

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

PAUL E. PETERSEN

Appellant,

Vet. App. No. 20-8475

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS
AFFAIRS

Appellee.

**APPELLANT'S MOTION FOR ATTORNEY'S FEES AND COSTS
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

AND NOW COMES, the Appellant/Veteran, Paul E. Petersen, by and through his attorney, Susan Paczak, Esquire, of ABES BAUMANN, P.C., and pursuant to 28 U.S.C., § 2412, moves the Court to grant attorney's fees and costs as follows:

1. On December 10, 2020, Appellant/Veteran Paul E. Petersen, appealed the August 14, 2020 Decision of the Board of Veterans' Appeals (BVA) which denied, along with other conditions, Veterans claims of entitlement to an initial rating in excess of 20 percent for residuals of a left eye injury for the period of July 28, 1995 to March 11, 2016 and denied an initial rating higher than 60% for residuals of a left eye injury for the period from March 11, 2016.

2. On March 10, 2022, the parties filed a Joint Motion for Partial Remand requesting this Honorable Court enter an Order vacating a portion of the August 14, 2020 BVA decision which denied Veteran's claims of entitlement to an initial rating in excess of 20 percent for residuals of a left eye injury for the period of July 28, 1995 to March 11, 2016 and to remand the matter for readjudication.

3. On March 21, 2022, this Honorable Court **granted** the Joint Motion for Partial Remand (JMPR). This Court ordered that the appeal of that part of the August 14, 2020 decision that denied entitlement to a disability rating in excess of 60% from March 11, 2016 for residuals of a left eye injury was dismissed and further ordered that the part of the decision that denied entitlement to an initial disability rating higher than 20% for residuals of a left eye injury for the period between July 28, 1995 and March 11, 2016 was **vacated** and the matter **remanded** in accordance with the terms of the parties' JMPR.

4. Appellant/Veteran is a prevailing party in this matter. In order to receive an EAJA award, an EAJA applicant must be a prevailing party. See, 28 U.S.C. §2412(d) ("court shall award to a prevailing party . . . fees and other expenses"); *Gordon v. Principi*, 2003 U.S. Vet. App. Claims LEXIS 611 (August 8, 2003), citing *Sumner v. Principi*, 15 Vet. App. 256 (2001); *Briddell v. Principi*, 16 Vet. App. 267, 271 (2002); *Cullens*, 14 Vet. App. at 237. The Appellant has the burden of demonstrating prevailing-party status under the EAJA. *Id.* Prevailing-party status arises in either of two ways. The first is through a direction of the Court, evident within the terms of the particular Court decision upon which the Appellant is basing the EAJA application, for VA to award VA benefits to the Appellant. *Sumner*, 15 Vet. App. at 264-65, *Zuberi v. Nicholson*, 19 Vet. App. 541 (2006). The second is through the grant of a merits-stage Court remand that was predicated upon administrative error. *Zuberi*, 19 Vet. App. at 544. In order for a remand to have been predicated upon administrative error, the remand must either (1) have been directed in a Court opinion, decision, or order that contained a Court recognition of administrative error or (2) have been granted on the basis of a concession of error by the Secretary. *Gordon*, citing *McCormick v. Principi*, 16 Vet. App. 407, 411 (2002); *Briddell*, 16 Vet. App. at 271-72. The Court will not "investigate at the EAJA prevailing-party stage the validity, type, or nature of the administrative

error." *McCormick*, 16 Vet. App. at 411. Where a plaintiff secures a remand requiring further agency proceedings because of the alleged error by the agency, the plaintiff qualifies as a prevailing party without regard to the outcome of the agency proceedings where there has been no retention of jurisdiction by the court or when successful in the remand proceedings where there has been a retention of jurisdiction. *Zuberi* at 545, citing *Former Employees of Motorola Ceramic Prods. v. United States*, 336 F.3d 1360, 1366 (Fed. Cir. 2003).

In this matter, the Appellant/Veteran is a prevailing party as the Secretary conceded that the Board offered an inadequate statement of reasons or bases supporting its decision. Prior to March 11, 2016, Veteran's service-connected residuals of his left eye injury had been assigned an initial 20% disability rating under 38 C.F.R. §4.84a, Diagnostic Code (DC) 6009 (1995), injury of a left eye. As the rating criteria for this diagnostic code was revised effective December 10, 2008, the amended rating criteria **do not apply** to Veteran's case. *See* 73 Fed. Reg. 66,543 (November 10, 2007) which explicitly indicated that "these amendments shall apply to all applications for benefits received by VA on or after December 10, 2008." Therefore, under the applicable, pre-revised rating criteria, 38 C.F.R. §4.84a provided, in pertinent part, the following:

Eye, injury of, unhealed: the above disabilities, in chronic form, are to be rated **from 10 percent to 100 percent for impairment of visual acuity or field loss, pain, rest-requirement, or episodic incapacity**, combining an additional rating of 10 percent during the continuance of active pathology. Minimum rating during active pathology ...10. (emphasis added).

38 C.F.R. §4.48a (1995). In Veteran's case, the Board failed to explain the standard it applied to the evidence of record to determine an appropriate rating based on "pain, rest-requirements, or episodic incapacity" in DC 6009. Specifically, the Board did not explain how it assessed "episodic incapacity" beyond just referencing the term. Furthermore, although the Board identified and discussed evidence that reflected pain and rest-requirements that rose to a compensable level, the

Board failed to explain why a higher rating was not warranted. Specifically, the Board did not explain why it was significant that Veteran's hour-long painful flare-ups did not ultimately impair his daily activities with respect to assigning a disability rating for "pain and rest-requirements" under DC 6009. And if the Board was using analogous ratings, it did not explain which diagnostic code(s) it used and why. Therefore, as it was unclear what standard the Board employed when it addressed the rating criteria, it was conceded that a remand was necessary.

In addition, the pre-2008 rating criteria for DC 6009 provided for ratings from 10% to 100% for impairment of visual acuity or field loss, pain, rest-requirements, or episodic incapacity, combining an additional 10% during continuance of active pathology. 38 C.F.R. §4.84a, DC 6009. 38 C.F.R. §4.80 (1995) only dealt with the visual impairment component and not the remaining factors listed in the rating criteria for DC 6009.

Therefore, remand is warranted for the Board to provide an adequate statement of reasons or bases applying the pre-2008 rating criteria for diagnostic code 6009 to the evidence of record for the period prior to March 11, 2016, concerning the appropriate initial evaluation/rating for Appellant's left eye disability. (*Tucker v. West*, 11 Vet. App. 369, 374 (1998), remand is appropriate "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations...).

5. The Secretary's position in this matter was not substantially justified. As discussed in detail above, the BVA misapplied the criteria for DC 6009 with regards to Veteran's initial disability rating for residuals of his left eye injury for the period from July 28, 1995 to March 11, 2016.

6. Appellant is qualified to receive an award of attorney's fees. Appellant does not have a net worth in excess of \$2 million at this time or at any time during the litigation of this case.

7. Appellant's counsel expended 29.3 hours of attorney time and 13.5 hours of paralegal time in preparing and presenting this case to the Court. Attached and made a part of his motion is Exhibit A, which provides a detailed listing of the hours expended in this matter. A rate more than \$125.00 per hour for attorney time is warranted in this matter based on the increase in the cost of living since March 1996. *See* 28 U.S.C. §2412(d)(2)(A)(ii). The attorney fee rate for 2021, adjusted for inflation for the Northeast Region (note that there is a CPI-U issued for Pittsburgh Metropolitan Region, but it does not provide a monthly listing; therefore, it is submitted the Northeast Region, which includes Pennsylvania, provides a more accurate reflection of CPI-U) was \$216.41 (this was calculated taking the CPI-U rate from March 1996 in comparison with the CPI-U rate for May 2021.) The market rates for Appellant's attorney exceeded \$216.41 per hour during the relevant period. The normal hourly rate for attorney's fees during that period of time was \$300.00. The rate for paralegal time was \$75.00 per hour.

WHEREFORE, counsel for Appellant/Veteran Paul E. Petersen respectfully requests that this Honorable Court assess attorney's fees in the amount of \$216.41 per hour and paralegal fees at \$75.00 per hour, amounting to \$7,353.31, against the Secretary of Veterans' Affairs pursuant to the Equal Access to Justice Act, 28 U.S.C., § 2412.

Respectfully submitted,

ABES BAUMANN, P.C.

/s/ Susan Paczak

Susan Paczak
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SP/SWK

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

PAUL E. PETERSEN, APPELLANT

v.

CAVC NO. 20-8475

DENIS MCDONOUGH, SECRETARY
OF VETERANS AFFAIRS, APPELLEE

**ABES BAUMANN, P.C. TIME RECORD
AS OF APRIL 19, 2022**

DATE	DESCRIPTION OF SERVICE	PERFORMED BY	TIME
8/25/20	Review BVA Decision dated 8/14/20 and email to Veteran	Attorney	.5
12/11/20	Review file and prepare Notice of Appeal and Notice of Appearance	Attorney	.8
12/11/20	Review Notice of Docketing	Attorney	.1
1/6/21	Review Corrected Notice of Docketing	Attorney	.1
1/6/21	Review Transmittal of Decision of Board of Veterans Appeals from Office of General Counsel	Attorney	.1
2/2/21	Review CAVC Attorney Notice of Appearance	Attorney	.1
2/8/21	Review Certificate of Service of RBA from Office of General Counsel and	Attorney	.1
3/2/21	Review Notice to File Brief (Brief due within 60 days)	Attorney	.1
3/12/21	Review Notice of CAVC CLS Conference scheduled for 4/9/21	Attorney	.1
3/24/21	Research for Summary of the Issues, issues 1 and 2 and draft of argument for those issues	Attorney	3.5
3/25/21	Research and preparation of Summary of the Issues, issue 3	Attorney	1.5
3/26/21	Proofread Summary of the Issues and Certificate of Service	Attorney	.5
4/9/21	Preparation for and attendance at pre-briefing Conference	Attorney	1.0
4/13/21	Review Notice of CAVC CLS Conference Update scheduled for 4/23/21	Attorney	.1

EXHIBIT A

4/23/21	Preparation for and attendance at second pre-briefing Conference	Attorney	.7
4/27/21	Review CAVC Order lifting Stay and notice that Appellant's Brief is due within 30 days	Attorney	.1
5/20/21	Review RBA and draft procedural history and Statement of the Facts for Brief	Attorney	3.0
5/21/21	Update research and draft argument for Issues I and II of Brief	Attorney	3.5
5/22/21	Update research and draft Issue 3 of Brief	Attorney	1.5
5/23/21	Prepare Summary of Argument and Conclusion of Brief	Attorney	1.0
5/27/21	Proofread and final revisions to Brief	Attorney	1.8
9/16/21	Review file and read Appellee Brief	Attorney	.8
9/30/21	Prepare Motion for Extension of Time	Attorney	.5
10/4/21	Review CAVC Order granting Motion to Extend Time to File Appellant's Reply Brief until 11/15/21	Attorney	.1
10/28/21	Initial preparation of Index of RBA (consisting of 7,925 pages) pages 1-2758	Paralegal	4.0
10/29/21	Preparation of Index of RBA pages 2759 to 4303	Paralegal	3.0
11/2/21	Preparation of Index of RBA pages 4304 to 5250	Paralegal	1.0
11/3/21	Preparation of Index of RBA pages 5251 to 6241	Paralegal	1.0
11/4/21	Preparation of Index of RBA pages 6242 to 7006	Paralegal	1.0
11/8/21	Preparation of Index of RBA pages 7007 to 7925	Paralegal	1.0
11/9/21	Research for Reply Brief	Attorney	1.5
11/10/21	Draft Issue and argument for Reply Brief	Attorney	2.5
11/11/21	Proofread and revise Reply Brief	Attorney	1.0
11/15/21	Review CAVC Record of Proceeding	Attorney	.3
12/3/21	Review CAVC Assign Judge	Attorney	.1
1/11/22	Review CAVC Order Assigning Panel of Judges	Attorney	.1
1/13/22	Review CAVC Order scheduling Oral Argument for 3/30/22	Attorney	.1
2/1/22	Review Notice of Appearance of Substitute Counsel	Attorney	.1

3/10/22	Review Motion of Appellee Joint Motion for Partial Remand	Attorney	.5
3/10/22	Review CAVC Order granting Joint Motion for Partial Remand	Attorney	.1
3/14/22	Review CAVC Order Oral Argument is Cancelled	Attorney	.1
3/25/22	Review CAVC Mandate	Attorney	.1
4/12/22	Prepare EAJA Petition	Attorney	.5
4/13/22	Preparation of Time Record	Paralegal	2.5
4/19/22	Review of Time Record	Attorney	.3

TOTAL ATTORNEY TIME: Attorney: 28.9 hours at \$_____ = \$_____
Paralegal: 13.5 hours at \$75.00 = \$1,012.50

TOTAL AMOUNT: \$-----



Databases, Tables & Calculators by Subject

Change Output Options: From: 1996 To: 2021

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Data extracted on: March 3, 2022 (12:10:53 PM)

CPI for All Urban Consumers (CPI-U)

Series Id: CUUR0100SA0

Not Seasonally Adjusted

Series Title: All items in Northeast urban, all urban consumers, not seasonally adjusted

Area: Northeast

Item: All Items

Base Period: 1982-84=100

Download: [xlsx](#)

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Annual	HALF1	HALF2
1996	161.4	162.2	162.8	162.9	163.0	163.1	163.4	164.0	164.6	165.1	165.4	165.7	163.6	162.6	164.7
1997	166.2	166.9	167.3	167.1	166.8	167.0	167.6	167.8	168.4	168.7	168.5	168.4	167.6	166.9	168.2
1998	168.8	169.1	169.3	169.5	169.4	169.6	169.9	170.5	170.6	171.3	171.2	171.2	170.0	169.3	170.8
1999	171.4	171.6	171.9	172.8	172.8	173.1	173.4	174.1	174.8	175.5	175.5	175.5	173.5	172.3	174.8
2000	176.2	177.6	178.5	178.5	178.4	179.0	179.8	179.9	180.7	181.2	181.5	181.3	179.4	178.0	180.7
2001	182.2	182.8	183.7	184.2	184.6	185.3	185.0	185.1	185.1	185.0	185.0	184.2	184.4	183.8	184.9
2002	184.9	186.1	187.0	187.8	187.7	187.8	188.3	189.3	189.5	189.9	190.1	189.6	188.2	186.9	189.5
2003	190.5	191.7	193.0	192.6	192.7	192.8	193.5	194.3	195.0	195.4	195.1	194.9	193.5	192.2	194.7
2004	195.9	196.8	198.6	199.4	199.9	201.1	201.0	201.0	201.2	202.5	202.6	201.9	200.2	198.6	201.7
2005	202.6	203.6	206.0	206.9	206.2	206.2	207.9	208.7	210.8	211.5	210.0	209.0	207.5	205.3	209.7
2006	211.0	211.6	212.8	214.7	215.7	216.7	217.5	218.1	216.3	215.2	214.8	215.2	215.0	213.8	216.2
2007	215.813	216.651	218.334	219.501	220.591	221.579	221.945	221.559	221.436	221.951	223.356	223.425	220.512	218.745	222.279
2008	224.325	225.213	226.926	228.133	230.089	232.649	234.545	233.788	232.841	230.837	227.236	225.091	229.306	227.889	230.723
2009	225.436	226.754	227.309	227.840	228.136	229.930	230.154	230.883	231.200	231.304	231.708	231.462	229.343	227.568	231.119
2010	232.294	232.382	233.188	233.615	234.130	233.834	233.885	234.150	234.027	234.671	235.094	235.141	233.868	233.241	234.495
2011	235.969	237.110	239.074	240.267	241.566	241.690	242.282	243.033	243.323	243.014	242.652	241.987	240.997	239.279	242.715
2012	242.879	243.850	245.125	245.850	245.709	245.201	244.984	246.252	247.409	247.564	247.097	246.456	245.698	244.769	246.627
2013	247.277	248.665	248.719	248.464	248.584	248.851	249.411	249.858	250.231	249.320	249.503	249.567	249.038	248.427	249.648
2014	251.045	251.233	252.413	252.506	253.598	253.555	253.833	253.185	253.154	252.730	251.781	250.519	252.463	252.392	252.534
2015	250.016	250.619	251.451	251.760	252.770	253.626	253.405	252.903	252.922	252.504	252.573	251.670	252.185	251.707	252.663
2016	251.739	252.250	252.854	254.270	255.023	255.471	255.386	255.545	256.085	256.605	256.541	256.427	254.850	253.601	256.098
2017	258.073	258.768	258.510	259.165	259.386	259.335	259.833	259.508	260.875	260.580	260.630	260.791	259.538	258.873	260.203
2018	262.188	263.260	263.556	264.669	265.840	265.950	265.830	266.425	266.709	266.464	265.487	265.286	265.139	264.244	266.034
2019	266.109	266.706	268.025	269.070	269.744	270.133	270.381	270.548	270.563	270.348	270.643	270.429	269.392	268.298	270.485
2020	272.316	273.080	272.531	271.325	271.345	272.283	273.347	273.597	273.925	273.374	273.543	274.225	272.908	272.147	273.669
2021	275.427	276.473	278.197	280.234	281.858	284.741	285.220	285.630	286.423	288.236	289.835	290.405	283.557	279.488	287.625

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Consumer Price Index Historical Tables for Northeast

CONSUMER PRICE INDEX FOR ALL URBAN CONSUMERS (CPI-U)

ALL ITEMS (1982-84=100)	Northeast											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Consumer Price Index												
2012	242.879	243.850	245.125	245.850	245.709	245.201	244.984	246.252	247.409	247.564	247.097	246.456
2013	247.277	248.665	248.719	248.464	248.584	248.851	249.411	249.858	250.231	249.320	249.503	249.567
2014	251.045	251.233	252.413	252.506	253.598	253.555	253.833	253.185	253.154	252.730	251.781	250.519
2015	250.016	250.619	251.451	251.760	252.770	253.626	253.405	252.903	252.922	252.504	252.573	251.670
2016	251.739	252.250	252.854	254.270	255.023	255.471	255.386	255.545	256.085	256.605	256.541	256.427
2017	258.073	258.768	258.510	259.165	259.386	259.335	258.833	259.508	260.875	260.580	260.630	260.791
2018	262.188	263.260	263.556	264.669	265.840	265.950	265.830	266.425	266.709	266.464	265.487	265.286
2019	266.109	266.706	268.025	269.070	269.744	270.133	270.381	270.548	270.563	270.348	270.643	270.429
2020	272.316	273.080	272.531	271.325	271.345	272.283	273.347	273.597	273.925	273.374	273.543	274.225
2021	275.427	276.473	278.197	280.234	281.858	284.741	285.220	285.630	286.423	288.236	289.835	290.405
2022	292.644	294.605	298.403									
Percent change from 12 months ago												
2012	2.9	2.8	2.5	2.3	1.7	1.5	1.1	1.3	1.7	1.9	1.8	1.8
2013	1.8	2.0	1.5	1.1	1.2	1.5	1.8	1.5	1.1	0.7	1.0	1.3
2014	1.5	1.0	1.5	1.6	2.0	1.9	1.8	1.3	1.2	1.4	0.9	0.4
2015	-0.4	-0.2	-0.4	-0.3	-0.3	0.0	-0.2	-0.1	-0.1	-0.1	0.3	0.5
2016	0.7	0.7	0.6	1.0	0.9	0.7	0.8	1.0	1.3	1.6	1.6	1.9
2017	2.5	2.6	2.2	1.9	1.7	1.5	1.3	1.6	1.9	1.5	1.6	1.7
2018	1.6	1.7	2.0	2.1	2.5	2.6	2.7	2.7	2.2	2.3	1.9	1.7
2019	1.5	1.3	1.7	1.7	1.5	1.6	1.7	1.5	1.4	1.5	1.9	1.9
2020	2.3	2.4	1.7	0.8	0.6	0.8	1.1	1.1	1.2	1.1	1.1	1.4
2021	1.1	1.2	2.1	3.3	3.9	4.6	4.3	4.4	4.6	5.4	6.0	5.9
2022	6.3	6.6	7.3									

CONSUMER PRICE INDEX FOR URBAN WAGE EARNERS AND CLERICAL WORKERS (CPI-W)

ALL ITEMS (1982-84=100)	Northeast											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Consumer Price Index												
2012	241.321	242.371	243.768	244.581	244.394	243.670	243.422	244.813	246.087	246.128	245.512	244.664
2013	245.524	247.015	247.129	246.779	246.855	247.122	247.682	248.220	248.535	247.473	247.450	247.658
2014	249.151	249.263	250.666	250.715	251.755	251.645	251.814	251.100	251.134	250.427	249.148	247.631
2015	246.795	247.352	248.253	248.670	249.756	250.587	250.236	249.603	249.365	248.818	248.842	247.902
2016	248.035	248.297	248.968	250.421	251.111	251.586	251.427	251.510	252.153	252.617	252.550	252.622
2017	254.407	255.028	254.725	255.359	255.598	255.462	254.887	255.723	257.297	256.850	256.969	257.251
2018	258.709	259.747	259.928	261.033	262.204	262.388	262.254	262.721	263.031	262.776	261.794	261.385
2019	262.089	262.620	263.917	264.971	265.678	265.927	266.210	266.409	266.295	266.128	266.452	266.403
2020	268.104	268.726	268.182	267.161	267.089	267.877	269.287	269.639	269.960	269.533	269.720	270.449
2021	271.700	272.771	274.475	276.633	278.373	281.366	281.956	282.714	283.563	285.769	287.527	288.316
2022	290.603	292.657	296.853									
Percent change from 12 months ago												
2012	3.2	3.1	2.7	2.4	1.7	1.5	1.1	1.4	1.8	1.9	1.8	1.8
2013	1.7	1.9	1.4	0.9	1.0	1.4	1.8	1.4	1.0	0.5	0.8	1.2
2014	1.5	0.9	1.4	1.6	2.0	1.8	1.7	1.2	1.0	1.2	0.7	0.0

ALL ITEMS (1982-84=100)	Northeast											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
2015	-0.9	-0.8	-1.0	-0.8	-0.8	-0.4	-0.6	-0.6	-0.7	-0.6	-0.1	0.1
2016	0.5	0.4	0.3	0.7	0.5	0.4	0.5	0.8	1.1	1.5	1.5	1.9
2017	2.6	2.7	2.3	2.0	1.8	1.5	1.4	1.7	2.0	1.7	1.7	1.8
2018	1.7	1.9	2.0	2.2	2.6	2.7	2.9	2.7	2.2	2.3	1.9	1.6
2019	1.3	1.1	1.5	1.5	1.3	1.3	1.5	1.4	1.2	1.3	1.8	1.9
2020	2.3	2.3	1.6	0.8	0.5	0.7	1.2	1.2	1.4	1.3	1.2	1.5
2021	1.3	1.5	2.3	3.5	4.2	5.0	4.7	4.8	5.0	6.0	6.6	6.6
2022	7.0	7.3	8.2									

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