UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

FLORENCE PETITE, **Appellant,** **v.** **DENIS MCDONOUGH,** **Secretary of Veterans Affairs,** **Appellee.**	U.S.C.A.V.C. Case No. 19-5815

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

Appellant, Ms. Florence Petite, hereby applies to this honorable Court for an award of her attorney's fees and expenses in the amount of $ 15,773.00. 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. Petite has expressly authorized this application.

I. Procedural History.

On August 15, 2019, the Board of Veterans' Appeals entered a decision that denied Ms. Petite entitlement to continued benefits under the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA). Ms. Petite filed a timely notice of appeal to this Court on August 27, 2019. The lawyer (with respect to whose fees this application is concerned) entered his appearance on

October 23, 2020.

This case was litigated. It was necessary for Ms. Petite to (A) examine, inventory, and analyze the claim file; (B) review and inventory the Secretary's designation and (C) counter-designate additional contents of the record on appeal, (D) inspect and inventory the record when it was filed, (E) file an opening brief, (F) reviewed for response the appellee's brief, (G) file a reply brief and appear for oral argument before the Court. This Court's dispositive order was dated December 16, 2021, about 28 months after counsel entered his appearance.

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

II. Averments.

Ms. Petite 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. Petite'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. Petite is a "party" to this action within the meaning of 28 U.S.C. § 2412(d)(2)(B);

(7) Ms. Petite is a "prevailing party" in this matter within the meaning of 28 U.S.C. § 2412(d)(1)(a);

(8) Ms. Petite is not the United States;

(9) Ms. Petite 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. Petite submits below an itemized statement of the fees and expenses for which she applies. The itemization shows the rates at which the fees and (where applicable) the expenses were calculated. Accordingly, Ms. Petite 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. Petite is a party eligible to receive an award of fees and expenses because his net worth does not exceed $2 million. *See* 28 U.S.C. § 2412(d)(2)(B). Ms. Petite's declaration establishes this allegation. It is annexed to this application as Exhibit 1.

Ms. Petite'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. Petite 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 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. Petite relies upon the following to satisfy the *Sumner* criteria:

1. Ms. Petite argued in his opening brief five arguments: (1) Neither the definition of "child" in 38 U.S.C. § 101(4) nor in 38 C.F.R. § 3.57 support the Board's decision to terminate Ms. Petite's CHAMPVA benefits; (2) Nothing in the plain language of 38 U.S.C. § 1781 required the termination of Ms. Petite's CHAMPVA benefits; (3) The mandate of the Affordable Care Act and its application by the service departments to TRICARE military retirement benefits controls the disposition of Ms. Petite's appeal; (4) The Equal Protection Clause of the Constitution requires that Ms. Petite's CHAMPVA benefits must be extended to age 26: and (5) The Board erred by failing to consider or apply the provisions of 38 U.S.C. § 101(4)(A)(iii). Opening Brief, pp. 4-15.

2. The final dispositive decision in this appeal, Exhibit A, reports at p. 2, held "that, to qualify as a 'child' eligible to receive CHAMPVA benefits between ages 18 and 23, the course of instruction that an individual is pursuing at a VA-approved educational institution need not be full-time." Court's decision, p. 2.

3. The decision continued, "The central issue in this case is whether the Board correctly interpreted controlling statutes when determining that Ms. Petite's CHAMPVA eligibility ended when she turned 18. The problem is that the parties disagree as to which statutes actually control." Court's decision, p. 3.

4. The decision also held that, "unless a particular statute indicates otherwise, whether an individual's course of instruction is full-time or part-time is not a relevant consideration under section 101(4)(A)(iii) when determining whether an individual is a 'child' for CHAMPVA purposes." Court's decision, p. 7.

5. The Court's decision concluded, "In sum, consistent with the plain language of section 1781, which does not contain a specific definition of 'child' for CHAMPVA purposes, and section 101(4), which does contain a general definition of the term for all title 38 programs, we hold that an individual who is between ages 18 and 23 and who otherwise meets the

requirements of sections 101(4)(A)(iii) and 1781(a) qualifies as a 'child' for CHAMPVA purposes if he or she is 'pursuing a course of instruction at an approved educational institution,' regardless of whether that course of instruction is part-time or full-time. 38 U.S.C. § 101(4)(A)(iii); see 38 U.S.C. § 1781(a). Because the plain language of these statutes compels this interpretation, our inquiry is at an end and there is no need to look to legislative history or other authorities to discern their meaning. *See Good Samaritan Hosp.*, 508 U.S. at 409; *Est. of Cowart*, 505 U.S. at 475." Court's decision, p. 10.

6. The Court's explained its disposition was as follows, " . . . the Board found that Ms. Petite was not eligible to continue receiving CHAMPVA benefits because she was over age 18 and was not pursuing a full-time course of instruction at a VA-approved educational institution. R. at 3, 6. That finding was based on a misinterpretation of the controlling law, as neither section 101(4)(A)(iii) nor section 1781 requires a full-time course of instruction for an individual between ages 18 and 23 to qualify as a child for CHAMPVA purposes. The Court will therefore reverse the Board's finding that Ms. Petite was categorically ineligible to continue receiving CHAMPVA benefits due to her enrollment in a part-time, rather than full-time, course of instruction. *See Deloach v.*

> *Shinseki*, 704 F.3d 1370, 1380 (Fed. Cir. 2013) (explaining that reversal of a Board finding is appropriate where the Board has performed the necessary factfinding and explicitly weighed the evidence and the Court is left with the definite and firm conviction that a mistake has been committed); *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004) (holding that "reversal is the appropriate remedy when the only permissible view of the evidence is contrary to the Board's decision"). However, because the Board has not yet assessed whether Ms. Petite's course of instruction is at a VA-approved educational institution, the Court will remand the matter for the Board to address that issue in the first instance and to adjudicate her entitlement to CHAMPVA benefits under the correct interpretation of the law. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate"). Court's decision, pp. 10-11.

These statements in the order establish that the Court "recognized" and entered findings as to the "administrative errors" on which the remand was predicated. Thus, the quoted passages from this Court's order in Ms. Petite's case establish that the remand of his 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), *rehrg denied*, _ F.3d _ (May 2, 2000). It is sufficient for Ms. Petite 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. Petite seeks compensation. *See* 28 U.S.C. § 2412(d)(1)(B).

Attorney Time, Costs and Other Expenses

Date	Activity	Hours	Expenses
10/13/20	Received email from Courtney Smith re: Pro Bono Consortium referral and reviewed file on line and agreed to take the case.	2.00	
10/23/20	Prepared and filed CAVC Notice of Appearance.	n/a	
10/27/20	Prepared and filed Motion for Leave to File New Briefing.	2.00	
11/4/20	Court ordered that the motion for leave to file substitute briefing was granted.	n/a	
11/30/20	Called Ms. Petite and discussed her situation.	1.00	
12/7/20	Made a preliminary review of RBA to confirm contents included all relevant documents, identify possible issues raise in RBA and prepare for more through examination of the relevant procedural and evidentiary documents.	3.00	
12/9/20	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	
12/11/20	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	
1/27/21	Reviewing the Ms. Petite's *pro se* brief and the Government's brief.	3.00	
1/29/21	Began preparation for writing the opening brief by researching and reviewing pertinent statutes; regulations, and caselaw.	4.00	
2/1/21	Began drafting of the opening brief focusing on what arguments needed to be presented.	3.00	
2/2/21	Drafted Argument I	2.00	
2/2/21	Drafted Argument II	2.00	
2/2/21	Drafted Argument III	2.00	

Date	Activity	Hours	Expenses
2/3/21	Drafted Argument IV	2.00	
2/3/21	Drafted Argument V and made final edits of brief before filing; cc: client	4.00	P
5/11/21	Rcv'd. and reviewed Appellee's Brief f. 5/11/21.	3.00	
6/28/21	Reply Brief prep. - draft of Argument.	2.50	
6/29/21	Edit and refine Argument	3.00	
6/30/21	Completed final revisions to draft of brief	3.00	
7/1/21	Reply Brief filed.	n/c	
9/27/21	Preparation for oral argument.	4.00	
9/29/21	Travel to Washington D.C. for oral argument.	8.00	
10/1/21	Oral Argument before panel.	4.00	
10/3/21	Return from oral argument in Washington, D.C.	8.00	
12/16/21	Rec'd and reviewed Court's decision of 12/16/21.	1.00	
3/14/21	Prepared and filed EAJA Application; cc: VAGC and client	2.00	P
	Total Hours	71.00	

75.5 hours x $ 208.79 per hour = $ 15,763.65
Attorney Fee Requested: $ 15,763.65

Expenses

UPS:	$ .00
Postage:	5.25
Copying: (41 x $.10)	4.10
Total Expenses:	$ 9.35

Total attorney fee & expenses: $ 15,773.00

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[1], as of

[1] The law offices of Carpenter Chartered are located in Topeka, Kansas, however, I have been working remotely in The Villages, Florida since December 2019 which is why the South Region and not the Midwest region has been used in this.

March 29, 1996, the base year CPI-U was 151.7; as of February 2021 it was 253.386, a 67 % increase. Applying this increase to the $ 125.00 hourly rate provided by the Equal Access to Justice Act, the current hourly rate would be $ 208.79.

Applying the rate computed above to the total time expended by counsel for Appellant, Appellant seeks a total attorney fee of $ 15,763.65.

The lawyer has reviewed the itemization to correctly categorize each entry. The lawyer has also reviewed the itemization to exercise "billing judgment" by (A) determining whether the activity or expense might be an overhead expense or, for any other reason, not properly billable and by (B) assigning to each task a rate appropriate to the work involved, using the three rates described above. 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, Appellant seeks a total reimbursement of $ 9.35, for a total attorney fee, costs and expense award of $ 15,773.00.

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. Petite respectfully moves for an order awarding to appellant his attorney's fees and expenses as set forth herein.

This application for attorney's fees and expenses is—

Respectfully submitted for Ms. Petite 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 April 8, 2022

Exhibit 1

THE VETERANS CONSORTIUM PRO BONO PROGRAM
AGREEMENT TO ENGAGE AN ATTORNEY

SCOPE OF LEGAL SERVICES: I, **Ms. Florence L. Petite**, hereby engage Attorney(s) **Mr. Kenneth M. Carpenter** of **Carpenter, Chartered**, to represent me before the United States Court of Appeals for Veterans Claims in Docket No. **19-5815**. This Agreement becomes effective after countersigned by my Attorney(s).

CONFIDENTIALITY: All communications, oral or written, transmitted via voice, data transmission, or otherwise, between my Attorney(s) and me, TVC administrative and legal staff, or co-counsel shall be strictly confidential and construed as privileged attorney/client communication.

FEES AND EXPENSES: I understand that no fees or expenses will be charged to me, or anyone on my behalf, for the representation provided to me because of this Agreement. However, I agree that an application for attorney's fees and litigation expenses, for my appeal, may be made under the provisions of the Equal Access to Justice Act (EAJA). Further, if the Court grants that application, I understand the full amount of such award may be retained by the assigned attorney(s). I understand that I will be consulted about any such application under EAJA, and I agree to provide any assistance required of me in connection with that application. I further agree that any check issued by the United States, for any fee or expense paid in this case pursuant to EAJA, may be endorsed and negotiated by the assigned attorney(s) or his/her successor as my attorney in fact for that specific purpose. I understand that any such award will be paid by the Department of Veterans Affairs separate and apart from any recovery to which I may be entitled.

I certify that my net worth at the time of the filing of the appeal in this case was less than two million dollars ($2,000,000.00)

DISCHARGE AND WITHDRAWAL: I acknowledge that any attorney's ability to effectively represent my best interest in the matter is dependent upon my continued cooperation and adherence to the terms of this Agreement. Accordingly, if I refuse to abide by the terms of this Agreement, or engage in a course of conduct that makes it unreasonably difficult for any attorney working on my behalf to continue the representation, then that attorney reserves the right to withdraw from this representation. My Attorney(s) likewise reserves the right to withdraw from this representation for other good cause, or if such withdrawal can be accomplished without material adverse effect on my interests. Furthermore, upon termination, whether by myself or Attorney(s), through withdrawal, discharge, or otherwise, I can request a copy of my file on CD-ROM disc in Adobe format.

I understand that my Attorney(s) will use professional judgment to pursue only those grounds for appeal that said attorney determines to be meritorious or deserving of valid judicial consideration.

My Attorney(s) reserves the right to decline to pursue issues on appeal that would be inconsistent with professional and ethical obligations. I further understand that I may discharge my attorney(s) under this program at any time and continue the case on my own.

CASE TRANSITION: I understand that this Agreement applies to representation in my appeal before the Court of Appeals for Veterans Claims. Similarly, if my appeal is subject to remand to the Department of Veterans Affairs, this Agreement will govern representation before that Agency. This is not an agreement to engage the attorney(s) mentioned above to represent me before the U.S. Court of Appeals for the Federal Circuit if further appealed to that Court.

EXHIBIT 1

NO PROMISES OR GUARANTEES ABOUT OUTCOME: I have read and understand this contract and agree that my Attorney(s) has made no promises or guarantees regarding the outcome of this matter. I will be notified of all settlement offers in this matter and no dismissal or settlement of any claim will be made without my express consent.

CONSENT TO RELEASE OF INFORMATION

I give my consent to the National Personnel Records Center (Military Personnel Records), St. Louis, Missouri; to the Department of Defense, the Department of Veterans Affairs and the Social Security Administration ; or any other public or private custodian (including, but not limited to, hospitals , clinics, and current and former treating physicians) that possess or control my military, veteran, medical, psychiatric, drug or alcohol treatment, Discharge Review or Correction Board records and files, to release to my attorneys, or to any person designated by my attorneys, all records contained in those files. I **hereby authorize the VA to provide a copy of my records to the undersigned attorney(s).**

If these records include information (protected under 38 U.S.C. §7332) regarding drug abuse, infection with human immunodeficiency virus (H1V), alcoholism or alcohol abuse, or sickle cell anemia, I specifically consent to that disclosure as well. To permit this, and for no other purpose, I waive my rights under the Privacy Act, 5 U.S.C. § 522a(b), and under any other federal or state law or regulation which controls access to my records.

ACKNOWLEDGEMENT OF ENGAGEMENT AND RELEASE OF INFORMATION

I hereby acknowledge that I have read the above information, consisting of two pages, and agree to engage the aforementioned attorney(s) and consent to the release of information as noted above.

Ms. Florence L. Petite, Appellant's Signature — Date: 16 October 2020

Attorney's Counter-Signature — Date: 10-21-2020

EXHIBIT 1