney works the majority of the time: David Lowenstein (DJL) in Silver Spring, Maryland; Krystle Waldron (KDW) in Glen Allen, Virginia; Erin Ralston (EER) in Woodbridge, Virginia, Daniel Krasnegor (DGK) and Keenan Danehey (KLD) in Charlottesville, Virginia; and Nancy Foti (NLF) and Andrew Miller (ABM) in Norfolk, Virginia.

based upon 11.1 hours of work at the rate of \$210.93 per hour² for a total of \$ 8,571.13.

Respectfully Submitted,
Timothy Harris

By Counsel

/s/ Daniel G. Krasnegor

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² The rates charged were calculated by increasing the statutory \$125.00 rate by the increase in the CPI-U for the location in which the particular attorney works the majority of the time. For attorneys in the Richmond and Charlottesville, Virginia offices, the CPI-U for Size B/C cities in the South region was used. The rate was calculated by first determining the increase in the CPI-U between March 1996 and November 1996 (1.7%). That increase was added to the statutory \$125.00 rate, yielding \$127.13 as of November 1996. To determine the current rate, the \$127.13 rate was increased by the change in the CPI-U between November 1996 and July 2020 (57.057%), yielding a rate of \$199.67. For attorneys in Silver Spring, Maryland and Woodbridge, Virginia, the CPI-U for the Washington-Arlington-Alexandria, DC-VA-MD-WV region was used. To determine the current rate, the \$125.00 statutory rate was increased by the change in the CPI-U between March 1996 and July 2020, (68.742%), yielding a rate of \$210.93.

EXHIBIT A
DECLARATION OF APPELLANT'S COUNSEL, DANIEL G. KRASNEGOR

In support of Appellant's application for attorney's fees under 28 U.S.C. § 2412(d), I, Daniel G. Krasnegor, hereby declare as follows:

1. I am an attorney licensed to practice in Washington, DC, and Georgia, and am admitted to practice before the United States Court of Appeals for Veterans Claims
2. I visited the web site maintained by the United States Department of Labor Bureau of Labor Statistics Office of Consumer Pricing Indexing. From that web site I ascertained the Consumer Price Index increases between March 1996, when the EAJA was amended and the relevant dates.
3. **Certificate of Net Worth:** At no time during the course of his appeal to the Court of Appeals for Veterans Claims, did the appellant have a net worth of, or in excess of, \$2,000,000.
4. The following is a statement of the exact service rendered and expenses incurred in my representation of the Appellant in this appeal.
5. I have reviewed the attached combined billing statement and am satisfied that it accurately reflects the work performed by all counsel;
6. I have considered and eliminated all time that is excessive or redundant.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Daniel G. Krasnegor

May 21, 2021

Daniel G. Krasnegor

Date

Court of Veterans Appeals

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RE: Harris, Timothy/CVA.2054W

For Professional Services Rendered Through May 21, 2021

SERVICES

Date	Person	Description of Services	Hours	Amount
12/18/2019	DGK	Read and analyze BVA decision and review regulations cited by BVA (0.2); research M21-1 provisions on updating attorney addresses (0.2); call with Timothy Harris to discuss merits of his appeal (0.2); draft letter discussing proposed strategy on appeal (0.2).	0.8	\$159.74
12/30/2019	DGK	Supervisory review of draft notice of appeal and appearance; file with CAVC.	0.1	\$19.97
01/02/2020	KDW	Draft intro letter.	0.1	\$19.97
01/02/2020	KDW	Draft and file notice of appearance.	0.1	\$19.97
01/03/2020	KDW	Review case, assign KEA task to send OGC consent form to CAVC.	0.1	\$19.97
01/30/2020	KDW	Review BVA decision.	0.2	\$39.93
02/26/2020	KDW	Review appearance of Stuart Anderson.	0.1	\$19.97
02/28/2020	KDW	Review RBA notice and update task deadlines.	0.1	\$19.97
03/16/2020	KDW	Review RBA, to identify illegible documents and documents which appear to be incomplete or missing. NOTE: attorney review is necessary, so that potential significance and importance of any apparently incomplete, illegible, or missing documents can be appropriately assessed.	2.5	\$499.18
03/19/2020	KDW	Review briefing order.	0.1	\$19.97
05/11/2020	KDW	Review briefing conference order and update task deadlines.	0.1	\$19.97
05/19/2020	DGK	Peer review of Rule 33 memo; two substantive suggestions to KDW; call with KDW to discuss.	0.3	\$59.90

SERVICES

Date	Person	Description of Services	Hours	Amount
05/19/2020	KDW	Review and analyze all documents in RBA, taking notes on information to be used in R. 33 memo, briefing conference and brief, along with record references. NOTE: process is particularly time-consuming since no index is provided for RBA - notes must be taken on all documents, so that it will be possible to find any necessary evidence later, without re-reviewing entire record. Research M21-1 provisions regarding addressing of notices and where to locate addresses for representatives. Draft R33 memo, review/edit memo, send to DGK for peer review.	2.9	\$579.04
05/22/2020	KDW	Review comments/suggestions from DGK, update args, add record cites, review/edit arg, draft certificate of service and email to VA and CLS attys.	0.5	\$99.84
06/05/2020	KDW	Prepare for and participate in briefing conference.	0.2	\$39.93
06/05/2020	KDW	Email Stuart citation discussed during conference.	0.1	\$19.97
06/12/2020	KDW	Review email from Stuart re: case provided for review.	0.1	\$19.97
07/02/2020	KDW	Email Stuart re: whether he's spoken with his deputy about case we discussed during R33.	0.1	\$19.97
07/03/2020	KDW	Draft brief, review/edit, send for peer review.	2.8	\$559.08
07/03/2020	KDW	Call with EER re: suggestions for brief.	0.0	\$0.00
07/03/2020	EER	Reviewed KDW brief, and made suggestions RE (1) to grammar/sentence structure (N/C), (2) to include note acknowledging BVA not bound by M21 but cannot adequately assess if decision properly mailed w/o discussing M21, (3) inclusion of direct quotes from BVA decision RE "properly mailed", and (4) inclusion of disc to Ashley/Chute RE presumption rebutted when no cover LTR w/rep address in record (.4); TC w/KDW RE inclusion of footnote to M21 and why it matters RE determination of what is correct address and proper mailing procedures (.1).	0.4	\$84.37
07/06/2020	KDW	Review comments/suggestions from EER, update args, add record cites, final review/edit, add TOC and TOA.	1.0	\$199.67
07/06/2020	KDW	Review/respond to email from Stuart.	0.1	\$19.97
09/04/2020	KDW	Review/respond to email from Stuart re: JMR and extension.	0.1	\$19.97
09/04/2020	KDW	Review email from Stuart indicating that they will not be offering remand, respond indicating unopposed to extension.	0.1	\$19.97
09/04/2020	KDW	Review motion for extension filed by secretary.	0.1	\$19.97
09/08/2020	KDW	Review order granting motion for extension.	0.1	\$19.97
10/24/2020	KDW	Review secretary's brief, research M-21, draft reply brief.	4.7	\$938.45
10/26/2020	EER	Reviewed CAVC docket, drafted/filed NOA, updated notes/tasks.	0.1	\$21.09
11/02/2020	KDW	Review comments/suggestions from NLF, update reply brief, add record cites, draft TOA and TOC, prepare appendix.	1.8	\$359.41

SERVICES

Date	Person	Description of Services	Hours	Amount
11/02/2020	KDW	Draft letter to client with copy of reply brief and secretary's brief and next steps.	0.1	\$19.97
11/16/2020	EER	Reviewed ROP and compared w/briefs filed (.4).	0.4	\$84.37
11/19/2020	KDW	Provide information to MR re: status of case at Court for call to client.	0.0	\$0.00
12/02/2020	KDW	Review assignment to Judge Davis.	0.1	\$19.97
12/03/2020	EER	Reviewed CAVC filing RE assignment to judge, updated notes/tasks (.1).	0.0	\$0.00
02/23/2021	KDW	Review order that case is submitted to panel.	0.1	\$19.97
03/02/2021	KDW	Review order to schedule oral argument.	0.1	\$19.97
03/02/2021	EER	Reviewed CAVC order for oral arg, disc w/KDW (.1) (N/C); TC w/KDW to go over potential ideas for resolution/facts or info we may want to develop at CAVC (.4).	0.4	\$84.37
03/15/2021	KDW	Review order scheduling oral argument.	0.1	\$19.97
03/15/2021	EER	Reviewed CAVC filing RE oral arg scheduled, updated notes/tasks (.1).	0.0	\$0.00
03/17/2021	EER	Reviewed CAVC order, updated notes/tasks (.1); TC w/KDW RE order, responses, and reaching out to VA atty RE possible JMR (.2).	0.0	\$0.00
03/19/2021	KDW	Email Stuart re: whether there's any potential for a remand agreement.	0.1	\$19.97
03/22/2021	KDW	Review email from Stuart and update EER.	0.1	\$19.97
03/22/2021	EER	Reviewed BVA decision/RBA/ROP and updated file summary (.8); reviewed briefs and made notes for TC w/KDW RE response to CAVC order (.7); read Romero and Crain made notes for TC w/KDW RE response to CAVC order (.4).	1.9	\$400.77
03/23/2021	KDW	Call with EER to discuss potential arguments for supplemental briefing - recommend contacting W&W for information regarding whether they had other cases where VA started using their new address after the OGC update, why they changed their address, etc. Discussed potential responses to the Romero question with that in mind. Discussed potential responses to question one and whether to reiterate our understanding of whether the address change has to be submitted individually for each veteran. Discussed and reviewed language for NOVA posting.	0.8	\$159.74
03/23/2021	KDW	Review email from Stuart re: ext - discuss response with EER, review NOVA postings re: address changes, discuss contacting Diane.	0.3	\$59.90
03/23/2021	KDW	Draft email to Stuart re: ext.	0.1	\$19.97

SERVICES

Date	Person	Description of Services	Hours	Amount
03/23/2021	EER	TC w/DGK RE how he updated COA w/VA and why he did it that way (.1); TC w/KDW RE gathering affidavits for supp response, holdings/disc in Romero, and drafting response (.8); post on NOVA RE reps (.2); email to W&W RE sworn affidavit/questions to address (.3); emails to/from DGK/NLF RE contacts at NVLSP/Chisholm (.1); TC w/KDW RE response from SA RE extension on case, review of NOVA forum RE rules for COA, and f/u with other groups (.3); drafted email to Diane Rauber RE CAVC case/potential affidavit (.4); drafted email response to SA RE ext request (.2).	2.4	\$506.23
03/24/2021	EER	Finalized/sent email to Diane Rauber (.1); emails from/to Diane RE TC (.1); emails from/to Diane RE 9am TC to go over case/potential affidavits (.1).	0.3	\$63.28
03/25/2021	KDW	Call with Diane from NOVA to discuss what information she's aware of regarding VA policies for updating addresses, potential people to reach out to, and any information she has regarding people who may have been told to update with OGC or who did and were successful.	0.3	\$59.90
03/25/2021	KDW	Call with EER to discuss conversation with Diane and next steps - discuss GAD mailing issues and whether to include those in supplemental briefing, advise EER of email from Stuart, discuss additional people we plan to contact, discuss additional cases for review for relevance, including Bankhead and cases cited by Bankhead, as well as Davis.	0.8	\$159.74
03/25/2021	KDW	Review email from Stuart.	0.1	\$19.97
03/25/2021	EER	TC w/KDW and Diane Rauber RE issues involving mailing/updating address in NOVA members, potential affidavit (.3); TC w/KDW RE f/u with other attorneys/practices, review of address update/ mailing issues w/in our own cases, whether to ask that OGC render an opinion on this matter, whether to include NOVA forum posts in our response to document inconsistent guidance from VA, and reviewed/discussed Crumlich (.8); drafted email to Zach Stulz RE CAVC case/potential affidavit/guidance from VA (.3); drafted email to Timothy Franklin RE CAVC case/potential affidavit/guidance from VA (.1); emails from/to Diane RE older NOVA forum posts/materials from 2018 conference/potential affidavit (.1); TC w/Tim Franklin RE his COA process/potential cases which fit our fact pattern/potential affidavit (.2).	1.8	\$379.67
03/26/2021	KDW	Call with EER to discuss responses to supplemental briefing, call with Sarah at W&W to discuss mailing issues, review Romero - Court decision and cited Board decision, review Euzebio and discuss arguments re: constructive notice to Board of VA's mailing issues and failure to adequately address how it determined the SOC was properly mailed despite assertions of non-receipt and how that ties into applicability of Romero, review other cases for evidence relevant to mailing issues and acceptance of address changes based on submission to OGC.	1.8	\$359.41

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SERVICES

Date	Person	Description of Services	Hours	Amount
03/26/2021	EER	Meeting w/KDW to go over response to CACV order, outlined response to Q#1, TC w/Sarah Woods RE potential affidavit, researched caselaw RE constructive receipt (Lang, Euzebio, Healey), disc RE Q#2 and how to Romero is applicable, reviewed BVA decision in this case/Romero, disc review of other W&W CAVC cases to see if VA started using updated address w/no COA request in file (1.8); reviewed other W&W CAVC cases to see if one had OGC COA update and subsequent mail rec'd at updated address (.9).	2.7	\$569.51
03/29/2021	KDW	Review Court's order, prepare initial draft of supplemental briefing and send to EER for review and suggestions.	1.5	\$299.50
03/29/2021	KDW	Review email from Stuart and call EER to go over possible joint stay and resolution and discuss questions/concerns for follow-up with Stuart (.2), draft follow-up email to Stuart (.1).	0.3	\$59.90
03/29/2021	KDW	Call with Stuart to go over questions re: joint stay and possible resolution (.1), call EER to discuss information obtained from Stuart (.1), call with client to go over joint stay and possible resolution (.1).	0.3	\$59.90
03/29/2021	EER	TC w/KDW RE email from VA atty RE joint stay and possible resolution (.2); email from KDW to VA atty RE proposed stay/resolution (.1); TC w/KDW RE TC w/VA atty and stipulation offer/articulation of EED/SC/reopen claims (.1).	0.4	\$84.37
03/30/2021	KDW	Email Stuart to advise that our client is willing to proceed with joint stay and negotiate language for remand agreement.	0.1	\$19.97
03/30/2021	KDW	Review email from Stuart and suggest additional language for the stay.	0.1	\$19.97
03/30/2021	KDW	Review updated stay motion, sign and return to Stuart, provide EER and DGK update.	0.1	\$19.97
03/30/2021	EER	Reviewed KDW draft at response to CAVC, made minor changes to grammar/sentence structure (.1) (N/C); reviewed VA proposed joint motion to stay, and disc w/KDW RE whether to modify language and/or to shorten stay period (.1); emails from/to W&W employee RE signed affidavit and communications w/Sarah Woods (.1); reviewed revised Joint Motion and disc w/KDW RE acceptance of it (.1) (N/C); email to Sarah Woods RE affidavit (.1) (N/C); reviewed CAVC filing RE joint motion to stay, updated notes/tasks (.1).	0.3	\$63.28
04/01/2021	DGK	Call with KDW to go over changes to language in proposed settlement; unique contribution was to suggest adding in that VA will make a new decision and saying that the "withdrawal" of the subsumed claim is unnecessary, but ultimately not harmful.	0.2	\$39.93
04/01/2021	KDW	Review/respond to Stuart re: motion to terminate and settlement.	0.1	\$19.97
04/01/2021	KDW	Review proposed Joint Motion to Terminate and Stipulated agreement, as well as letter to VA drafted by Stuart, discuss with EER, review file to ensure dates are accurate, send emails to Stuart with requested changes.	1.0	\$199.67

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SERVICES

Date	Person	Description of Services	Hours	Amount
04/01/2021	KDW	Review/respond to email from Stuart inquiring as to why VA is unwilling to change some language.	0.1	\$19.97
04/01/2021	KDW	Review updated settlement letter.	0.1	\$19.97
04/01/2021	KDW	Review email from Stuart re: why VA won't accept language change, discuss with EER, discuss with DGK, redraft language, go over with EER, and send to Stuart for approval.	0.5	\$99.84
04/01/2021	KDW	Email W&W for additional contact information for client.	0.0	\$0.00
04/01/2021	KDW	Review email from W&W with email address, draft email to client requesting that he call our office.	0.0	\$0.00
04/01/2021	KDW	Review email from Anne re: stay.	0.1	\$19.97
04/01/2021	KDW	Review email from Stuart accepting changes.	0.1	\$19.97
04/01/2021	KDW	Review email from W&W advising that client has been asked to contact us asap.	0.0	\$0.00
04/01/2021	KDW	Review order granting stay.	0.1	\$19.97
04/01/2021	KDW	Email W&W re: continued inability to reach veteran - ask for information regarding the number they called to reach him and the number they gave him to reach us.	0.0	\$0.00
04/01/2021	KDW	Review email from W&W re: number they called to reach him and number they gave him to reach us, attempt to call client again.	0.0	\$0.00
04/01/2021	EER	Email from KDW w/email from VA atty RE: proposed motion to terminate/settle (.1); TC w/KDW RE changes to proposed motion to terminate/stipulations (1); email to Anne Stygles RE: whether we need to file response (.1) (N/C); emails from/to Anne RE working on stay (.1) (N/C); reviewed CAVC grant of stay, updated notes/tasks (.1); disc w/KDW RE reconsider v re-adjudicate, reviewed Black's Law Dic for definitions, disc w/KDW RE TC w/DGK and changes to language, reviewed revisions, TC w/KDW RE revisions/communication w/client (.6).	0.0	\$0.00
04/02/2021	KDW	Call client to go over stipulated agreement and answer any questions.	0.2	\$39.93
04/02/2021	KDW	Final review of stipulated agreement, review Aug 2014 RD to see if denied an IR or granted SC, correct information in stipulated agreement and send to Stuart for approval.	0.3	\$59.90
04/02/2021	KDW	Review email from Stuart re: additional minor change, final review of motion to terminate and stipulated agreement, sign and return to Stuart for filing.	0.2	\$39.93
04/02/2021	KDW	Review/respond to email from Stuart re: changing numbering of paragraphs.	0.1	\$19.97
04/02/2021	KDW	Review Joint Motion to Terminate and Stipulated agreement as filed.	0.1	\$19.97
04/22/2021	KDW	Review order granting joint motion to terminate and canceling oral argument.	0.1	\$19.97

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Date	Person	Description of Services	Hours	Amount
04/22/2021	EER	Reviewed CAVC grant of motion to dismiss, updated notes/tasks (.1).	0.0	\$0.00
05/03/2021	KDW	Draft email to W&W re: outcome - going over stipulated agreement and next steps.	0.2	\$39.93
05/03/2021	KDW	Draft letter to client re: outcome - going over stipulated agreement and next steps.	0.2	\$39.93
05/11/2021	KDW	Call from client requesting that we resend him the letter with the JMT and stipulated agreement. He received it but lost it. Ask MP to resend.	0.0	\$0.00
05/12/2021	KDW	Review DGKs question re: EAJA deadline, review docket, review Court rules, respond to DGK with correct EAJA deadline.	0.0	\$0.00
05/21/2021	DGK	Review and edit billing statement for EAJA: make sure that all time worked is included in bill and that all descriptions are complete and accurate; exercise billing judgment by deleting, or billing at no charge, all time that is arguably duplicative, unproductive, clerical or that might not be charged to a private client.	0.4	\$79.87
05/21/2021	DGK	Research for and preparation of EAJA application: read and analyze Joint Settlement Motion; calculate rates for attorneys and non-attorneys based upon geographic location; prepare application.	0.5	\$99.84
Total Professional Services			42.3	\$8,571.13

PERSON RECAP

Person	Hours	Amount
DGK Daniel G. Krasnegor	2.3	\$459.25
KDW Krystle D. Waldron	28.9	\$5,770.57
EER Erin E. Ralston	11.1	\$2,341.31
Total Services	\$8,571.13	
Total Current Charges		\$8,571.13
PAY THIS AMOUNT		\$8,571.13

Please remit payment to: 123 E Main St, 7th Flr, Charlottesville, VA 22902. Please include the invoice number or file number with your remittance. Thank you.