

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JULI K. LONAKER,
Appellant,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,
Appellee.

U.S.C.A.V.C. Case No. 19-1637

APPELLANT’S APPLICATION FOR AWARD OF ATTORNEY’S FEES & EXPENSES

Appellant, Ms. Juli K. Lonaker hereby applies to this honorable Court for an award of her attorney’s fees and expenses in the amount of \$ 13,722.24. This application is made pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and this Court’s Rule 39. Ms. Lonaker has expressly authorized her application.

I. Procedural History.

On November 13, 2018, the Board of Veterans’ Appeals entered a decision that denied Ms. Lonaker’s claim for retroactive payment of DEA benefits under Chapter 35, Title 38, U.S.C., prior to April 16, 2014. Ms. Lonaker filed a timely notice of appeal to this Court on March 11, 2019. The lawyer (with respect to whose fees her application is concerned) entered her appearance on March 11, 2019.

This case was not fully litigated and was resolved by settlement following the VA’s receipt and consideration of Ms. Lonaker’s opening brief. This Court’s

dispositive order was dated June 21, 2021, about 27 months after counsel entered her appearance.

This application is timely under 28 U.S.C. § 2412(d)(1)(B).

II. Averments.

Ms. Lonaker 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 Ms.
Lonaker's appeal to the Board of Veterans' Appeals;
- (5) This Court has jurisdiction over the underlying
appeal under 38 U.S.C. § 7252;
- (6) Ms. Lonaker is a "party" to this action within the
meaning of 28 U.S.C. § 2412(d)(2)(B);
- (7) Ms. Lonaker is a "prevailing party" in this matter
within the meaning of 28 U.S.C. § 2412(d)(1)(a);
- (8) Ms. Lonaker is not the United States;
- (9) Ms. Lonaker 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.

Ms. Lonaker submits below an itemized statement of the fees and expenses for which he applies. The itemization shows the rates at which the fees and (where applicable) the expenses were calculated. Accordingly, Ms. Lonaker contends that he 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”

Ms. Lonaker 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). Ms. Lonaker’s declaration establishes this allegation. It is annexed to this application as Exhibit 1.

Ms. Lonaker’s eligibility may also be inferred from this Court’s waiver of its filing fee. *See Owens v. Brown*, 10 Vet. App. 65 (1997) (93-1106); *Bazalo v. Brown*, 9 Vet. App. 304 (1996) (en banc) (93-660); *Jensen v. Brown*, 8 Vet. App. 140 (1996) (*per curiam* order) (90-661).

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 remand. *Stillwell v. Brown*, 6 Vet. App. 291, 300 (1994). *See Employees of Motorola Ceramic Products v. United States*, 336 F.3d 1360 (Fed. Cir. 2003) (remand because of alleged error and court does not retain jurisdiction). Ms. Lonaker is a “prevailing party” entitled to an award of fees and expenses because this Court vacated the Board’s decision and remanded this case for

adjudication anew, as he asked, on the basis of the issues that he would have argued.

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

1. Ms. Lonaker argued in her opening brief presented three arguments: (1) The effective date provisions of 38 U.S.C. §§ 5113(b)(2) cannot be applied to Ms. Lonaker without notice of the time for filing for retroactive Dependent Educational Assistance (DEA) benefits; (2) The Board’s denial of retroactive DEA benefits to Ms. Lonaker violated the principles of fair process; and (3) in the alternative, Ms. Lonaker is entitled to equitable tolling of the period for filing her application for retroactive DEA benefits. Appellant’s Opening Brief pp. 4-16.
2. This matter was fully litigated and was set for oral argument before a panel of this Court. As a result VA’s attorney and Ms. Lonaker’s counsel agreed upon the terms of a joint motion to terminate the appeal by way of settlement.
3. The joint motion to terminate the appeal prepared by the Secretary, included a stipulated agreement in which the VA agreed to grant Ms.

Lonaker entitlement to and remit payment of retroactive Dependents' Educational Assistance (DEA) benefits under Chapter 35, Title 38, United States Code, from May 9, 1994.

These statements in the joint motion to terminate and stipulated agreement establish that the Secretary "conceded" that the Board's decision contained "administrative errors" on which the joint motion to terminate and stipulated agreement were predicated. The joint motion of the parties in Ms. Lonaker's case establishes that the settlement of her appeal was predicated on a finding of administrative error.

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 L.Ed.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), *appeal dismissed*, 206 F.3d 1401 (Fed. Cir. 2000) (99-7107), *reh'g denied*, __ F.3d __

(May 2, 2000). It is sufficient for Ms. Lonaker simply to aver this element.

E. Itemized Statement of Fees and Expenses

Set out below are the required declaration of the lawyer, and an itemized statement of the services rendered and the fees and expenses for which Ms. Lonaker seeks compensation. *See* 28 U.S.C. § 2412(d)(1)(B).

Attorney Time, Costs and Other Expenses

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
11/19/18	Received on 11/19/18 the Board 11/13/18 decision and made an initial review of Board's decision to evaluate whether an appeal should be filed.	1.00	
1/25/19	Made a more thorough review of the Board's decision, identifying possible bases for an appeal. This review included an examination of prior decisions on the VA and the Board in this case as well as consideration of current decisions of this court and the Federal Circuit.	2.00	
2/18/19	Letter to veteran indicating a willingness to proceed with and appeal and enclosing the required initial paperwork needed to be signed to initiate the appeal.	n/c	P
3/4/19	Received and review paperwork from claimant	n/c	
3/11/19	Reviewed the documentation prepared for the filing of the appeal; E-filed notice of appeal; notice of appearance, motion to waive filing fee; fee agreement; filed BVA/VARO fee agreement; ltr. to VAGC w/consent form; ltr. to client w/copies	1.00	P
6/12/19	Made a preliminary review of RBA to confirm contents included all relevant documents, identify possible issues raise in RBA and prepare for more thorough examination of the relevant procedural and evidentiary documents.	3.00	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
6/13/19	Examined RBA to identify and organize into chronological all relevant procedural documents. After organizing the procedural documents into chronological confirmed the claim stream's beginning and made notes concerning the possible errors made by the Board.	4.00	
6/14/19	After completing the organization and analysis of the relevant procedural documents the RBA was examined to identify all relevant evidentiary documents in the RBA to confirm that the Board addressed each and noted any evidence not discusses or not correctly discussed by the Board.	3.00	
8/9/19	Began preparation of the CLS memo by identifying and framing the issues to be presented in the memo based on the prior reviews of the Board decision and the annotations prepared by the paralegal.	2.00	
8/12/19	Drafted statement of facts and relevant proceedings.	4.00	
8/13/19	Wrote the argument sections of the memo.	4.00	
8/14/19	E-mailed pre-briefing conference memo.	n/c	
8/28/19	Prepared for and participated in CLS conference; VAGC indicated that the VA would defend.	2.00	
10/23/19	Brief prep. - research - regs., caselaw, statutes; draft issues and statement of the case	4.00	
10/24/19	Brief prep. - draft of Argument.	4.00	
10/25/19	Edit and refine Argument	4.00	
10/28/19	Completed final revisions to draft of brief	4.00	
10/29/19	Finalized brief for filing;; cc: VAGC and client	2.00	P
4/1/20	Rcv'd. and reviewed Appellee's Brief f. 2/13/20.	3.00	
4/2/20	Reply Brief prep. - draft of Argument.	2.50	
4/6/20	Edit and refine Argument	3.00	
4/7/20	Completed final revisions to draft of brief	3.00	
4/8/20	Filed Reply Brief on April 8, 2020.	n/a	
4/13/20	Received and reviewed VA's motion to strike reply brief filed on 4/10/20.	2.00	
4/21/20	Prepared reply to VA's motion to strike.	4.00	
5/29/20	Received and review 5/29/20 Court order that the Secretary's motion to strike be held in abeyance for decision by the judge assigned to decide the case.	n/a	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
3/23/21	Rec'd e-notice dtd 3/22/21 of CAVC Order, that this case was submitted to the panel.	n/a	
6/1/21	Prepared initial outline for oral argument.	4.00	
6/1/21	Contacted by VA with proposal to settle, discussed terms, indicated that I would recommend to Ms. Lonaker.	1.00	
6/1/21	Contacted Ms. Lonaker, explained the offer answered her questions and she agreed.	1.00	
6/2/21	Received, reviewed and signed Joint Motion to Terminate the Appeal and Stipulated Agreement.	1.00	
6/24/21	Rec'd e-notice dtd 6/21/21 of CAVC Order, ORDERED that the joint motion to terminate appeal is TERMINATED.	n/c	
7/21/21	Prepared and filed EAJA Application; cc: client.	<u>1.00</u>	P
	Total Hours	69.5	

69.5 hours x \$ 197.13 per hour = \$ 13,700.54

Total Attorney Fee Requested: \$ 13,700.54

Expenses

UPS:	\$.00
Postage:	6.70
Copying: (60 x \$.25)	<u>15.00</u>
Total Expenses:	\$ 21.70

Total attorney fee & expenses: \$ 13,722.24

According to the U.S. Department of Labor Bureau of Labor Statistics, the National Consumer Price Index for all Urban Consumers in the Midwest Region, as of March 29, 1996, the base year CPI-U was 151.7; as of October 2009 it was 239.243, a 57.71 % increase. Applying this increase to the \$ 125.00 hourly rate provided by the Equal Access to Justice Act, the current hourly rate would be \$

197.13.

Applying the rate computed above to the total time expended by counsel for Appellant, Appellant seeks a total attorney fee of \$ 13,700.54.

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 her attention any mistakes which might remain.

For costs and expenses expended by counsel for Appellant, Appellant seeks a total reimbursement of \$ 21.70, for a total attorney fee, costs and expense award of \$ 13,722.24.

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/Kenneth M. Carpenter
Kenneth M. Carpenter
CARPENTER, CHARTERED
Counsel for Appellant

IV. Prayer for Relief

Ms. Lonaker respectfully moves for an order awarding to appellant her attorney's fees and expenses as set forth herein.

This application for attorney's fees and expenses is—

Respectfully submitted for Ms. Lonaker by:

/s/Kenneth M. Carpenter
KENNETH M. CARPENTER
Counsel for Appellant
1525 Southwest Topeka Boulevard
Post Office Box 2099
Topeka, Kansas 66601

Submitted by e-filing submission
On July 21, 2021.

Exhibit 1

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Juli K. Lonaker,

Appellant,

v.

Robert L. Wilkie,
Secretary of Veterans Affairs,

Appellee.

U.S.C.A.V.C. Case No.: 19-1637

DECLARATION OF NET WORTH

Appellant Juli K. Lonaker, hereby declares and states:

1. I am the appellant named in this appeal. This declaration is based upon my personal knowledge.

2. At the time this civil action was filed, my personal net worth did not exceed \$2,000,000 (two million dollars); nor did I own any unincorporated business, partnership, corporation, association, unit of local government, or organization, the net worth of which 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: March 11, 2019.

Executed at: Columbus, IN

X 
Juli K. Lonaker

EXHIBIT 1