

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

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**GLORIA J. GREER,**

**Appellant,**

**v.**

**DENIS McDONOUGH,**  
**Secretary of Veterans Affairs,**

**Appellee.**

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U.S.C.A.V.C. Case No. 20-3047

**APPELLANT’S APPLICATION FOR AWARD OF ATTORNEY’S FEES & EXPENSES**

Appellant, Mrs. Gloria Greer, hereby applies to this honorable Court for an award of her attorney’s fees as substituted appellant for Walter Brinkman and expenses in the amount of \$ 16,096.01. This application is made pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and this Court’s Rule 39. Mrs. Greer has expressly authorized this application.

**I. Procedural History.**

On January 8, 2020, the Board of Veterans Appeals issued a decision that denied Walter Brinkman, Mrs. Greer’s father entitlement to non-service-connected pension benefits. Mr. Brinkman filed a timely notice of appeal to this Court on May 4, 2020. The lawyer (with respect to whose fees this application is concerned) entered his appearance on May 4, 2020. After this matter had been fully briefed by

the parties and submitted to a panel for oral argument, Mr. Brinkman died on October 5, 2021. Thereafter, Mrs. Greer sought to be substituted as appellant which this Court granted.

This case was litigated. It was necessary for Mrs. Greer to (A) examine, inventory, and analyze the claim file; (B) review and inventory the Secretary's Record of Before the Agency and (C) a comparison and analysis of the contents of the record on appeal, (D) preparation of a pre-briefing memorandum and participation in conference with the Court's Central Legal Staff, (E) file an opening brief, (F) reviewed for response the appellee's brief, (G) file a reply brief and prepare for and present oral argument. This Court's decision was dated June 12, 2023, about 38 months after counsel entered his appearance.

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

## **II. Averments.**

Mrs. Greer 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.

Brinkman's appeal to the Board of Veterans'

Appeals;

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

Mrs. Greer 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, Mrs. Greer contends that she 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. Brinkman was 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. Brinkman’s declaration establishes this allegation. It is annexed to this application as Exhibit 1.

Mr. Brinkman’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). Mrs. Greer 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 she asked, on the basis of the issues that she 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.” Mrs. Greer relies upon the following to satisfy the *Sumner* criteria:

1. Mr. Brinkman argued in his opening brief, that the Board erred as a matter of law when it failed to provide Mr. Brinkman the notice required by the provisions of 38 U.S.C. § 5104 and that the Veterans Law Judge was not qualified without evidence from an independent legal opinion to determine whether a trust meets the requirements of the applicable provisions of law Opening Brief, pp. 4-16.

2. The final dispositive decision in this appeal, Exhibit A, reports at p. 1, “we nevertheless remand for the Board to cure inadequacies conceded by the Secretary in its statement of reasons or bases.” Court’s decision p. 1.

Board to provide an adequate statement of its reasons or bases for all findings. *See Tucker v. West*, 11 Vet.App. 369, 374 (1998) (remand is warranted “where the Board has . . . failed to provide an adequate statement of reasons or bases for its determinations”); *Allday*, 7

Vet.App. at 527; *Russell*, 3 Vet.App. at 315. Court’s decision, p. 6.

The statement 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 Mrs. Greer’s case establish that the remand of her 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, she 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), *rebrg denied*, \_\_ F.3d \_\_ (May 2, 2000). It is sufficient for Mrs. Greer 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 Mrs. Greer 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>
2/28/20	Received on 2/28/20 the Board 1/8/20 decision and made an initial review of Board’s decision to evaluate whether an appeal should be filed.	1.00	
4/22/20	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	
4/22/20	Letter to veteran indicating a willingness to proceed with and appeal and enclosing the required initial paperwork needed to be signed to initiate the appeal.	n/c	P
5/1/20	Received and review paperwork from veteran	n/c.	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
8/24/20	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	
8/26/20	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	
8/28/20	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	
9/4/20	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	
9/7/20	Drafted statement of facts and relevant proceedings.	4.00	
9/8/20	Wrote the argument sections of the memo.	4.00	
9/9/20	E-mailed pre-briefing conference memo.	n/c	
9/23/20	Prepared for CLS conference; VAGC indicated that the VA would defend the Board's decision.	2.00	
12/1/20	Began preparation for writing the opening brief by researching and reviewing pertinent statutes; regulations, and caselaw. Reviewing the CLS memo and reexamining the issues and statement of the case.	3.00	
12/2/20	Began drafting of the opening brief focusing on the arguments to be presented.	2.00	
12/3/20	Completed final revisions to draft of brief	2.00	
12/4/20	Made final edits of brief before filing; cc: client	1.00	P
3/23/21	Rcv'd. and reviewed Appellee's Brief f. 3/19/21.	2.00	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
5/12/21	Reply Brief prep. - drafted Argument.	2.50	
5/13/21	Edit and refine Argument.	2.00	
5/14/21	Completed final revisions to draft of reply brief	2.00	
8/5/21	Court ordered case to panel.	n/c	
9/2/21	Court ordered case to be set for oral argument.	n/c	
10/04/21	Received call from family that Mr. Brinkman died explained procedure at Court following his death.	1.00	
10/5/21	Prepared and submitted notice of death to Court.	.50	
10/7/21	Received notice from panel that oral argument cancelled.	n/c	
11/5/21	Prepared and submitted motion to substitute to Court.	1.50	
11/10/21	Received and reviewed Court order to show cause why the appeal should not be dismissed.	.50	
11/19/21	Court revoked its 11/10/21 order ordered copy of death certificate to be filed with Court.	n/c	
12/8/21	Prepared and filed response 11/19/21 order.	.50	
12/8/21	Prepared and filed with VA forms for substitution.	2.00	
12/9/21	Prepared fee agreement with Mrs. Greer and received signed copy.	1.00	
1/4/22	Received and reviewed 12/17/21 letter from VA denying Mrs. Greer's request to be substituted.	1.00	
1/10/22	Received and reviewed email dated 1/10/22 from GC advising that the Milwaukee RO sent a copy of their determination letter granting substitution on 1/7/22 and advising that GC would be filing a response indicating that VA does not oppose the motion along with an attached redacted copy of that letter.	1.50	
2/2/22	Received and reviewed Court's 1/31/22 ORDER, that Gloria Greer's motion for substitution as the appellant was granted <i>nunc pro tunc</i> to August 23, 2021, the date of the veteran's death. It was further ORDERED that the Clerk of the Court shall change the caption of the case to reflect that Gloria J. Greer is now the appellant and that the Clerk of the Court shall reschedule oral argument as the business of the Court permits.	.50	
3/9/22	Received and reviewed Court's 3/4/22 ORDER, that oral argument is set for Wednesday, May 18, 2022, at 10:00 a.m.	n/c	
4/28/22	Received and reviewed VA's motion to stay.	.50	

<u>Date</u>	<u>Activity</u>	<u>Hours</u>	<u>Expenses</u>
4/28/22	Prepared and filed Opposition to motion to stay.	1.00	
5/10/22	Received and reviewed Court's 5/6/22 ORDER staying proceedings and canceling oral argument scheduled for May 18, 2022, at 10:00 a.m.	n/c	
6/21/22	Prepared and filed Unopposed Motion to Lift Stay.	.50	
8/10/22	Received and reviewed Court's 8/9/22 ORDER setting oral argument for Tuesday, November 1, 2022, at 10:00 a.m.	n/c	
9/2/22	Received and reviewed Court's 8/31/22 ORDER rescheduling the oral argument form 10:00 a.m. to at 2:00 p.m. on November 1, 2022.	n/c	
10/28/22	Preparation for oral argument.	4.00	
10/31/22	Preparation for oral argument.	4.00	
11/1/21	Prepared for and participated in oral argument remotely.	4.00	
6/13/23	Rec'd and reviewed e-notice dtd 6/12/23 of CAVC Opinion, which VACATED the Board's January 8, 2022 decision and REMANDED for readjudication consistent with this decision.	1.00	
9/2/23	Prepared and filed EAJA Application; cc: client	<u>1.50</u>	P
	Total Hours	68.00	

68 hours x \$ 236.39 per hour = \$ 16,074.52

Attorney Fee Requested: \$ 16,074.52

**Expenses**

UPS:	\$ .00
Postage:	6.24
Copying: (61 x \$.25)	<u>15.25</u>
Total Expenses:	\$ 21.49

**Total attorney fee & expenses: \$ 16,096.01**

According to the U.S. Department of Labor Bureau of Labor Statistics, the National Consumer Price Index for all Urban Consumers in the South Urban Region, as of March 29, 1996, the base year CPI-U was 152.4; as of December 2021<sup>1</sup> it was 288.205, a 89.11 % increase. Applying this increase to the \$ 125.00 hourly rate provided by the Equal Access to Justice Act, the current hourly rate would be \$ 236.39.

Applying the rate computed above to the total time expended by counsel for Appellant, Appellant seeks a total attorney fee of \$ 16,074.52.

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 her attention any mistakes which might remain.

For costs and expenses expended by counsel for Appellant, Appellant seeks a

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<sup>1</sup> Generally the midpoint for calculating the cost of living increase is the month of the filing of the opening brief, however, because of the death of Mr. Brinkman just before this matter was to be originally argued before the panel and the delay resulting from the need to have Mrs. Greer substituted, I am using December 2021, the actual midpoint of this case rather than December 2020 the month the opening brief was filed.

total reimbursement of \$ 21.49, for a total attorney fee, costs and expense award of \$ 16,096.01.

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**

Mrs. Greer respectfully moves for an order awarding to appellant her attorney's fees and expenses as set forth herein.

This application for attorney's fees and expenses is—

Respectfully submitted for Mrs. Greer 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 September 29, 2023.

# Exhibit 1

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

<b>Walter Brinkman,</b>  <b>Appellant,</b>  <b>v.</b>  <b>Robert L. Wilkie,</b> <b>Secretary of Veterans Affairs,</b>  <b>Appellee.</b>	U.S.C.A.V.C. Case No.: 20-3047
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DECLARATION OF NET WORTH

Appellant, Walter Brinkman, hereby declares and states:

1. I am the appellant named in this appeal. This declaration is based upon my personal knowledge.

2. At the time this civil action was filed, my personal net worth did not exceed \$2,000,000 (two million dollars); nor did I own any unincorporated business, partnership, corporation, association, unit of local government, or organization, the net worth of which exceeded \$7,000,000 (seven million dollars) and which had more than 500 employees.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 4, 2020.

Executed at: Floyds Knobs, IN

X 

Walter Brinkman

EXHIBIT 1