

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

GILBERT R DURAN,)	
Appellant,)	
)	
vs.)	Vet. App. No. 20-5759
)	
DENIS MCDONOUGH,)	
Secretary of Veterans Affairs,)	
Appellee.)	

**MOTION FOR AWARD OF REASONABLE ATTORNEYS FEES UNDER 28
U.S.C. § 2412 AND DECLARATION IN SUPPORT OF MOTION**

Comes now, Appellant GILBERT R DURAN, through counsel, and files this motion for an award of reasonable attorney fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 (2012).

There has been a resolution in this action. On July 20, 2023, this Court issued a Memorandum Decision that remanded the April 23, 2020, Board of Veterans' Appeals ("Board") decision, that—in relevant part—discontinued a rating of 30% for Parkinson's and denied a rating in excess of 30% for PTSD. Further, the Court agreed that reversing the Board's discontinuance of the minimum 30% rating under DC 8004 and remand the matter and remanding the claim for increase from 30% for a PTSD rating.

An itemized statement of the services rendered and the reasonable fees and expenses for which Appellant seeks compensation is attached to this application as Exhibit A. Included in Exhibit A is a certification that lead counsel has "(1) reviewed the combined billing statement and is satisfied that it accurately

reflects the work performed by all counsel and (2) considered and eliminated all time that is excessive or redundant.” *Baldrige and Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005). Pursuant to 28 U.S.C. § 2412(d), Appellant is seeking fees for 165.6 hours of attorney time at a rate of \$204.84 per hour, as outlined in Exhibit A. Appellant also seeks fees for 14.5 hours of law clerk time, performed under the supervision of lead counsel, billed at \$75.00 per hour, which is less than the rate set forth in the USAO Attorney’s Fees Matrix as set forth in Exhibit B, and should be considered reasonable. See *Sandoval v. Brown*, 9 Vet. App. 177 (1996).

In addition, Appellant seeks reimbursement for the following expenses:

Airfare to and from Washington DC – Attorney Bennett: \$505.96

Airfare to and from Washington DC – Attorney Crow: \$410.20

Hotel – Attorneys Bennett and Crow: \$595.46

Travel in Washington DC – Attorneys Bennett and Crow

(rideshare from and to airport): \$33.78

Appellant’s legal counsel is not seeking reimbursement for photocopying and other miscellaneous expenses incurred in this action. The total amount of fees and expenses requested is \$36,554.40.

The prerequisites for an award of attorneys and expenses pursuant to 28 U.S.C. § 2412 (2009) have been met, and are as follows:

- 1) Appellant is a prevailing party. *Shalala v. Schaefer*, 113 S.Ct. 2625

(1993);

- 2) The underlying action was a civil action. The term “civil action” includes proceedings seeking judicial review of administrative agency decisions. It did not sound in tort, there is no statute which prohibits or provides for such awards;
- 3) This Court has jurisdiction. 38 U.S.C. § 7252(a) (2009);
- 4) The position of the United States was not substantially justified as set forth in the Memorandum Opinion;
- 5) No special circumstances exist to make the award unjust and this application is timely filed;
- 6) Appellant has submitted a declaration of net worth when the appeal was filed. Appellant did not have a net worth in excess of \$2,000,000 at such time;
- 7) The “United States” includes any agency and any official thereof acting in his official capacity, including the Secretary of Veterans Affairs;
- 8) The “position of the United States” for the purposes of deciding substantial justification means both the position taken by the United States in the civil action, and the action or the failure to act, by the agency against whom the civil action is based, and position was not justified;

- 9) No portion of time expended herein by appellant's legal counsel has unreasonably protracted the proceedings; and
- 10) Appellant is qualified and eligible to receive attorney fees and expenses pursuant to EAJA in this case. All of the provisions and prerequisites under the statute and governing case law have been met.

WHEREFORE, Appellant respectfully requests the Court award attorney fees in the amount of \$36,554.40.

Respectfully submitted,

GILBERT R DURAN, Appellant

/s/ Stephani M. Bennett
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BILLING RECORDS & REPORT [Attorney Time – Hours]

Re: GILBERT R DURAN, Appellant

USCAVC Case No. 20-5759

Preface:

On July 20, 2023, this Court issued a Memorandum Decision that remanded the April 23, 2020, Board of Veterans' Appeals ("Board") decision, that—in relevant part—discontinued a rating of 30% for Parkinson's and denied a rating in excess of 30% for PTSD. Further, the Court agreed that reversing the Board's discontinuance of the minimum 30% rating under DC 8004 and remand the matter and remanding the claim for increase from 30% for a PTSD rating.

DATE	SERVICES PERFORMED (By Stephani M. Bennett, unless otherwise indicated.)	HRS
7/15/20	Review Board decision, check docket, and review file docs for determination whether to appeal	0.2
8/17/20	Notice of Appeal; Notices of Appearance	0.2
8/17/20	Notice of Docketing for BVA's decision w/in 30 days; RBA w/in 60 days	0.1
9/9/20	Board Decision transmittal	0.1
10/8/20	Entry of appearance OGC attorney	0.1
10/13/20	RBA Notice	0.1
10/30/20	Review RBA	3.0
11/3/20	Notice to file Appellant's brief	0.1
12/4/20	Conference notice	0.1
12/21/20	Review RBA and Outline SOI	1.6
1/19/21	Draft SOI	2.7
1/20/21	Rule 33 notice	0.1
2/3/21	Prepare for conference, conference held, additional legal research, email memo	1.2
2/18/21	Review records, SOI, conference notes	1.0
2/19/21	Legal research and outline Brief	2.2
3/3/21	Reviewing records and drafting Statement of Facts	3.0
3/9/21	Reviewing records and writing Brief arguments	1.7
3/10/21	Continue drafting Brief arguments	2.4
3/25/21	Writing Brief arguments	2.8
4/15/21	Review and finalize Brief; fill Table of Authorities	1.5
4/19/21	Appellant's Brief filed	0.1

6/21/21	Email with OGC; Mot of Appellee to extend time to file appellee brief	0.2
6/22/21	Clerk's stamp granting the same	0.1
8/2/21	Appellee's Brief	0.1
8/13/21	Review Appellee's Brief	0.6
10/6/21	Record of Proceedings	0.1
10/22/21	Assigned case to Judge Toth	0.1
1/28/22	Appearance for OGC	0.1
6/13/22	Order that the case is submitted to panel	0.1
7/6/22	Case submitted to panel	0.1
7/7/22	Review Case for Panel	0.3
7/14/22	Order scheduling Oral Argument	0.1
7/15/22	Emails with OGC re: rescheduling Oral Argument	0.2
7/15/22	Motion of Appellee to reschedule Oral Argument	0.1
7/20/22	Judge's stamp granting motion to reschedule	0.1
7/25/22	Order scheduling Oral Argument	0.1
7/26/22	Outline Oral Argument preparation schedule	1.0
7/27/22	Review emails with co-counsel re: preparation; book flight	0.3
8/10/22	Oral Argument prep with co-counsel; assign research task to clerk	1.3
8/11/22	Research DC and M21-1 regs (clerk)	2.6
8/12/22	Research for Oral Argument; draft outline of comparative regulations (clerk)	2.8
8/15/22	Continue research for Oral Argument; draft outline of comparative regulations (clerk)	3.0
8/16/22	Finalize research for Oral Argument; draft outline of comparative regulations (clerk)	2.5
9/2/22	Oral Argument prep with co-counsel	3.0
9/2/22	Assist with Oral Argument prep (atty Weiss)	3.0
9/2/22	Assist with Oral Argument prep (atty Hoeser)	1.9
9/2/22	Help SMB and EAW with oral argument prep (Atty Crow)	1.7
9/9/22	Oral Argument prep with co-counsel	3.0
9/9/22	Assist with Oral Argument prep (atty Weiss)	3.0
9/15/22	Replace co-counsel and discuss case; set up mock oral argument	0.8
9/19/22	Notice of Atty Weiss to withdraw	0.1
9/20/22	Notice of Appearance for Attorney Montana Crow	0.1
9/27/22	Review previous oral argument notes; legal research for Oral Argument	2.8
9/27/22	Oral Argument prep with co-counsel; draft script	3.0
9/27/22	Assist with Oral Argument prep; review and revise script (atty Crow)	3.0

9/27/22	Assist with revising script for Oral Argument (atty Hoeser)	1.0
9/27/22	Talk through legal issues with Montana Crow and provide feedback on Oral Argument script (clerk)	1.0
9/28/22	Oral Argument practice in Omaha office before panel of attorneys	2.8
9/28/22	Oral Argument practice in Omaha office (atty Crow)	2.8
9/28/22	Assist with Oral Argument practice; provide feedback (atty Costello)	2.5
9/28/22	Assist with Oral Argument practice with feedback (atty Robb)	2.5
9/28/22	Assist with Oral Argument practice and follow up with revisions (atty Hoeser)	3.0
9/28/22	Revise arguments after morning practice and outline potential Appellee arguments (atty Crow)	1.4
9/28/22	Revisions on script with feedback from attorneys	3.0
10/5/22	Draft and file Notice for Clarification of Issues for Oral Argument	1.0
10/10/22	Revise Oral Argument script and practice arguments (atty Crow)	1.9
10/11/22	Review and practice Oral Arguments; revise scripts for practice OA	3.0
10/12/22	Assist with practice Oral Argument and provide feedback for argument (atty Hoeser)	2.0
10/12/22	Oral Argument practice (atty Crow)	3.0
10/12/22	Oral Argument practice in front of Omaha attorneys	3.0
10/12/22	Mock Oral Argument (Costello)	1.8
10/12/22	Document feedback and revise script/arguments	2.5
10/14/22	Phone call with client re: Oral Argument	0.2
10/14/22	Review Order granting motion and clarifying the issues	0.3
10/16/22	Practice script and Oral Arguments (atty Crow)	0.8
10/17/22	Edit and revise script for Oral Arguments (atty Crow)	1.3
10/17/22	Oral Argument prep with attys Costello and Hoeser; practice memorization of arguments (atty Crow)	2.1
10/17/22	Assist with Oral Argument practice for atty Crow (atty Costello)	1.5
10/17/22	Assist with Oral Argument practice for atty Crow (atty Hoeser)	1.5
10/18/22	Review and practice scripts for Oral Arguments (atty Crow)	1.6
10/18/22	Practice Oral Argument and revise argument	3.0
10/19/22	Assist with Oral Argument practice; provide feedback (atty Costello)	2.5

10/19/22	Assist with Oral Argument practice as panel member (atty Hoeser)	2.5
10/19/22	Oral Argument practice with co-counsel; practice rebuttal (atty Crow)	3.0
10/19/22	Oral Argument practice in front of Omaha attorneys	3.0
10/19/22	Feedback session post-practice Oral Argument; revisions	3.0
10/19/22	Feedback session post-practice Oral Argument; help co-counsel with revision (atty Crow)	3.0
10/21/22	Revise script; further research; solo practice argument	3.0
11/3/22	Oral Argument practice with co-counsel	3.0
11/3/22	Oral Argument practice with co-counsel (atty Crow)	3.0
11/8/22	Oral Argument practice with co-counsel	3.0
11/8/22	Oral Argument practice with co-counsel (atty Crow)	3.0
11/10/22	Final dress rehearsal for Oral Argument in front of panel of attorneys	3.0
11/10/22	Final dress rehearsal for Oral Argument in front of panel of attorneys (atty Crow)	3.0
11/10/22	Assist with final dress rehearsal for Oral Arguments serving on panel (atty Hoeser)	2.6
11/10/22	Assist with final dress rehearsal for Oral Arguments serving on panel (atty Costello)	2.6
11/10/22	Assist with final dress rehearsal for Oral Arguments serving on panel (atty Thomas)	2.6
11/10/22	Assist with final dress rehearsal for Oral Arguments serving on panel (clerk)	2.6
11/10/22	Final feedback and revisions with co-counsel	3.0
11/10/22	Go over final arguments (atty Crow)	3.0
11/15/22	Participate Oral Argument	2.8
11/15/22	Participate in Oral Argument as co-counsel (atty Crow)	2.8
11/21/22	Review email from OGC re: possible JMPR; discuss with co-counsel	0.4
11/21/22	Call client re: JMPR; client declines; email OGC	0.6
7/20/23	Review Memorandum Decision	0.4
7/27/23	Phone call with client re: case outcome	0.2
8/11/23	Judgment	0.1
10/11/23	Mandate	0.1
10/14/23	Draft EAJA App	2.2

Total Hours: 180.1 hours

Attorney: 165.6 hours

Law clerk: 14.5 hours

Issues / Claims Being Remanded:

On July 20, 2023, this Court issued a Memorandum Decision that remanded the April 23, 2020, Board of Veterans' Appeals ("Board") decision, that—in relevant part—discontinued a rating of 30% for Parkinson's and denied a rating in excess of 30% for PTSD. Further, the Court agreed that reversing the Board's discontinuance of the minimum 30% rating under DC 8004 and remand the matter and remanding the claim for increase from 30% for a PTSD rating.

Billing General Case Management:

In this appeal, a portion of the hours spent in prosecuting the appeal are “general case management” hours. That is, time spent on tasks inherent to prosecuting an appeal regardless of the number of claims remanded compared to the number of claims appealed. These hours include review of records, preparation of documents and pleadings, *inter alia*. Although not directly related to a claim which was remanded, such time is billable time. *See, Elcyzyn v. Brown*, 7 Vet. App. 170 (1994) (The time spent for general case management is inextricably linked to the preparation of an entire case. There is no basis or fair mechanism for equitably apportioning the time spent for general case management into billable and non-billable hours.)

Time Spent on the Issue Remanded:

The time spent in prosecuting this appeal was related to the issues remanded.

The Billing Formula Employed Herein:

A. The Hourly Rate:

The law provides effective for appeals filed after March 29, 1996, the hourly rate for EAJA purposes is \$125. This base amount is adjusted annually to reflect cost of living changes relative to 1996. The statutory formula provides the base hourly rate (\$125) is multiplied by the Consumer Price Index (CPI) for the appropriate mid-point date. The sum is then divided by \$151.70, which is the Midwest CPI for March 1996.

Under *Elczyn v. Brown*, 7 Vet. App. 170 (1994), the appropriate hourly rate for paralegals, law clerks, and law students is (1) the rate in the prevailing market in which the services were performed, or (2) the \$75 rate set forth in § 2412(d)(2)(a) plus a cost of living adjustment calculated under the Consumer Price Index. We are asking for \$75.00 per hour for law clerk time, which is less than that listed for law clerks under the USAO's Attorney's Fees Matrix.

B. The Mid-Point Date:

The mid-point date is one of three dates:

- (1). The date the appeal was filed;
- (2). The date the summary of issues was filed, or;
- (3). The date the brief was filed.

See *Elczyn v. Brown*, 7 Vet. App. 170 (1994) (The mid-point date should be the date of the appellant's principal brief, motion, or petition filed with the

Court, which provides, “the capstone of the litigation process.”); *Apodackis v. Nicholson*, 19 Vet. App. 91 (2005) (The midpoint of the litigation is the middle of the month where a majority of the work was performed.).

In this case, the appropriate mid-point date is in APR 2021 – the date the Appellant's brief was filed.

Consumer Price Index (CPI):

This Court has held the cost-of-living adjustment is determined by reference to the **CPI-All Index** in the region where the work is performed. *Elcyzn v. Brown*, 7 Vet. App. 170 (1994). In this appeal, the work was performed in Nebraska.

Accordingly, the Midwest urban region – in which Nebraska is grouped – is the appropriate region of the **CPI-All Index**.

The CPI Rate for the mid-point is 248.593. See, Bureau of Labor Statistics, CPI Tables for the Midwest urban. See, *Elcyzyn v. Brown*, the rate is for the All-Items Index. See, <https://www.bls.gov/regions/midwest/data/xg-tables/ro5xg01.htm>

C. Hourly Rate For This Appeal:

The statutory formula results in the following calculations.

\$125.00	(Base Amount)
	(multiplied by)
\$248.593	(Midwest CPI in APR 2021 midpoint date)
	(divided by)
\$151.70	(Midwest CPI in March 1996)
<hr/>	
\$204.84	(Adjusted Rate for attorney time)

CONCLUSION

Applying the statutory rate of \$204.84 to the 165.6 hours of attorney time equals \$33,921.50, and the rate of \$75.00 to the 14.5 hours spent by the law clerk equals \$1087.50, which combines to \$35,009.00. Additionally, counsel seeks travel expenses for oral arguments in the amount of \$1,545.40, for a total of \$36,554.40 – the amount sought herein.

Respectfully submitted,

GILBERT R DURAN, Appellant

/s/ Stephani M. Bennett
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CERTIFICATE OF SERVICE

I hereby certify, to the best of my knowledge and ability, under penalty of perjury under the laws of the United States, that copy of the forgoing was served electronically to the attorney of record for the party below:

Nathan Bader, Esq.
Office of the General Counsel
Department of Veterans Affairs
810 Vermont Ave., NW
Washington DC 20420

On October 20, 2023.

/s/ Stephani M. Bennett
STEPHANI M. BENNETT, Esq.