

Virginia A. Girard-Brady
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**IN THE UNITED STATES COURT OF APPEALS FOR VETERANS'
CLAIMS**

WILLIAM D. LESTER,)	
)	
Appellant,)	
)	
v.)	Vet. App. No. 21-0430
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
)	
Appellee.)	
_____)	

**APPELLANT'S APPLICATION FOR AN AWARD OF ATTORNEY FEES,
COSTS AND OTHER EXPENSES**

Comes now, Virginia A. Girard-Brady, on behalf of William D. Lester, in the above-captioned case, and pursuant to U.S. Vet. App. R. 39 and 28 U.S.C. § 2412, and submits this application for an Award of Attorney Fees, Costs, and Other Expenses within the time frame set by the U.S. Court of Appeals for Veterans' Claims Mandate issued March 29, 2022.

In support of this motion, counsel asserts the following:

1. This case was pending on or after October 29, 1992, and the Equal

Access to Justice Act (EAJA) is applicable. *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994).

2. The Appellant is a prevailing party and eligible to receive an award. 28 U.S.C. § 2412(d)(2)(B); (d)(2)(H).
3. A Notice of Appeal was filed with the Court on January 22, 2021.
4. On March 29, 2022, after the Court issued a Memorandum Decision, which vacated and remanded the Board of Veterans' Appeals (BVA)'s December 3, 2020 decision, to the extent that it denied a claim for entitlement to a temporary total disability rating for convalescence following lumbar spine surgery beyond November 1, 2017, and for the Board to provide an adequate statement of reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record.
5. Appellant's net worth is less than two million dollars at the time he filed his Notice of Appeal with this Court on January 22, 2021. (Exhibit 1.) Appellant is thus eligible to receive an award under 28 U.S.C. § 2412(d)(2)(B).
6. The specific position of the Department of Veterans Affairs, that the Secretary had fulfilled its duty to assist the veteran in developing his claim and that the record was thus sufficient for purposes of adjudicating the merits of the veteran's claim for benefits, was not substantially justified. 28 U.S.C. § 2412(d)(1)(A).

7. No “special circumstances,” as defined by 28 U.S.C. § 2412(d)(1)(A), exist in this case which would make an attorney fees award unjust. This case was not one of first impression involving a good faith argument; nor did this case involve a new, more stringent requirement for adjudication.
8. Counsel for Appellant has claimed a reasonable fee, predicated upon the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. A statement from the Appellant’s attorney itemizing each type of service rendered in this Court through the date of final judgment, in addition to the time spent in preparation of the Appellant’s EAJA Application, and noting the actual time expended, costs, expenses, and the rate at which fees are computed, is attached. (Exhibit 2.)
9. The total hours expended total 13.4; the regular hourly rate is \$195.00; the reduced rate is \$35.00; the total attorney fee sought is **\$2,581.00**. Counsel waives reimbursement for expenses. Thus, the total amount of fees, costs and expenses is **\$2,581.00**.
10. Counsel for the Appellant has submitted an itemized statement, broken down into general case management tasks, review of records, client interview time, and general case document preparation; all of which are inextricably intertwined to the preparation of the entire case; provides no basis for equitable apportionment.

11. For the equitable regular hourly rate, counsel for Appellant has utilized the fixed starting rate under the EAJA of \$125.00, plus the cost of living calculated pursuant to the CPI-U, the United States Department of Labor's Consumer Price Index for Midwest Urban Consumers, as published by the Bureau of Labor Statistics, as of January, 2021; such date being the approximate point at which the Notice of Appeal was filed in this case, and representation formally undertaken.
12. The claimed hourly rate, reduced rate and attorney fees, costs, and other expenses are reasonable in light of the fact that Appellant was forced to retain counsel to appeal a BVA decision which failed to comply with required procedure.

WHEREFORE, Appellant respectfully requests that the U.S. Court of Appeals for Veterans Claims award his attorney fees, costs, and other expenses, in the total amount of **\$2,581.00**.

Respectfully Submitted,

/s/ Virginia A. Girard-Brady
Virginia A. Girard-Brady
Counsel for Appellant
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**ON APPLICATION FOR AN AWARD OF FEES AND EXPENSES
UNDER THE EQUAL ACCESS TO JUSTICE ACT**

I, Virginia A. Girard-Brady, make the following declaration in support of Appellant's application for an award of attorney fees, costs and other expenses in connection with the above-captioned appeal filed with the U.S. Court of Appeals for Veterans Claims.

ABS Legal Advocates, P.A., was attorney of record for the Appellant in proceedings before the U.S. Court of Appeals for Veterans Claims, and continues as attorney of record in proceedings before the Department of Veterans Affairs. The following itemization of services rendered encompasses representation before the

Court, through the Mandate of March 29, 2022, as well as in pursuance of fees, costs and expenses under the Equal Access to Justice Act (EAJA).

ATTORNEY TIME, COSTS AND OTHER EXPENSES

<u>DATE</u>	<u>ACTIVITY</u>	<u>HOURS</u>
12/22/20	Jamie M. Atwood (JMA), Esq., reviewed BVA Decision for purposes of appeal; identified basis for appeal; updated case file	.1
01/22/21	Virginia A. Girard-Brady (AGB), Esq., reviews correspondence from veteran; prepared NOA, EOA and Fee Agreement	.2
01/25/21	AGB reviewed Notice of Docketing	.1
02/01/21	T/c with veteran in re: appeal	*.1 ¹
03/24/21	AGB reviews EOA from Carrie Ferrando, Esq., for the Secretary	.1
03/31/21	JMA reviewed Record Before the Agency (RBA) for purposes of Dispute; accepted same	2.6
04/01/21	AGB reviews Notice to File Brief	.1
04/02/21	AGB reviewed Order in re: Briefing Conference	.1
04/13/21	JMA drafted Summary of the Issue (SOI) for the Briefing Conference; forwarded same to OGC and CLS	1.6

TOTAL HOURS ONLY ON THIS PAGE: 5.0

¹ Charged at reduced rate of \$35.00 per hour.

<u>DATE</u>	<u>ACTIVITY</u>	<u>HOURS</u>
04/26/21	AGB reviewed Secretary's Motion to Reschedule Briefing Conference; granted	.1
05/17/21	T/c with veteran in re: status	*.1
06/16/21	JMA participated in Briefing Conference w/ OGC and CLS; case to proceed to briefing	.1
07/15/21	JMA began drafting Brief, including Statement of the Case	2.0
07/15/21	JMA completed Brief, revising/expanding Argument section; drafting Summary of the Argument; proofreading/editing all sections and creating tables	2.1
09/13/21	AGB reviewed Secretary's Motion to Extend Time to File Appellee's Brief	.1
11/10/21	JMA reviewed Appellee's Brief and drafted Reply Brief	2.5
11/19/21	JMA reviewed Record of Proceedings	.2
01/04/22	AGB reviewed CAVC Memorandum Decision	.2
01/26/22	AGB reviewed CAVC Judgment	.1
03/29/22	AGB reviewed Mandate	.1
04/22/22	AGB prepared EAJA Application	.8
TOTAL HOURS ONLY ON THIS PAGE:		8.4
TOTAL HOURS ON ALL PAGES:		13.4

NO. OF HOURS AT REDUCED RATE: 0.2²

NO. OF HOURS AT REGULAR RATE: 13.2³

Total Hours: 13.4⁴

1. According to the U.S. Department of Labor, Bureau of Labor Statistics, the National Consumer Price Index for All MIDWEST Urban Consumers in the United States, as of March 29, 1996, was 155.7; as of January, 2021, it was 242.552. It therefore increased by 56%. Applying this increase to the \$125.00 hourly rate provided by EAJA, **the current hourly rate would be \$195.00**
2. Applying the rate computed above to the total time expended by counsel for the Appellant equals at both the reduced rate and regular rate a total amount in attorney fees of **\$2,581.00.**
3. Counsel for the Appellant does not seek reimbursement for expenses, as such expenses were negligible.
4. 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.

Dated this 22nd day of April, 2022.

/s/ Virginia A. Girard-Brady
Virginia A. Girard-Brady
Counsel for Appellant
ABS Legal Advocates, P.A.
901 New Hampshire Street, Suite 201
Lawrence, KS 66044

²0.2 hours billed at reduced rate of \$35.00 for a total of \$7.00.

³13.2 hours billed at regular rate of \$195.00 for a total of \$2,574.00.

⁴13.4 total hours for a combined total billing of both reduced (\$7.00) and regular (\$2,574.00) rates at \$2,581.00.

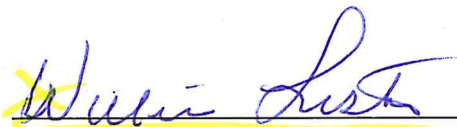
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**APPELLANT'S AFFIRMATION OF NET WORTH AT THE TIME
THAT NOTICE OF APPEAL WAS FILED**

I, William D. Lester, affirm that my net worth was less than two million dollars at the time I filed my Notice of Appeal with this Court on January 22, 2021.



William D. Lester

EXHIBIT 1

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 21-0430

WILLIAM D. LESTER, APPELLANT,

v.

DENIS McDONOUGH,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before ALLEN, *Judge*.

MEMORANDUM DECISION

*Note: Pursuant to U.S. Vet. App. R. 30(a),
this action may not be cited as precedent.*

ALLEN, *Judge*: Appellant William D. Lester served the Nation honorably in the U.S. Army from June 1989 to August 1989.¹ In this appeal, which is timely and over which the Court has jurisdiction,² he contests a December 3, 2020, Board of Veterans' Appeals decision that denied entitlement to a temporary total disability rating for convalescence following lumbar spine surgery beyond November 1, 2017.³ Because the Board's statement of reasons or bases is inadequate because it does not address relevant evidence, we will set aside the December 2020 decision and remand this matter for further proceedings.

I. ANALYSIS

Under 38 C.F.R. § 4.30, a temporary 100% disability rating "will be assigned without regard to other provisions of the rating schedule when it is established by report at hospital discharge" that the veteran underwent "[s]urgery necessitating at least one month of convalescence" or "[s]urgery with severe postoperative residuals such as incompletely healed

¹ Record (R.) at 3025.

² See 38 U.S.C. §§ 7252(a), 7266(a).

³ R. at 5-8.

surgical wounds, . . . the necessity for house confinement, or the necessity for continued use of a wheelchair or crutches (regular weight-bearing prohibited)."⁴ "Surgery necessitating at least one month of convalescence" means surgery "that would require at least one month for the veteran to return to a healthy state" that is "established by report at hospital discharge . . . or outpatient release."⁵ The total temporary rating is "effective the date of hospital admission . . . and continu[es] for a period of 1, 2, or 3 months from the first day of the month following . . . hospital discharge or outpatient release."⁶ "Extensions of 1, 2 or 3 months beyond the initial 3 months may be made" if warranted.⁷

We review a decision to grant or deny an extension of convalescence benefits under the "arbitrary and capricious" standard of review.⁸ However, the Board is nevertheless required to provide an adequate statement of reasons or bases for its determination.⁹ To comply with this requirement, the Board must analyze the credibility and probative value of evidence, account for evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of material evidence favorable to the claimant.¹⁰ If the Board failed to do so, remand is appropriate.¹¹

Appellant argues that the Board erred when it failed to consider relevant evidence that indicated his need for additional convalescence and applied "too strict of a standard" in considering whether an extension beyond 3 months for a convalescence rating was warranted. Specifically, appellant argues that he should have received, at least, a 1-month extension of his convalescence rating because his doctor instructed him to refrain from certain activities for a period of 4 months. Those activities included lifting with weight restrictions, climbing, squatting, and making sudden movements.¹² The Secretary argues to the contrary and urges us to affirm the Board's decision.

We agree with appellant that the Board failed to consider potentially relevant evidence. It is clear the Board did not address appellant's May 2019 statement when it denied an extension of

⁴ 38 C.F.R. § 4.30 (a)(1), (a)(2) (2021).

⁵ *Felden v. West*, 11 Vet.App. 427, 430 (1998).

⁶ 38 C.F.R. § 4.30.

⁷ 38 C.F.R. § 4.30(b).

⁸ *Felden*, 11 Vet.App. at 431.

⁹ *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

¹⁰ *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

¹¹ *Tucker v. West*, 11 Vet.App. 369, 374 (1998).

¹² Appellant's Brief (Br.) at 5 (citing R. at 782).

time, beyond 3 months or November 1, 2017, for his convalescent rating. In his May 2019 statement, appellant answered a questionnaire, indicating that it was not until December 2017 that he was released from restrictions based on "doctor[']s orders of 4 months."¹³ We recognize that the Board discussed appellant's representative's statement indicating as much, but it is not clear how the Board would have weighed appellant's direct statement to VA versus the weight it assigned to his representative's statement.¹⁴ Moreover, the Board focused on the representative's statement that appellant could lift no more than 10 pounds and concluded that such a limitation "does not equate to a severe post-operative residual."¹⁵ As mentioned above, appellant's statement details additional restrictions, or at least more than lifting limitations. Accordingly, judicial review is frustrated, and remand is necessary because the Board failed to discuss or provide adequate reasons or bases for rejecting the potentially favorable evidence.¹⁶

Because the Court is remanding this matter to the Board for readjudication, the Court need not address any remaining argument now, and appellant can present them to the Board.¹⁷ On remand, appellant may submit additional evidence and argument and has 90 days to do so from the date of VA's postremand notice.¹⁸ The Board must consider any such additional evidence or argument submitted.¹⁹ The Board must also proceed expeditiously.²⁰

II. CONCLUSION

After consideration of the parties' briefs, the governing law, and the record, the Court SETS ASIDE the December 3, 2020, Board decision and REMANDS this matter for further proceedings consistent with this decision.

DATED: January 4, 2022

¹³ R. at 782-83.

¹⁴ See *Jandreau v. Nicholson*, 492 F.3d 1372, 1377 (Fed. Cir. 2007) (stating that laypersons are competent to report contemporaneous medical diagnoses or descriptions of symptoms).

¹⁵ R. at 8.

¹⁶ See *Caluza*, 7 Vet.App. at 506; *Tucker*, 11 Vet.App. at 374.

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¹⁹ *Kay v. Principi*, 16 Vet.App. 529, 534 (2002).

²⁰ 38 U.S.C. §§ 5109B, 7112.

Copies to:

Virginia A. Girard-Brady, Esq.

VA General Counsel (027)

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²⁰ 38 U.S.C. §§ 5109B, 7112.

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