

UNITED STATES COURT OF APPEALS
FOR VETERANS' CLAIMS

GORDON ALEX GRAHAM,)
Petitioner,)
v.)
ROBERT A. MCDONALD,) Docket No. 15-0112
SECRETARY OF VETERANS AFFAIRS,)
Respondent.)

PETITIONER'S
FIRST AMENDED APPLICATION FOR
ATTORNEY'S FEES AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)

CERTIFICATE OF ELECTRONIC SERVICE

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**PETITIONER'S
FIRST AMENDED APPLICATION FOR
ATTORNEY'S FEES AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d)**

Pursuant to the Equal Access to Justice Act (E.A.J.A.), 28 U.S.C. § 2412(d) and U.S. Vet. R. 39, Petitioner Gordon A. Graham applies for an award of reasonable attorney's fees and expenses in the amount of \$ 3,907.74.

PROCEDURAL HISTORY

An Order of the Court dated March 20, 2015, the Court denied the petition for extraordinary relief in the nature of a writ of *mandamus*.

The Petitioner filed a petition for extraordinary relief in the nature of a writ of *mandamus* which was docketed on January 6, 2015. Counsel for the Petitioner appeared on January 17, 2015, but had represented the Petitioner before this Court and the U.S. Department of Veterans Affairs continuously and exclusively since June of 2012.

In the Petition Mr. Graham sought relief on six issues:

1). Award a 100% service connected disability compensation rating for Porphyria Cutanea Tarda (PCT) using an analogous rating such as 38 C.F.R. § 4.115a which comprehends ongoing systemic blood therapy with effective date of March 31, 1994, as per the Court's Joint Motion for Partial Remand (JMPR) agreement approved by the Court by order dated April 23, 2013.

The Secretary has granted the effective date correctly, the rating has only been partially granted at the 60 percent rate. See Petitioner's Exhibit G. This constitutes a partial grant of the relief sought.

2). Award Special Monthly Compensation "S" (SMC-S) at the housebound rate effective March 31, 1994, based on 38 U.S.C. § 1114(s) pursuant to two 100% schedular totally disabling diseases.

This has been granted. See Petitioner's Exhibit G.

3). Either grant benefits or issue a decision on claims for Cryoglobulinemia (DC 7354-7820) and Fibromyalgia (DC7354-5025), secondary to service-connected Hepatitis C, filed on October 1, 2012, from which Petitioner might appeal.

The Secretary awarded service connected disability compensation for these conditions at a rate of 40% effective October 2, 2012. This constitutes a grant of the relief sought.

4). Either grant benefits or issue a Supplemental Statement of the Case (SSOC) with certification (Form 8) and advancement on the docket under 38 C.F.R. § 20.900(c) for appeal of Independent Living Program (ILP) claim filed May 2011 for a greenhouse pursuant to 38 U.S.C. §§ 3106(e), 3109, and 3120.

This matter was certified to the Board. This constitutes a grant of the relief sought.

5. Immediately convert my paper VA benefits claims file to electronic format to expedite processing of my claims.

The Secretary has promised to convert the file to electronic format at the earliest opportunity. This constitutes a partial grant of the relief sought.

6. Ensure that VLJ Mark Hindin has no further contact with the adjudication of my claims.

The Court and the Secretary have denied relief on this issue.

The Petitioner, by and through his counsel, Robert P. Walsh, moves the Court for an award of reasonable attorney's fees and expenses. Petitioner seeks an award for preparing the petition and appendix, and the time and cost associated with the case from January 6, 2015, until April 11, 2015.

Expenses are \$ 261.24 in this matter. Attorney fees for the Mr. Walsh are \$ 3,646.50.

In support of this application Mr. Graham demonstrates that: 1) he is entitled to and award of attorney's fees and expenses under E.A.J.A. subsection (d); and 2) an award of \$ 3,907.74 is both reasonable and appropriate.

SUMMARY OF PROCEEDINGS

In the Order of the Court dated March 20, 2015, the Court, Davis, J., dismissed the the petition for extraordinary relief in the nature of a writ of *mandamus* of the Petitioner.

The Court recited the issues and the actions taken by the Secretary to comply. With the exception of the last issue, prohibiting Mr. Hindin from taking any further action in his claims, the Petitioner has substantially prevailed on every issue.

ARGUMENT

I. THE PETITIONER IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEY'S FEES AND EXPENSES PURSUANT TO E.A.J.A. SUBSECTION (d).

There are three basic statutory requirements that a party must satisfy in order to be eligible for an award of attorney's fees under E.A.J.A. subsection(d). They are: 1) the party must have been a "prevailing party and be eligible to receive an award under this subsection"; 2) the position of the United States must not have been "substantially justified"; and 3) there must be no "special circumstances" which would make an award unjust. If these requirements are met, the Court "shall award" reasonable fees and expenses. *Gavette v. Office of Personnel Management*, 808 F.2d 1456 (Fed. Cir. 1986) (*en banc*). As we demonstrate in this section, Petitioner has satisfied each of these requirements.

A. Petitioner Is A Prevailing Party.

A party prevails with respect to the E.A.J.A. if they "succeed on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citations omitted), *Shalala v. Schaefer*, 113 S. Ct. 2625, 2632 (1993).

The Order of the Court dated March 20, 2015, denied the petition for extraordinary relief in the nature of a writ of *mandamus*. It also recites issue by issue the relief granted by the Secretary-Respondent as set forth above.

This was a significant portion of the relief sought by Mr. Graham and he is clearly a prevailing party.

**B. Petitioner Is A Person Eligible To Receive
An Award Under Subsection (d).**

In order to be eligible to file a petition for fees under subsection (d), a prevailing party must not be:

- (a) an individual whose net worth exceeded \$2,000,000.00 at the time the litigation began, nor
- (b) a business or entity whose net worth exceeded \$7,000,000.00 and which had more than 500 employees at the time the litigation began.

Mr. Graham is disabled. During all times relevant to this litigation Mr. Graham's income and net worth have been below the statutory limits. His net worth is below \$2,000,000.00. See the declaration of the Petitioner attached and marked as Exhibit 'A'.

**C. The Position Of The Government
Was Not Substantially Justified.**

In order to be considered "substantially justified" under the E.A.J.A., the government must show that its position was "justified to a degree that could satisfy a reasonable person", *i.e.*, has a "reasonable basis both in law and fact." *Pierce v. Underwood*, 108 S.Ct. 2541, 2550 (1988). The burden is on the Secretary to demonstrate that his position was substantially justified. *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).

In order to determine whether the Government's position was substantially justified, the court is "instructed to look at the entirety of the government's conduct and make a judgment call

whether the government's overall position had a reasonable basis in both law and fact." *Chi v. United States*, 948 F.2d 711 (Fed. Cir. 1991) (emphasis added). The "overall" position is that taken by the government "both prior to and during litigation." *Id.* at 715. Thus, in order to prevail on "substantial justification" in this case, the government must demonstrate that the agency action leading to the litigation (*i.e.*, the denial and long delays in the adjudication of Petitioner's claims) were "overall" reasonable.

In this case it is clear that the Respondent's position was unreasonable. The Regional Office had delayed certifying his appeal. They had neglected to issue rating decisions on fibromyalgia and cryoglobulinemia for almost 3 years. While they failed to grant the proper 100% service connected disability compensation rating for Porphyria Cutanea Tarda (PCT), they did issue a 60 percent rating and adjust the effective date to March 31, 1994, as ordered by this Court on April 23, 2013. As indicated above, the Respondent granted Fibromyalgia and cryoglobulinemia at the 40 percent level effective October 2, 2012.

The failure of the Respondent's Regional Office staff to timely comply with the April 23, 2013, Order of this Court resulted in the petition for relief *via mandamus* by the Petitioner. This failure to comply has been the direct cause of this petition and the resulting expense and inconvenience to the Petitioner. These are the expenses and fees for which the E.A.J.A. is meant to compensate.

D. No Special Circumstances Make An Award Unjust In This Appeal.

Not only is the Secretary's position without "substantial justification," but he also cannot meet his heavy burden to prove that "special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). See *Devine v. Sutermeister*, 733 F.2d 892, 895 (Fed. Cir. 1984). Courts narrowly construe this "special circumstances" exception so as not to interfere with the Congressional purpose in passing the E.A.J.A., *i.e.*, to insure that litigants have access to the courts when suing the Government. In this case no facts are present which would fall within the definition of "special circumstances."

II. THE COURT SHOULD AWARD Petitioner REASONABLE ATTORNEY FEES AND EXPENSES OF \$ 3,907.74.

The E.A.J.A. provides that a court "shall" award fees and other expenses" when the other prerequisites of the statute have been met. 28 U.S.C. § 2412(d)(1)(A). The statute defines "fees and other expenses" to include "reasonable attorney fees." 28 U.S.C. § 2412 (d)(2)(A).

When Congress has authorized the award of "reasonable" attorney fees, the amount to be awarded is based on the "lodestar" the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. See *Hensley v. Eckerhart*, 461 U.S. at 433; *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1325 (D.C. Cir. 1982).

A. The Hours Reasonably Expended.

One attorney expended time on this appeal. A total of **19.5** hours were expended on this appeal. See Exhibit B, attached.

B. The Reasonable Hourly Rate.

The billing rate of \$ 250.00 per hour was used in this appeal. This was the standard billing rate of the attorney for federal matters at the time the fee agreement was executed. The current rate is \$250.00 per hour and is supported by the data provided by the State Bar of Michigan. This rate was also in use at that time for matters before the U.S. Merit Systems Protection Board, The Employees Compensation Appeal Board, U.S. Equal Employment Opportunity Commission and the Social Security Administration.

1. The Prevailing Market Rate for the Kind
and Quality of Services Furnished.

To the best of his knowledge counsel for the Petitioner is one of very few attorneys actively practicing and accepting cases before the U.S. Court of Appeals for Veterans Claims in this State. His standard rate for federal administrative law matters was \$250.00 per hour at the time this case was accepted. His office rate for Federal Court of Appeals cases is now \$350.00 per hour. The rate for other general practitioners in this county now averages over \$250.00 per hour for family law and general legal services. This is based on a survey conducted by the State Bar of Michigan.

1. A. The Statutory Rate Adjusted for Inflation by the
Consumer Price Index.

The October 1, 1981, statutory rate was increased from \$ 75.00 per hour to \$ 125.00 per hour for cases commenced on or after March 26, 1996. The statutory rate of \$ 125.00 per hour was adjusted by use of the consumer price index calculator of the U.S. Department of Labor.¹ The calculation was based on work performed in 2015. This calculation resulted in an hourly rate of **\$ 187.00**, which was used in calculating the fee in this case.

2. Distinctive Knowledge and Specialized Publications
Are Required To Practice Before This Court.

To practice effectively before this court a significant investment in specialized publications must be made. In addition, background and insight into medical terms and concepts along with an understanding of the V.A. claims adjudication process is essential.

¹ U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index Calculator, www.bls.gov CPI Inflation Calculator \$ 125.00 in 1996 adjusted to 2015.

3. Petitioner's Counsel, Robert P. Walsh, Has The Distinctive Knowledge and Library Resources To Practice Before This Court.

Mr. Robert P. Walsh is a former VA staff attorney. He has been admitted to practice before the Court since his return to the U.S. from Kuwait in November of 1994. Mr. Walsh is one of very few attorneys in Michigan admitted to the bar of this court that actively accepts cases. Mr. Walsh has made a substantial investment in library resources and time in an effort to assist the veterans in this geographical region. The factual matters in dispute before the court are often similar to those encountered before the Social Security Administration in disability appeals. Mr. Walsh also practices in that area.

C. Expenses.

Under the E.A.J.A. subsection (d), the Court "shall" award a prevailing party, a reasonable attorney fee "and other expenses" 28 U.S.C. § 2412(d)(1)(A). *Patterson v. Apfel*, 99 F. Supp. 2d 1212, 1215, (C.D. Cal. 2000) quoting *Bullfrog Films, Inc. v. Catto*, 815 F. Supp. 338, 344 (C.D. Cal. 1993), states that "As the prevailing party in this litigation, plaintiff is entitled to an award of costs and expenses under the EAJA. . . all reasonable and necessary expenses incurred in a case, which are customarily charged to a client, are recoverable under the EAJA."

Petitioner seeks expenses for postage in the amount of: \$ 127.47 for postage; \$ 83.77 for office supplies for preparation of the appendix; and \$ 50.00 for the filing fee for the petition for a total of **\$ 261.24** in litigation expenses in this appeal.

D. Summary of Fees and Expenses.

In sum, petitioner submits that \$ 3,907.74 constitutes a reasonable award of attorney fees and expenses incurred in this matter, calculated as follows:

| | |
|--------------------------------------|---------------------------|
| Total time: 19.50 hours x \$187.00 = | \$ 3,646.50 |
| Total expenses: | \$ 261.24 |
| Total EAJA application | <u>\$ 3,907.74</u> |

Exhibit 'B', attached to this application, contains a detailed accounting of the time and expenses associated with this appeal.

CONCLUSION

For the foregoing reasons, the Court should award reasonable attorney fees, expenses, and costs in the amount of **\$ 3,907.74**.

Appendix:

Exhibit A. Affidavit: Declaration of net worth of Petitioner.

Exhibit B. Itemized and verified statement of fees and expenses.

/S/ Robert P. Walsh
ROBERT P. WALSH, Esq.
Counsel for Petitioner

ORIGINAL ON FILE

STATE OF MICHIGAN)
) ss.
COUNTY OF CALHOUN)

Being first duly sworn to before me this 10th day of April, 2015, Robert P. Walsh, Counsel for Petitioner, deposes and says that the expenses and time set forth above represent the full and final accounting of charges in this matter.

/s/ SHAWN L. KEQUOM ORIGINAL ON FILE
Shawn L. Kequom, Notary Public
Calhoun County, Michigan
My Commission Expires: 08/16/2018

CERTIFICATE OF ELECTRONIC SERVICE

I, Robert P. Walsh, hereby certify that I have

1. Filed this document using the Electronic Filing System of the U.S. Court of Appeals for Veterans Claims which will automatically send it to counsel for the Appellee,

Mr. Mark M. McNabb
Office of General Counsel (027C)
U.S. Department of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420

Telephone (202) 632-7109

and;

2. I have mailed a copy of this document to the Petitioner by first class mail to his address of record.

/S/ Robert P. Walsh

Date: April 11, 2015

Robert P. Walsh
Attorney for Claimant-Petitioner

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Two West Michigan Avenue
Suite 301
Battle Creek, Michigan 49017

Telephone (269) 962-9693
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SWORN DECLARATION OF GORDON ALEX GRAHAM

Gordon Alex Graham, Appellant, being first duly cautioned and sworn, deposes and says that:

1. I am the named Petitioner in this action, CAVC docket number 15-0112.
2. This declaration is based upon my personal knowledge.
3. At the time this civil action was filed my personal net worth did not exceed \$ 2,000,000.00 (two million dollars); nor did I own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$ 7,000,000.00 (seven million dollars) and which had more than 500 employees.
4. That the conditions set forth in paragraph 3, above have remained true throughout the pendency of this civil action and are true today.

I declare under penalty of perjury that the foregoing is true and correct.

Gordon Alex Graham, Appellant
14910 125th Street KP N
Gig Harbor, Washington 98329
Telephone (253) 884-3079

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

Subscribed and sworn to before me this 9th day of April, 2015, by Gordon Alex Graham, Appellant.

Notary Public

Exhibit 'A'

**ITEMIZED STATEMENT OF SERVICES RENDERED AND AMOUNTS OF
REASONABLE FEES AND EXPENSES**

Graham, Gordon A., Petitioner v. McDonald
CAVC Docket Number 15-0112

Below are the itemized expenses and time accounting for this matter:

| | <u>DATE</u> | <u>ITEM</u> | <u>TIME</u> |
|-----|-------------|---|-------------|
| 1. | 12/04/14 | Discuss CAVC <i>Mandamus</i> petition and issues with Mr. Graham. | .50 |
| 2. | 12/08/14 | Review proposed appendix exhibits with Mr. Graham. | 1.00 |
| 3. | 12/16/14 | Prepare draft <i>mandamus</i> petition and submit to client for review. | 2.00 |
| 4. | 12/18/14 | Prepare index to appendix and exhibits and Bates number | 4.50 |
| 5. | 12/28/14 | Complete final edits and send petition to client for signature. | .75 |
| 6. | 12/28/14 | Prepare Fee Agreement and Appearance. | 1.00 |
| 7. | 01/06/15 | Petition filed by Petitioner via express mail. | 1.00 |
| 8. | 01/17/14 | Fee agreement, VA 21-22a and appearance filed. | .50 |
| 9. | 01/19/15 | Prepare and Motion for Oral Argument. | .50 |
| 10. | 02/23/15 | Prepare and File Supplemental Authorities under Rule 30. | .50 |
| 11. | 02/25/15 | Prepare and File Supplemental Authorities under Rule 30. | .50 |
| 12. | 02/28/15 | Prepare and File Supplemental Authorities under Rule 30. | .50 |
| 13. | 03/02/15 | Prepare and File Response to Respondents Response. | 1.50 |
| 14. | 03/05/15 | Prepare and File Motion to strike. | 1.00 |
| 15. | 04/11/15 | Prepare Mot. for EAJA. | 1.50 |
| 16. | 04/11/15 | Prepare time accounting. | 1.00 |
| 17. | 04/11/15 | File Mot. For EAJA. | .25 |

Graham, Gordon A. v. McDonald
CAVC Docket Number 15-112

Total time h. 19.50

EXPENSES

| | | | |
|-----|----------|--|-----------|
| 18. | 12/2014 | Office supplies, exhibit labels for preparation of petition And appendix. | \$ 83.77 |
| 19. | 01/06/15 | Postage for service of Petition. | \$ 127.47 |
| 20. | 01/06/15 | Filing fee | \$ 50.00 |

Total expense \$ 261.24

Total time: 19.50 hours x \$ 187.00 = \$ 3,646.50

Total EAJA application \$ 3,907.74

Wherefore, Appellant respectfully requests that the Court award attorney fees and expenses in the total amount of **\$ 3,907.74** in this matter.

/S/ Robert P. Walsh

ORIGINAL ON FILE

Robert P. Walsh
Counsel for Appellant

EAJA EXHIBIT 'B'

Graham, Gordon A. v. McDonald
CAVC Docket Number 15-0112

STATE OF MICHIGAN)
)
) ss.
COUNTY OF CALHOUN)

Being first duly sworn to before me this 10th day of April, 2015, Robert P. Walsh,
Counsel for Petitioner, deposes and says that the time set forth above represents the full and final
accounting of charges in this matter.

/S/ Shawn L. Kequom

ORIGINAL ON FILE

Shawn L. Kequom, Notary Public
Calhoun County, Michigan
My Commission Expires: 08/16/2018

EAJA EXHIBIT 'B'