

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

PATRICK RODRIGUEZ,

Appellant,

v.

ROBERT WILKIE,

Secretary of Veterans Affairs,

Appellee.

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Docket No. 19-287

**APPELLANT’S APPLICATION FOR AN AWARD OF REASONABLE
ATTORNEY FEES AND EXPENSES**

Appellant hereby seeks an award of reasonable attorney fees and expenses under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), in the total amount of \$9,152.70. In support of this application, Appellant asserts that (1) he was a prevailing party, (2) his net worth when he filed this appeal was less than \$2 million, and (3) the Secretary’s position in this case was not substantially justified. An itemized statement detailing the time spent and fees sought is attached.

I. ARGUMENT

In order to be granted EAJA fees, an appellant must establish that he is a prevailing party and eligible for the award, and must allege that the government’s position was not substantially justified. *Bazalo v. Brown*, 9 Vet. App. 304 (1996). Because Appellant meets these requirements, the Court should grant his application.

A. APPELLANT IS A PREVAILING PARTY AND ELIGIBLE TO RECEIVE AN AWARD.

To obtain “prevailing party” status, a party need only to have obtained success “on any significant issue in litigation which achieve[d] some of the benefit ... sought in bringing the suit.” *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993) (quoting *Texas State Teachers Assn. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989)). In this case, Appellant is a prevailing party because on the Court entered judgment remanding Appellant’s appeal back to the Board for Veterans’ Appeals for readjudication consistent with its decision. *See Zuberi v. Nicholson*, 19 Vet. App. 541 (2006); *Sumner v. Principi*, 15 Vet. App. 256 (2001) (en banc). This Court ordered relief creates the “material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.” *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health and Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Garland Indep. Sch. Dist.*, 489 U.S. at 792). Accordingly, Appellant satisfies the first requirement for an EAJA fee award.

Appellant asserts that he is a party eligible to receive an award of reasonable fees and expenses because his net worth was less than \$2 million at the time he filed the appeal in this matter. As an officer of the Court, the undersigned counsel hereby states that Appellant’s net worth did not exceed \$2 million (two million dollars) at the time this civil action was filed, nor did he own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7 million (seven million dollars) and which had more than 500 employees. *See Bazalo v. Brown*, 9 Vet. App. 304, 309, 311 (1996).

B. THE POSITION OF THE SECRETARY OF VETERANS AFFAIRS WAS NOT SUBSTANTIALLY JUSTIFIED.

The Secretary can prevail in defeating Appellant's application for fees and costs only by demonstrating that the government's position was substantially justified. *See Brewer v. American Battle Monument Comm'n*, 814 F.2d 1564, 1566-67 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994). The U.S. Supreme Court has held that for the position of the government to be substantially justified, it must have a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *accord Beta Sys. v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989).

The Secretary's position in this case was not substantially justified. The Court found that the Board failed to provide an adequate statement of reasons or bases for denying a higher disability rating for PTSD and headaches. The Court also remanded Appellant's claim for a right shoulder disability as inextricably intertwined with the Appellant's remanded claim for his neck disability. These errors have no reasonable basis in fact or law. In addition, the litigation position of the Secretary, defending the Board's decision despite the aforementioned errors, has no basis in fact or law. Appellant thus satisfies the third criterion for an EAJA fee award.

C. ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF REASONABLE FEES AND EXPENSES.

Based upon the pleadings herein and the above discussion, an award of EAJA fees is appropriate. Attached to this application is counsel's affidavit, setting forth the time expended on this case and the expenses incurred. Counsel certifies that she has eliminated all time that is excessive or redundant.

Counsel has determined the hourly rate charged by increasing the \$125/hour base rate for increases in the Consumer Price Index for the Dallas-Fort Worth metropolitan area, which is the location of counsel's office and where the work was performed.¹

Attorneys choose a litigation mid-point date upon which to base a COLA increase. *Elczyn v. Brown*, 7 Vet. App. 170, 179-181 (1994). In this case, Appellant's attorney filed her appearance on January 4, 2019, and the Court's Judgment was entered on July 29, 2020. Appellant selects September 2019 as the date for calculating the CPI increase, as it represents an approximate mid-point of the litigation. This calculation yields an hourly rate of \$200.50.² *Id.*

Appellant is eligible to receive an EAJA award and no special circumstances would make an award unjust. When an Appellant meets all the eligibility requirements for EAJA fees and expenses, the Court "shall award" them. *Gavette v. Office of Personnel Management*, 808 F.2d 1456, 1466 (Fed. Cir. 1986) (en banc).

¹ A rate in excess of \$125 per hour for the attorneys for Appellant in this case is justified based on the increase in the cost of living since the EAJA was amended in March 1996. *See* 28 U.S.C. § 2412(d)(2)(A)(ii).

² CPI data was obtained from <http://data.bls.gov>. According to the most recent report from the Bureau of Labor Statistics, applying the increase in the CPI for the Dallas-Fort Worth region to the statutory rate, directs that Appellant's counsel should be compensated at the rate of \$200.50 per hour:

Dallas-Fort Worth Region CPI-U for September 2019:	239.815
Divided by Region CPI-U for July 1996:	<u>149.500</u>
	= 1.604
	<u>x \$125.00</u>
	= \$200.50

Appellant's attorney also requests that she be permitted to supplement with a final application to include fees and expenses incurred after the date of this application should such filing be necessary.

Considering the foregoing, Appellant respectfully requests that the U.S. Court of Appeals for Veterans Claims award a total fee of \$9,152.70, which includes of \$9,102.70 in attorney fees and \$50 in expenses, payable to the Appellant, Patrick Rodriguez, care of (C/O) his attorney, Julie L. Glover.

/s/ Julie L. Glover
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