

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

CHAUNCEY OKAMURA,	)	
	)	
Appellant,	)	
	)	
v.	)	Vet. App. No. 20-3229
	)	
DENIS MCDONOUGH	)	
Secretary of Veterans Affairs,	)	
	)	
Appellee.	)	

**APPELLANT'S APPLICATION FOR AN AWARD OF ATTORNEY'S FEES AND  
EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)**

Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), and U.S. Vet. App. R. 39, Appellant, Chauncey Okamura, through counsel, applies for an award of reasonable attorney's fees and expenses in the amount of **\$11,444.89**.

**Procedural History of the Case**

On April 24, 2020, the Board of Veterans' Appeals (Board) denied Appellant's entitlement to a total disability rating due to individual unemployability (TDIU) as moot. Appellant appealed to this Court. The parties fully briefed the issues, and on December 3, 2021, the appeal was submitted to a panel for decision. On December 7, 2021, Appellant filed a Motion for Oral Argument, which was granted. On January 13, 2022, the parties filed a Joint Motion to Terminate the Appeal, along with a Stipulated Agreement for settlement. The Court granted the parties' Joint Motion, adopted the settlement, and issued the Mandate on January 21, 2022. Appellant is the prevailing party

as a result of the stipulated settlement, and Appellant is eligible and entitled to an award of attorney fees.

### **Grounds for an Award**

The Equal Access to Justice Act (EAJA) provides as follows:

Except as otherwise specifically provided by statute, a court *shall* award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412(d)(1)(A) (emphasis added). This provision expressly applies to this Court and to actions brought in this Court by appellants seeking judicial review of the decisions of the Board of Veterans' Appeals. *Id.* at § 2412(d)(2)(F).

This Court has analyzed and provided guidance regarding how the EAJA applies to cases pending before it. *Bazalo v. Brown*, 9 Vet.App. 304 (1996), *reversed in part Bazalo v. West*, 150 F.3d 1380, 1382 (Fed.Cir. 1998). The Court has outlined predicate findings that are necessary to warrant an award by the Court of attorney's fees and expenses to an eligible party pursuant to EAJA. These are: (1) the party opposing the United States must be a prevailing party; (2) the government's position must not have been substantially justified; (3) there must be no circumstances that make an award against the government unjust; and (4) a showing that the appellant is eligible to receive an award at the time the appeal was filed. *Bazalo v. Brown*, 9 Vet.App. at 309.

As will be demonstrated below, Appellant satisfies each of these predicate requirements.

**I. SPECIFIC SHOWING THAT APPELLANT'S NET WORTH DOES NOT EXCEED TWO MILLION DOLLARS**

Appellant satisfies the EAJA requirement of his net worth not exceeding \$2 million in order for him to be eligible for an award of attorney's fees and expenses. *See* 28 U.S.C. § 2412(d)(2)(B). Filed with the Court is Appellant's fee agreement with counsel in which Appellant certifies his net worth did not exceed \$2 million at the time this case was filed. Also, Appellant filed a Declaration of Financial Hardship and the Court accepted it lieu of the filing fee. This is direct evidence that Appellant's net worth did not exceed \$2 million at the time the appeal was filed. Appellant's net worth did and does not exceed \$2 million at the time the appeal was filed and at the present time, and he is therefore eligible and entitled to receive an EAJA award. Counsel will provide to the Court and the Secretary additional information regarding Appellant's net worth, if necessary.

**II. APPELLANT SATISFIES EACH OF THE OTHER REQUIREMENTS FOR AN AWARD OF ATTORNEY'S FEES AND EXPENSES**

**A. Appellant is a Prevailing Party.**

To obtain "prevailing party" status, an appellant to this Court need only have gained success "on any significant issue in litigation which achieves some benefit . . . sought in bringing suit." *Shalala v. Schaefer*, 113 S.Ct. 2625, 2632 (1993). Prevailing party status may be established by the procurement of a favorable settlement. *Maher v. Gagne*, 448 U.S. 122, 129 (1980). Appellant is a prevailing party entitled to an award of

fees and expenses because, through the procurement of a favorable settlement agreement, the Court overrode the April 24, 2020 Board Decision denying entitlement to TDIU and adopted the parties' Stipulated Agreement, which grants entitlement to TDIU as of October 15, 2014.

B. The Position of the Secretary Was Not Substantially Justified.

For the position of the Secretary to be considered substantially justified:

[T]he VA must demonstrate the reasonableness, in law and fact of the position of the VA in a matter before the Court, and of the action or failure to act by the VA in a matter before the VA, based upon the totality of the circumstances, including the merits, conduct, reasons given, and consistency with judicial precedent and VA policy with respect to such position, and action or failure to act, as reflected in the record on appeal and the filings of the parties before the Court.

*Elczyn v. Brown*, 7 Vet.App. 175, *quoting Stillwell v. Brown*, 6 Vet.App. 302. The position of the Secretary at the administrative and litigation stages of this case was not substantially justified.

The Secretary's position at the administrative and litigation stages of this case was substantially unjustified because the Secretary of Veterans Affairs and Appellant have reached a settlement overriding the Board's April 24, 2020 Decision and granting the benefit the Board denied – TDIU. Though Appellee has not admitted any error was committed by the Department of Veterans Affairs, Appellant asserts that Appellee's voluntary grant of TDIU, through the settlement agreement filed with the Court, is evidence that the Board's denial of TDIU as moot was substantially unjustified.

C. No Special Circumstances Exist to Make an Award Unjust.

Finally, there is no evidence that "special circumstances" exist in Appellant's case that would make an award of reasonable fees and expenses unjust. 28 U.S.C. § 2412(d)(1)(A).

**III. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES**

Appellant has claimed a reasonable amount of attorney's fees, predicated upon "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Elczyn, Vet.App.* 176-177 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433; 103 S.Ct. 1933, 1939; 76 L.Ed.2d 40 (1983)). To document the amount of fees and expenses requested, the EAJA provides that an applicant "shall" include in the application "the amount sought, including an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 38 U.S.C. § 2412(d)(1)(B).

Accordingly, counsel for Appellant states the following itemization of the actual time expended and expenses in this case at which fees and expenses were computed:

**Attorney Time Expended and Nature of Work Performed**

<b><u>Date</u></b>	<b><u>Hours</u></b>	<b><u>Nature of Work Performed</u></b>
4/27/20	0.50	Sean Kendall (SK) called client, reviewed case.
5/08/20	0.50	SK reviewed file.
7/13/20	<del>0.20</del>	Megan Kondrachuk (MK) drafted and filed Notice of Entry of Appearance, sent copy of document to

		client. [time not billed in the interest of billing discretion]
7/20/20	<del>0.10</del>	MK gave directions to paralegal regarding Record Before Agency (RBA). [time not billed in the interest of billing discretion]
8/04/20	<del>0.10</del>	MK reviewed Court document, updated calendar. [time not billed in the interest of billing discretion]
8/05/20	<del>0.10</del>	MK updated calendar. [time not billed in the interest of billing discretion]
8/11/20	0.10	MK exchanged email with paralegal.
9/04/20	<del>0.10</del>	MK reviewed Court document, updated calendar. [time not billed in the interest of billing discretion]
9/09/20	1.40	MK reviewed RBA, legal research.
9/10/20	0.20	SK consulted with co-counsel MK.
9/10/20	0.30	MK discussed legal research with co-counsel SK.
9/10/20	1.20	MK legal research, reviewing RBA.
9/11/20	2.00	MK reviewing RBA, drafting Briefing Memo, drafting Statement of Case.
9/15/20	0.80	MK drafting Briefing Memo, drafting Procedural History, drafting Argument.
9/16/20	1.40	MK drafting Briefing Memo, drafting Argument.
9/16/20	0.50	SK reviewed Briefing Memo, made comments on Briefing Memo.
9/16/20	<del>0.20</del>	MK drafted Certificate of Service for Briefing Memo. [time not billed in the interest of billing discretion]

9/17/20	0.30	MK finalized Briefing Memo, sent copies to VA attorney and Central Legal Staff (CLS), filed Certificate of Service with Court.
10/01/20	0.30	MK prepared for Briefing Conference, received call from CLS, updated calendar.
10/05/20	0.30	MK attended Briefing Conference.
10/05/20	0.10	MK updated co-counsel.
10/05/20	0.10	MK sent email to client.
10/28/20	0.30	MK drafting Brief, drafting Statement of Case.
11/04/20	<del>0.30</del>	MK sent email to VA attorney, drafted Motion for Extension, filed Motion for Extension with Court. [time not billed in the interest of billing discretion]
12/14/20	1.0	MK drafting Brief, drafting Statement of Case, drafting Statement of Facts.
12/15/20	0.60	MK drafting Brief, drafting Statement of Facts, drafting Statement of Issues.
12/15/20	1.80	MK legal research, drafting Brief, drafting Argument.
12/16/20	3.00	MK legal research, drafting Brief, drafting Argument.
12/17/20	1.00	MK drafting Brief, drafting Argument.
12/18/20	3.40	MK drafting Brief, drafting Argument.
12/20/20	2.80	MK drafting Brief, drafting Argument.
12/20/20	0.40	MK drafting Brief, drafting Table of Authorities, drafting Table of Contents.
12/20/20	0.20	MK drafting Brief, drafting Standard of Review.

12/21/20	1.70	MK drafting Brief, drafting Argument.
12/21/20	0.40	MK drafting Brief, drafted Summary of Argument, revised Stated of Issues.
12/21/20	1.20	MK drafting Brief, proofreading, finalized Brief, filed Brief with Court.
2/19/21	0.10	MK responded to VA attorney's email.
3/24/21	<del>0.10</del>	MK reviewed case status. [time not billed in the interest of billing discretion]
3/25/21	<del>0.10</del>	MK reviewed case status. [time not billed in the interest of billing discretion]
4/06/21	0.50	SK reviewed document, sent email to VA attorney.
4/19/21	<del>0.10</del>	MK sent email to VA attorney. [time not billed in the interest of billing discretion]
4/19/21	<del>0.20</del>	MK drafted and filed with Court Motion for Extension. [time not billed in the interest of billing discretion]
4/20/21	0.10	SK sent email to co-counsel.
5/20/21	0.30	MK reviewed Appellee's Brief.
5/25/21	0.60	MK reviewed document, legal research, sent email to co-counsel.
5/25/21	1.20	SK reviewed legal cases, responded to co-counsel's email.
5/26/21	0.10	MK consulted with co-counsel.
5/27/21	1.50	MK drafting Reply Brief, drafting Argument.
5/28/21	0.50	MK drafting Reply Brief, legal research.
5/28/21	0.50	MK drafting Reply Brief.

6/01/21	1.10	MK drafting Reply Brief, drafting Argument.
6/01/21	0.30	MK drafted Reply Brief, drafting Table of Contents, drafting Table of Authorities.
6/03/21	0.20	MK drafting Reply Brief, consulted with co-counsel on editing.
6/03/21	0.30	SK reviewed Reply Brief.
6/03/21	0.40	MK drafting Reply Brief, editing and proofreading Reply Brief, filed Reply Brief with Court, sent copy of document to client.
6/17/21	<del>0.10</del>	MK sent email to VA attorney. [time not billed in the interest of billing discretion]
6/30/21	<del>0.10</del>	MK sent email to VA attorney. [time not billed in the interest of billing discretion]
6/30/21	0.30	MK downloaded Record of Proceedings (ROP), reviewed ROP, sent email to VA attorney.
7/09/21	<del>0.10</del>	MK Reviewed email from VA attorney, updated calendar. [time not billed in the interest of billing discretion]
7/14/21	0.10	MK sent email to VA attorney.
7/14/21	0.30	MK drafted and filed dispute of ROP with Court.
7/22/21	0.10	MK sent message to co-counsel.
8/01/21	<del>0.10</del>	MK reviewed Court Order, updated calendar. [time not billed in the interest of billing discretion]
8/09/21	0.20	MK reviewed VA attorney's response, reviewed ROP.
8/25/21	0.10	MK called Court, left message.
8/26/21	0.30	Mk spoke with Court, drafted and filed with Court Motion Response to Amended ROP and Court

Order.

8/27/21	<del>0.10</del>	MK reviewed Court Notice. [time not billed in the interest of billing discretion]
12/03/21	0.10	SK reviewed documents.
12/05/21	0.10	MK sent email to VA attorney.
12/06/21	0.60	MK drafted Motion for Leave, drafted Motion for Oral Argument, called client.
12/07/21	0.10	MK filed with Court Motion for Leave and Motion for Oral Argument.
12/09/21	<del>0.10</del>	MK reviewed Court document. [time not billed in the interest of billing discretion]
12/14/21	0.20	MK spoke to client about case status.
12/20/21	<del>0.10</del>	MK reviewed Court order. [time not billed in the interest of billing discretion]
12/20/21	<del>0.20</del>	Timothy Franklin (TF) drafted and filed Notice of Entry of Appearance with Court. [time not billed in the interest of billing discretion]
12/30/21	0.20	TF reviewed settlement proposal from VA attorney.
12/30/21	0.40	MK reviewed settlement from VA attorney, discussed with co-counsel.
12/31/21	0.20	MK sent email to client.
1/02/22	0.20	SK prepared counteroffer to VA attorney.
1/03/22	0.80	MK reviewed Claims file.
1/05/22	3.50	SK reviewed Claims file and Briefs, drafted counter proposal to VA attorney's offer, sent proposal to colleagues.

1/05/22	0.10	SK discussed case with co-counsel.
1/05/22	0.40	MK discussed case with VA attorney, sent email to VA attorney.
1/05/22	0.70	MK spoke again to VA attorney, sent email to VA attorney.
1/06/22	<del>0.10</del>	MK received Court document, updated calendar. [time not billed in the interest of billing discretion]
1/11/22	0.10	MK sent email to VA attorney.
1/12/22	0.20	MK reviewed settlement agreement, discussed case with co-counsel.
1/13/22	0.30	SK reviewed settlement agreement, called client.
1/13/22	0.10	MK finalized Motion to Terminate Case with stipulated agreement, sent Motion to VA attorney.
1/25/22	<del>0.20</del>	MK reviewed case law, updated calendar. [time not billed in the interest of billing discretion]
1/26/22	0.10	MK gave directions to paralegal for EAJA, sent email to paralegal.
2/16/22	0.40	MK reviewed and revised EAJA Application.
2/18/22	0.40	MK continued reviewing and revising EAJA Application, finalized EAJA Application.
<b>Total</b>	46.10	

Appellant seeks attorney's fees at the rate of \$223.08 per hour for representation services before the U.S. Court of Appeals for Veterans Claims. This rate was calculated by adjusting the \$125.00 per hour statutory EAJA rate by the increase in the cost of living. Under 28 U.S.C. section 2412(d)(2)(A)(ii), attorneys may demonstrate that an increase in the cost of living justifies and increase in the \$125.00 per hour statutory cap.

*See Pierce v. Underwood*, 108 S. Ct. 2541, 2553 (1988) (referring to a cap of \$75.00 per hour “adjusted for inflation.”); *Phillips v. General Serv. Admin.*, 924 F.2d 1577, 1583 (Fed. Cir. 1991).

Appellant has chosen July 2020, as the "midpoint" date for this litigation. See 28 U.S.C. section 2412(d)(2)(A)(ii); *Elczyn v. Brown*, 7 Vet.App. 170, 181 (1994) (“[A] permissible cost of living increase would be measured from [March 29, 1996], the date of the enactment [of amendment] of EAJA . . . to the date [of a midpoint in the litigation.”]). For the period July 1996 to December 2021, the available data reviewed for cost of living is for the Denver-Lakewood-Aurora, CO urban area as determined by the Bureau of Labor Statistics’ Consumer Price Index (CPI-U). For the period July 1996 through July 2020, the consumer price index increased by 119.264 points. The consumer price index was 271.264 in July 2020 (first half) and it was 152.0 in July 1996; thus, there was a 78.46% increase during this period. The CPI-U increase of 78.46% equals a rate of \$223.08 per hour. Appellant requests the Court increase the \$125.00 per hour cap to \$223.08 per hour.

The rate per hour, multiplied by the number of billable hours (46.10) results in a total attorney's fee amount of: \$10,283.99. Being mindful of the reasonableness requirement for attorney’s fees, Appellant is not requesting compensation for 2.8 hours, totaling \$624.62, of billable attorney time.

**Law Clerk Time Expended and Nature of Work Performed**

<b><u>Date</u></b>	<b><u>Hours</u></b>	<b><u>Nature of Work Performed</u></b>
12/20/21	0.20	Pulled Briefs from docket, reviewed Briefs for oral argument preparation.
12/23/21	0.80	Reviewed Briefs for oral argument preparation.
<b>Total</b>	1.00	

The law clerk bills for legal work at the rate of \$131.00 per hour for a total of \$131.00.

Appellant is also billing for the paralegal work performed by attorney's assistant.

<b><u>Date</u></b>	<b><u>Hours</u></b>	<b><u>Nature of Work Performed</u></b>
2/02/22	1.00	Preparing EAJA application.
2/03/22	1.10	Preparing EAJA application.
2/04/22	1.80	Preparing EAJA application.
2/09/22	1.20	Preparing EAJA application.
2/10/22	1.40	Preparing EAJA application.
2/13/22	0.80	Preparing EAJA application.
2/14/22	0.50	Preparing EAJA application.
<b>Total</b>	7.80	

The assistant bills for paralegal work at the rate of \$131 per hour for a total of \$1,021.80. The EAJA permits compensation for paralegals that is in line with the prevailing market rates. *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008) (under EAJA paralegal fees may be awarded at prevailing market rates). The Court has

found that “the Laffey Matrix ... is a reliable indicator of fees and is far more indicative of the prevailing market rate in the jurisdiction, particularly as to cases involving fees to be paid by government entities....” *Wilson v. Principi*, 16 Vet.App. 509, 513 (2002).

According to the Laffey Matrix, the prevailing market rate for paralegals from June 1, 2019, and after is \$173.00 per hour. However, Appellant’s counsel practices in Colorado, not the District of Columbia, where the Laffey Matrix was modeled.

The most recent survey data for paralegal rates in the Denver Metro Area is the Colorado Bar Association 2017 Economics of Law Practice Survey. A PDF of this survey can be accessed at [cobra.org/portals/COBAR/repository/2017EconomicSurvey.pdf](https://cobra.org/portals/COBAR/repository/2017EconomicSurvey.pdf).

According to the Survey, the most common hourly billing rate in 2016 for paralegals with 5-9 years of experience was an average of \$118. Appellant requests the Court find this data representative of the prevailing market rate of paralegals in Colorado in 2016. As applied to the attorney’s fees above, Appellant also requests the Court allow an adjustment of this rate for the increase in cost of living in the Denver Metro Area from 2016 to 2020. Using the CPI-U increase for the Denver-Lakewood-Aurora, CO urban area from 2016 to 2020, the increase in the CPI-U for this time period is 10.63%.

Applying this increase to the 2016 paralegal rate found in the Colorado Bar Association’s Survey, the CPI-U increase of 10.63% equals a rate of \$131 (rounded to the nearest dollar). Appellant requests the Court adopt \$131 as the appropriate paralegal rate for the work done in this case.

Appellant is including billing for the administrative work performed by the attorney’s assistant. The assistant bills for administrative work at the rate of \$20.00 per

hour. However, in the interest of billing discretion, Appellant's counsel is not billing the \$20.00 per hour assistant administrative time, which includes the following work:

<b><u>Date</u></b>	<b><u>Hours</u></b>	<b><u>Nature of Work Performed</u></b>
4/29/20	0.10	Sent forms to client.
5/08/20	0.30	Filed Notice of Appeal, Notice of Entry of Appearance, Declaration of Financial Hardship, Fee Agreements with Court, sent copy of documents to client.
6/02/20	0.10	Sent signed form to VA attorney.
7/13/20	0.10	Updated calendars.
8/10/20	0.10	Updated calendars.
8/11/20	0.10	Sent emails to VA attorney and Court.
8/17/20	0.10	Uploaded Record Before Agency (RBA), sent RBA to counsel.
9/04/20	0.10	Updated calendars, sent copy of Court document to client.
9/16/20	0.10	Updated calendars.
10/01/20	0.10	Updated calendars.
10/01/20	0.10	Sent copy of document to client.
11/04/20	0.10	Sent copy of document to client.
11/12/20	0.10	Received Court document.
12/21/20	0.10	Sent copy of document to client.
2/19/21	0.10	Sent copy of Court document to client.
4/06/21	0.10	Updated calendars, sent copy of document to client.

4/07/21	0.10	Sent email to client.
6/03/21	0.10	Sent copy of document to client.
7/27/21	0.10	Sent copy of document to client.
8/09/21	0.10	Sent copy of document to client.
8/25/21	0.10	Sent copy of document to client.
12/03/21	0.10	Sent copy of Court document to client.
12/07/21	0.10	Sent coy of documents to client.
<b>Total</b>	<b>2.50</b>	

Appellant also seeks reimbursement for the costs of this litigation. An itemization of expenses for which reimbursement is sought is as follows:

<b><u>Nature of Expense</u></b>	<b><u>Amount</u></b>
Photocopying @ \$.10 per page	\$ 1.20
Postage	\$ .58
Facsimile Expenses @ \$.50 per page	\$ 4.50
Long Distance Telephone Charges @ \$.13 per minute	\$ 1.82
<b>Total:</b>	<b>\$ 8.10</b>

Considering the foregoing, Appellant's counsel requests a fee of \$11,444.89 based upon 46.10 hours of attorney work totaling \$10,283.99, 1 hour of law clerk work totaling \$131, 7.80 hours of paralegal work completed by the attorney's assistant totaling \$1,021.80, and \$8.10 in expenses.

### **Lead Attorney Certification**

As lead attorney, the undersigned certifies that he has read the above combined billing statement and is satisfied that it accurately reflects the work performed by all representatives. The undersigned further certifies that all time that was redundant or excessive, in lead attorney's estimation, was eliminated

Accordingly, the total amount of attorney's fees and expenses for which Appellant seeks reimbursement for legal representation services before the Court on his behalf is:  
**\$11,444.89.**

Dated: February 18, 2022

Respectfully submitted,

/s/ Sean A. Kendall

Sean Kendall, Esq.

2727 Pine Street, Suite 6

Boulder, CO 80302

(303) 449-4773

Lead Attorney for Appellant

/s/ Megan Kondrachuk

Megan Kondrachuk, Esq.

2727 Pine Street, Suite 6

Boulder, CO 80302

(303) 449-4773

Co-counsel for Appellant