IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

No. 20-4372

SHERRY CRAIG-DAVIDSON,

Appellant,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Appellee.

APPELLANT'S APPLICATION FOR AWARD OF ATTORNEYS' FEES & EXPENSES

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Date: December 6, 2023

Appellant, Mrs. Sherry Craig-Davidson, hereby applies to this honorable Court for an award of her attorneys' fees and expenses in the amount of $27,271.05. She submits this application pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and this Court's Rule 39. Mrs. Craig-Davidson has authorized this application.

I. Procedural History

This EAJA application arises out of a claim for disability benefits originally filed by Mr. Virgil Davidson. Following his active-duty service in the United States Marine Corps from 1955 to 1961, Mr. Davidson developed lung cancer. On February 14, 2019, Mr. Davidson applied for disability compensation for residuals of lung cancer. The Department of Veterans Affairs Regional Office denied Mr. Davidson's application on August 23, 2019. In October 2019, Mr. Davidson appealed the adverse rating decision to the Board of Veterans' Appeals ("the Board"). In his appeal, Mr. Davidson averred that he was exposed to radiation during his training at the Atomic Biology Warfare School at Camp Pendleton. On December 3, 2019, the Board denied Mr. Davidson's appeal after concluding that the criteria for service connection had not been met. In reaching that conclusion, the Board failed to weigh or otherwise consider Mr. Davidson's sworn testimony that he was exposed to radiation during his military service.

When the Board issued its decision, Mr. Davidson was receiving palliative care and near the end of his life. He died from lung cancer on May 23, 2020. After burying her husband of 31 years, Mrs. Craig-Davidson began going through his papers. It was during that process that Ms. Craig-Davidson discovered that the Board had denied Mr. Davidson's

claim and that she needed to appeal the decision. Acting *pro se*, she filed a Notice of Appeal ("NOA") on June 22, 2020, 30 days after her husband's death.

On appeal, the Secretary first moved to dismiss the appeal as untimely. *See Craig-Davidson v. McDonough*, 35 Vet. App. 281, 283 (2022). This Court held the Secretary's motion to dismiss in abeyance, stayed proceedings in the appeal, and ordered Mrs. Davidson to provide a copy of Virgil's death certificate and to inform the Court whether she filed a claim for accrued benefits at the VA regional office. *Id.* at 283-84. Mrs. Davidson promptly submitted a copy of a death certificate reflecting that Mr. Davidson died on May 23, 2020, 171 days after the Board issued its decision, and a completed VA Form 21P-0847, Request for Substitution of Claimant Upon Death of Claimant. *Id.* Mrs. Davidson subsequently retained undersigned counsel.

On June 21, 2021, the Court ordered the parties to submit supplemental briefs addressing whether Mrs. Davidson had statutory and constitutional standing to pursue an appeal of the December 2019 Board decision and whether equitable tolling should apply. *Id.* at 284. Oral argument was held on March 15, 2022. On May 16, 2022, the Court denied the Secretary's motion to dismiss, concluding that Mrs. Craig-Davidson was "an eligible accrued-benefits claimant, [with] statutory and constitutional standing to bring this appeal because the veteran died during the time he was permitted to file an NOA." *Id.* at 294. The Court also determined the appeal was timely because the "extraordinary circumstances" of Mr. Davidson's death and Mrs. Craig-Davidson's filing of the NOA just 30 days later justified the application of equitable tolling. *Id.*

After Mrs. Craig-Davidson prevailed on the threshold questions of standing and timeliness, this appeal proceeded to the merits. On September 7, 2022, the parties participated in a briefing conference pursuant to Rule 33. During the conference, undersigned counsel raised controlling law requiring the Board to "weigh" "a non-combat veteran's lay statements" "against other evidence, including the absence of military records supporting the veteran's lay statement." *See Bardwell v. Shinseki*, 24 Vet. App. 36, 38 (2010). Undersigned counsel also explained that the Board had failed to weigh Mr. Davidson's statements concerning his exposure to radiation in its decision denying his claim. Finally, undersigned counsel proposed that the parties stipulate to remand of the claim so that the Board could properly weigh Mr. Davidson's testimony in accordance with its obligations under the law. Counsel for the Secretary refused.

The parties completed merits briefing on March 21, 2023. This Court issued its memorandum decision on September 13, 2023. *See Craig-Davidson v. McDonough*, No. 20-4372, 2023 WL 5941958 (Vet. App. Sept. 13, 2023). Citing *Bardwell*, the Court explained that the Board erred by failing to weigh Mr. Davidson's testimony concerning his exposure to radiation. *Id.* at *2. "Since the Board didn't analyze key evidence," it was "unclear" "why the Board didn't accept that he was exposed to radiation. So the Board failed to provide adequate reasons or bases for its conclusion that there wasn't any competent evidence of in-service exposure to radiation." *Id.* The Court set aside the Board's December 2019 decision denying service connection and remanded the matter with instructions that the Board "undertake a thorough and critical review of the evidence

. . . in an expeditious manner." *Id.* at *3. Judgment entered on October 5, 2023 and the mandate took effect on December 4, 2023.

II. Averments

Mrs. Craig-Davidson 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 the Veteran'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. Craig-Davidson is a "party" to this action within the meaning of 28 U.S.C. § 2412(d)(2)(B);

(7) Mrs. Craig-Davidson is a "prevailing party" in this matter within the meaning of 28 U.S.C. § 2412(d)(1)(a);

(8) Mrs. Craig-Davidson is not the United States;

(9) Mrs. Craig-Davidson 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. Craig-Davidson submits below an itemized statement of the fees and expenses for which she applies. The itemization shows the rates at which the fees were calculated. Mrs. Craig-Davidson contends that she is entitled to an award of fees and expenses in this matter in the total amount itemized, and that award should be paid directly to her attorneys.

Courts routinely recognize that the attorney-client relationship, the fee/retainer agreement, and the purpose and nature of EAJA can give rise to an obligation for the client to pay her attorney any court-ordered EAJA fee award. *See Turner v. Comm'r of Soc. Sec.*, 680 F.3d 721, 725 (6th Cir. 2012) (holding that "litigants 'incur' fees under the EAJA when they have an express or implied legal obligation to pay over such an award to their legal representatives, regardless of whether the court subsequently voids the assignment provision").[1] That reality is rooted in the nature of litigation such as this case:

> [A]llowing fee awards to *pro bono* counsel under the EAJA serves to insure that . . . *pro bono* counsel, have a strong incentive to represent indigent . . . claimants. If attorneys' fees to pro bono organizations are not allowed in litigation against the federal government, it would more than likely discourage involvement by these organizations in such cases, effectively reducing access to the judiciary for indigent individuals. Such a result surely does not further the goals of the EAJA.

Cornella v. Schweiker, 728 F.2d 978, 986–87 (8th Cir. 1984) (internal citations and quotations omitted). In signing a retainer agreement, Mrs. Craig-Davidson agreed that Arnold & Porter LLP, may, as appropriate, seek full payment of all fees and expenses from

[1] *Accord Ed A. Wilson, Inc. v. GSA*, 126 F.3d 1406, 1409 (11th Cir. 1997) (affirming that an EAJA fee award is appropriate where there is an express or implied agreement that any fee award will be paid to the legal representative); *Phillips v. GSA*, 924 F.2d 1577, 1583 (Fed. Cir. 1991) ("we hold that to be 'incurred' within the meaning of a fee shifting statute, there must also be an express or implied agreement that the fee award will be paid over to the legal representative.").

the government, and need only return to Mrs. Craig-Davidson any sums she had to pay to reimburse the firm for expenses. For these reasons, the Court should approve the application and require payment of fees directly to counsel. *See Arredondo v. Holder*, No. 08-73835, slip op. at 17 (9th Cir. Nov. 30, 2012) (finding litigant's and attorneys' declarations sufficient to establish an agreement to pay the fee award directly to counsel).

III. Argument

The EAJA provides that "a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The assessment of the jurisdictional adequacy of a petition for EAJA fees is governed by the four factors set forth in *Cullens v. Gober*:

> In order to be eligible for an EAJA award, the application must contain: (1) a showing that the applicant is a prevailing party within the meaning of EAJA; (2) an assertion that the applicant is a party eligible for an award under EAJA because his or her net worth does not exceed two million dollars; (3) an assertion that the position of the Secretary at the administrative level or in litigation was not substantially justified; and (4) an itemized statement of the fees and expenses sought, supported by an affidavit from the applicant's counsel.

14 Vet. App. 234, 237 (2001) (en banc). Mrs. Craig-Davidson satisfies each of these factors.

A. "Court"

As a preliminary matter, 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"

Mrs. Craig-Davidson is a party eligible to receive an award of fees and expenses because her net worth does not exceed $2 million. *See* 28 U.S.C. § 2412(d)(2)(B) and Exhibit 1.

C. "Prevailing Party"

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 Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791–92 (1989). The Federal Circuit has clarified that this requires only that the party have received "at least some relief on the merits of his claim" such that there has been a "material alteration of the legal relationship of the parties." *Vaughn v. Principi*, 336 F.3d 1351 (Fed. Cir. 2003) (citing *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 603 (2001)).

The "prevailing party" requirement is satisfied by "a court remand predicated upon administrative error." *Zuberi v. Nicholson*, 19 Vet. App. 541, 544 (2006) (citing *Sumner v. Principi*, 15 Vet. App. 256, 264 (2001) (en banc)); *see also Dover v. McDonald*, 818 F.3d 1316, 1319–320 (Fed. Cir. 2016) (where an appellant before the Court of Appeals for Veterans Claims has secured a remand to the Board for Veterans' Appeals, the appellant is

a "prevailing party" if the remand was necessitated by agency error, and the remand calls for further agency proceedings). "A Court remand predicated upon administrative error is a remand predicated either upon the Court's finding of error or upon a concession of error by the Secretary." *Id.* (citing *Scarborough v. Nicholson*, 19 Vet. App. 253, 259 (2005); *Gordon v. Principi*, 17 Vet. App. 221, 223 (2003); *Sumner v. Principi*, 15 Vet. App. at 260–61.

Mrs. Craig-Davidson is a "prevailing party" entitled to an award of fees and expenses because she prevailed on the threshold questions of standing and timeliness and because this Court's remand is explicitly predicated on the Board's failure to properly weigh evidence in the record and to adequately explain the bases for its December 2019 decision.

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. Am. Battle Monument Comm'n*, 814 F.2d 1564, 1566 (Fed. Cir. 1987); *see also* 28 U.S.C. § 2412(d)(1)(B). Mrs. Craig-Davidson avers that the Government's position was not substantially justified, and therefore it cannot avoid EAJA fees on those grounds.

Where, as here, the appellant has "allege[d] that the position of the United States was not substantially justified," as required under 28 U.S.C. §2412(d)(1)(B), "the Government has the burden of providing that its position was substantially justified in order to defeat [the] appellant's EAJA application." *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994) (citing *Gavette v. OPM*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (en banc)). To meet

this burden, the Government must show that its position had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565–66 (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. *McCormick v. Principi*, 16 Vet. App. 407, 412 (2002). Thus, it is sufficient at this stage for Mrs. Craig-Davidson simply to aver this element.

E. Itemized Statement of Fees and Expenses

The required declaration of Mrs. Craig-Davidson's counsel, including an itemized statement of attorney fees and expenses for which Mrs. Craig-Davidson seeks compensation, is attached as Exhibit 2. *See* 28 U.S.C. § 2412(d)(1)(B).

The attorneys representing Mrs. Craig-Davidson in her appeal have customary rates ranging from $640 to $1,335 per hour. 28 U.S.C. § 2412(d)(2)(A)(ii), however, provides that "attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living . . . justifies a higher fee." A rate above $125 per hour for Mrs. Craig-Davidson's attorneys is justified based on the increase in the cost of living since the EAJA was amended in March 1996.[2]

According to the Bureau of Labor Statistics of the U.S. Department of Labor, the Consumer Price Index for all Urban Consumers ("CPI-U")[3] in the Denver-Aurora-

[2] March 29, 1996, is the original effective date of the maximum $125 hourly rate provided by the EAJA. *See* Contract with America Advancement Act of 1996, Pub. L. No 104–121, §232(b), 110 Stat. 847, 863 (1996) (changing rate from $75 to $125).

[3] *See also Mannino v. West*, 12 Vet. App. 242 (1999) (providing that the CPI will be applied when available in determining attorney fees under EAJA).

Lakewood, CO region was 153.1 in 1996. Ex. 2 ¶ 3. Given that case work was performed over the period from July 2021 to September 2023, and Mrs. Craig-Davidson appealed the Board's denial of her husband's disability compensation claim in June 2020, January 2022 is an appropriate "mid-point" to calculate a cost-of-living increase. *See Elcyzyn v. Brown*, 7 Vet. App. 170, 181 (1994) ("[T]he Court will permit—and encourage—the selection of a single mid-point date, such as the date upon which an appellant's principal brief, motion, or petition is filed with the Court, as the base for calculating a cost of living increase."). In January 2022, the CPI-U in the Denver region was 293.58—91.8% higher than in 1996. Ex. 2 ¶ 3. Applying this increase to the $125 hourly rate provided by the EAJA, the current hourly rate for attorneys is $239.70. *Id.*

The appropriate hourly rate for paralegals is (i) the rate in the prevailing market in which the services were performed or (ii) the $125 rate set forth in 28 U.S.C. § 2412(d)(2)(A) plus a cost-of-living adjustment calculated under the Consumer Price Index, whichever is lower. *Sandoval v. Brown*, 9 Vet. App. 177, 181 (1996). The paralegal who assisted Mrs. Craig-Davidson's attorneys customarily charges $415 per hour, which is consistent with prevailing rates in the Denver market. Adjusting the $125 hourly rate established by the EAJA using the same procedure applied above results in a lower rate of $239.70 per hour and is thus the appropriate rate for paralegal time.

Applying the rates computed above, Mrs. Craig-Davidson seeks the following attorneys' fees for representation in the Court of Appeals for Veterans Claims:

Name	**Rate**	**Hours**	**Fee Amount**
Thomas Stoever (1990 law graduate)	$239.70	31	$7,430.70
Eliseo Puig (2015 law graduate)	$239.70	43.8	$10,498.86
David Jelsma (2019 law graduate)	$239.70	3.5	$838.95
Elizabeth Stonehill (2022 law graduate)	$239.70	3.6	$862.92
Rebecca Golz (paralegal)	$239.70	29.6	$7095.12
		TOTAL:	**$26,726.55**

An itemization of expenses for which reimbursement is sought is as follows:

Nature of Expenses		**Amount**
Legal Research (Computer)		$543.60
Duplicating Costs		$0.90
	TOTAL:	**$544.50**

Mrs. Craig-Davidson's counsel spent over 110 hours to prevail twice during this appeal. The value of that time alone is $99,295.50 (based on counsels' commercial billing rates). Counsel has reviewed all of the time entries since the initiation of this matter and has removed entries that might be considered duplicative (*e.g.*, where a new lawyer is getting up to speed on the matter) and any activity or expense that might be considered "overhead" (*e.g.*, time spent filing applications to be admitted to practice before this Court,

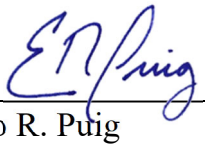
time spent by attorneys preparing to act as judges in a moot court).[4] *See Baldridge & Demel v. Nicholson*, 19 Vet. App. 227, 240 (2005).

Mrs. Craig-Davidson seeks a total award of $27,271.05 for her attorneys' fees, costs, and expenses. This amount is reasonable, fair, and justifiable under the circumstances. Mrs. Craig-Davidson respectfully requests the proposed award be granted.

F. Prayer for Relief

Mrs. Craig-Davidson respectfully moves for an order awarding to appellant her attorneys' fees and expenses as set forth herein.

Respectfully submitted this 6th day of December, 2023.



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[4] By choosing not to ask the Court to award fees for these activities, Arnold & Porter is not taking the position that the time spent on these activities was inappropriate or should not be recoverable by Arnold & Porter or any other lawyer or law firm pursuant to EAJA.