

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

<b>Gary Philbrook,</b>  <b>Appellant,</b>  <b>v.</b>  <b>Denis McDonough,</b> <b>Secretary of Veterans Affairs,</b>  <b>Appellee.</b>	U.S.C.A.V.C. Case No. 18-5628
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**APPELLANT’S APPLICATION FOR AWARD OF ATTORNEY’S FEES & EXPENSES**

Appellant, Mr. Gary Philbrook, hereby applies to this honorable Court for an award of his attorney’s fees and expenses in the amount of \$ 27,380.20. This application is made pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and this Court’s Rule 39. Mr. Philbrook has expressly authorized this application.

**I. Procedural History.**

In June 2018, the Board of Veterans’ Appeals denied a rating for total disability based on individual unemployability (TDIU) under federal provisions that prohibit the assignment of a TDIU rating to a veteran who “is incarcerated in a Federal, State or local penal institution or correctional facility for conviction of a felony.” 38 U.S.C. § 5313(c); accord 38 C.F.R. § 3.341(b) (2021). Mr. Philbrook filed a timely notice of

appeal to this Court on October 3, 2019. The lawyer (with respect to whose fees this application is concerned) entered his appearance on March 8, 2019.

This case was litigated. It was necessary for Mr. Philbrook 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, and (G) file a reply brief. As well as an appeal to the United States Court of Appeals for the Federal Circuit. This Court's dispositive order was dated February 11, 2022, about 36 months after counsel entered his appearance. In a May 2020 memorandum decision, this Court affirmed the Board's decision, holding that the plain language of the statute ("incarcerated" in a "correctional facility") covered the veteran's situation—confinement at the Oregon State Hospital after entering a stipulation of guilty except for insanity. Mr. Philbrook appealed to the Federal Circuit, which held that "the Oregon State Hospital is not a 'penal institution or correctional facility' under § 5313(c)" and reversed this Court's "decision that Mr. Philbrook was barred from receiving a TDIU rating as a matter of law." *Philbrook v. McDonough*, 15 F.4th 1117, at 1121 (2021).

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

## II. Averments.

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

Mr. Philbrook 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, Mr. Philbrook 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"**

Mr. Philbrook 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). Mr. Philbrook's declaration establishes this allegation. It is annexed to this application as Exhibit 1.

Mr. Philbrook'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). Mr. Philbrook is a "prevailing party" entitled to an award of fees and expenses because this Court vacated the Board's decision to deny him a total disability based on individual unemployability (TDIU) under federal provisions that prohibit the assignment of a TDIU rating to a veteran who "is incarcerated in a Federal, State or local penal institution or correctional facility for conviction of a felony." 38 U.S.C. § 5313(c); accord 38 C.F.R. § 3.341(b) (2021) based on a misinterpretation of the statute.

This Court sharpened the criteria for “prevailingness” in *Summer 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.” Mr. Philbrook relies upon the following to satisfy the *Summer* criteria:

1. Mr. Philbrook argued in his opening brief that the Board relied upon a misinterpretation of the phrase “incarcerated in a Federal, State, local, or other penal institution or correctional facility for conviction of a felony,” as used in 38 U.S.C. § 5313(c) and 38 C.F.R. §3.341(b). Appellant’s Opening Brief, pp. 4-9.
2. This Court affirmed the Board’s decision of Mr. Philbrook’s appeal and that decision was appealed to the Federal Circuit which reversed this Court judgment.
3. The final memorandum decision, Exhibit A, reports at p. 1 that this Court’s vacated and remanded the Board’s June 19, 2018, decision denying TDIU for readjudication. Decision, p. 3.

This statement in the memorandum decision established that the Court “recognized” and entered findings as to the “administrative errors” on which the remand was predicated. Thus, this Court’s February 11, 2022 issued a decision in Mr. Philbrook’s case vacating and remanding the Board’s June 19, 2018, decision established 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), *reh'g denied*, \_\_ F.3d \_\_ (May 2, 2000). It is sufficient for Mr. Philbrook simply to aver this element. However, it should be noted that the VA's position was not substantially justified at either the administrative or the litigation levels.

#### **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 Mr. Philbrook seeks compensation. *See* 28 U.S.C. § 2412(d)(1)(B).

**Attorney Time, Costs and Other Expenses**

<b><u>Date</u></b>	<b><u>Activity</u></b>	<b><u>Hours</u></b>	<b><u>Expenses</u></b>
3/1/19	Received on 3/1/19 the Board July 2018 decision and made an initial review of Board's decision to evaluate whether an appeal should be filed.	1.00	
3/3/19	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	
3/8/19	E-filed notice appearance.	n/c	P
3/8/19	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	
3/9/19	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	
3/10/19	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	
3/12/19	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	
3/16/19	Drafted statement of facts and relevant proceedings.	2.00	
3/17/19	Wrote the argument sections of the memo.	2.00	
3/18/19	E-mailed pre-briefing conference memo.	n/c	



<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
4/1/19	Prepared for and participated in CLS Pre-Briefing Conference.	2.00	
7/29/19	Brief prep. - research - regs., caselaw, statutes; draft issues and statement of the case	4.00	
7/30/19	Brief prep. - draft of Argument.	3.00	
7/31/19	Edit and refine Argument	3.00	
8/3/19	Completed final revisions to draft of brief	2.00	
8/4/19	Finalized brief for e-filing; cc: client	1.00	P
9/20/19	Rcv'd. and reviewed Appellee's Brief f. 9/19/19.	2.00	
11/7/19	Reply Brief prep. - draft of Argument.	2.00	
11/8/19	Edit and refine Argument	2.00	
11/11/19	Completed final revisions to draft of brief	2.00	
11/12/19	E-filed Reply Brief.	n/c	
2/26/20	Prepared and submitted <i>Solze</i> Notice.	2.00	
4/6/20	Received and reviewed Secretary's <i>Solze</i> Notice.	1.00	
4/6/20	Received and reviewed Secretary's Notice of Change of Position.	2.00	
4/6/20	Prepared and submitted motion for leave to respond the Secretary's Notice of Change of Position.	3.00	
4/16/20	Received and reviewed 4/14/20 of Appellee's Supplemental Authorities under Rule 30(b).	2.00	
4/20/20	Prepared for Oral Argument	4.00	
4/21/20	Prepared Citation to Supplemental Authority.	2.00	
4/21/20	Prepared and Argued before Judges Pietsch, Greenberg, and Toth.	2.00	
5/21/20	Received and reviewed 5/19/20 Memorandum Decision affirming the June 19, 2018, Board decision.	2.00	
5/31/20	Prepared Federal Circuit intake to evaluate whether there is a basis to appeal and if so on what basis.	2.00	
8/21/20	Prepared and filed NOA to Fed. Cir.	n/a	
9/10/20	Prepared docketing statement.	1.00	
12/16/20	Brief prep. - research - regs., caselaw, statutes; draft issue and statement of the case	4.00	
12/17/20	Brief prep. - draft of Argument.	4.00	
12/18/20	Edit and refine Argument	4.00	

12/21/20	Completed final revisions to draft of brief	4.00	
12/22/20	Finalized brief for filing; cc: DOJ and client	2.00	P
3/4/21	Rcv'd. and reviewed Appellee's Brief f. 3/3/21.	2.50	
5/8/21	First draft of reply brief prepared.	4.00	
5/9/21	Completed first draft Appellant's Reply Brief	4.00	
5/10/21	Editing of draft	2.50	
5/11/21	Worked on refining arguments.	2.50	
5/12/21	Made further edits and revisions.	6.00	
5/13/21	Made final edits.	.50	
5/14/21	Filed Reply Brief 5/12/21.	n/c	
8/28/21	Preparation for oral argument.	4.00	
8/29/21	Preparation for oral argument.	4.00	
8/30/21	Oral Argument at Federal Circuit.	4.00	
9/17/21	Preparation and submission of Supplemental Authority.	2.00	
10/8/21	Rcv'd. and reviewed Federal Circuit Opinion And Judgment dated 10/8/21 REVERSED and REMANDED.	1.00	
2/11/22	On February 11, 2022, the Veterans Court vacated and remanded the Board's June 19, 2018 decision which had denied a rating for total disability based on individual unemployability (TDIU) under federal provisions that prohibit the assignment of a TDIU rating to a veteran who "is incarcerated in a Federal, State or local penal institution or correctional facility for conviction of a felony."	1.00	
5/8/22	Prepared and filed EAJA Application; cc: client	<u>2.00</u>	P
	Total Hours	122.50	

122.5 hours x \$ 203.75 per hour = \$ 24,959.38

Total Attorney Fee Requested: \$ 24,959.38

**Expenses**

UPS Expenses CAVC:	\$ .00
Postage:	7.35
Copying Expenses CAVC: (70 x \$.25)	17.50
Expenses Federal Circuit Arg:	2180.50
USPS Expenses Federal Circuit:	31.00
Printing Expenses Federal Circuit:	
Brief	18.71
Appendix	35.52
<u>Reply Brief</u>	<u>10.08</u>
 Total Expenses:	 \$ 2,300.66

**Total attorney fee & expenses: \$ 27,380.20**

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 July 2019 it was 247.250, a .63 % increase. Applying this increase to the \$ 125.00 hourly rate provided by the Equal Access to Justice Act, the current hourly rate would be \$ 203.75.

Applying the rate computed above to the total time expended by counsel for Appellant, Appellant seeks a total attorney fee of \$ 24,959.38.

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 \$ 2,300.66, for a total attorney fee, costs, and expenses award of \$ 27,380.20.

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**

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

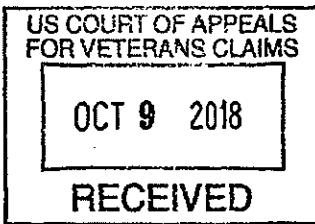
This application for attorney's fees and expenses is—

Respectfully submitted for Mr. Philbrook 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 June 4, 2022.

# Exhibit 1



## RETAINER AGREEMENT

Client Gary Philbrook and attorney Robert A. Friedman agree:

1. The client hires Robert A. Friedman & Associates, P.S., in his claim for VA benefits. Payment for services will come from any retroactive VA award, and from fees under the Equal Access to Justice Act, as described below. If the Court or the VA rules against the client, the client will owe no fee to the attorney. The maximum fee will total 20 percent of any retroactive award.

2. Mr. Friedman does not agree to appeal this matter to the Federal Circuit Court of Appeals if the Court of Appeals for Veterans Claims rules against the client. If the client wishes to appeal to the Federal Circuit, a new retainer will have to be signed before any appeal is taken by the attorney.

3. If the Court of Appeals for Veterans Claims reverses or remands the case, Mr. Friedman will represent the veteran in all matters before the Board of Veterans Appeals and the Regional Office.

4. In consideration of the services to be rendered by Mr. Friedman, the client agrees to pay Mr. Friedman a total of one-fifth (20 percent) of any amount paid as a lump sum and representing client's retroactive benefits for the period from the date benefits commence through the date benefits are awarded. This attorney fee shall be paid directly from the client's retroactive benefits by the VA as provided by 38 C.F.R. § 20.609(h). The parties specifically authorize the VA to remit the full amount of any such fee award to Mr. Friedman.

5. The client agrees that, if the Court either awards benefits or sends the case back to the Board of Veterans Appeals for a new decision, Mr. Friedman may seek an order from the Court directing the VA to pay fees under the Equal Access of Justice Act (EAJA). For that motion, client affirms that his net worth is less than \$2 million. The client shall receive a dollar-for-dollar credit toward the 20 percent fee obligation in the amount of the EAJA fee, i.e., whatever EAJA fee is received should be deducted from the client's fee obligation to the attorney. This credit or dollar-for-dollar reduction in the fee shall apply if the benefits are awarded by the Court, the Board of Veterans Appeals or the Regional Office.

6. In addition to the attorney fee, client agrees to pay any court costs and reasonable expenses that are incurred in representing client in court. Such costs may include the filing fee and service of the summons and complaint. Such expenses may include long distance telephone calls, photocopying, postage and travel. Client will receive an itemized bill for these costs and expenses.

7. Associate counsel may be retained to assist my attorney. If associate counsel is retained, that will not increase the amount of client's attorney fee.

Gary Philbrook  
Gary Philbrook

September 14, 2018  
Date signed

VA Claim No. \_\_\_\_\_

RAFriedman  
Robert A. Friedman  
Attorney at Law

10/3/18  
Date