

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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ROBERT W. HERNES,

Plaintiff,

OPINION AND ORDER

v.

01-C-455-C

JO ANNE B. BARNHART, Commissioner  
of Social Security,

Defendant.

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Plaintiff Robert W. Hernes has applied for an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. Plaintiff contends that he is the prevailing party in an action in which he sought reversal or remand of a decision of defendant Commissioner of Social Security and that defendant's position in this litigation was not substantially justified. Plaintiff is seeking fees and costs in the amount of \$8,566.56. Defendant disputes both the amount of the fees and costs sought and the characterization of her position as unjustified. Because I find that defendant's position was justified, I will deny the petition for an award of fees and costs.

The following undisputed facts are taken from the record. These facts are material to the question whether defendant's position was substantially justified.

## FACTS

Plaintiff applied for disability insurance benefits on January 23, 1998. After his claim was denied twice at the state agency level, plaintiff's claim was heard by an administrative law judge. On January 26, 2000, the administrative law judge issued a decision, finding that plaintiff was not disabled; the Appeals Council denied plaintiff's request for review.

On August 13, 2001, plaintiff filed a civil action for judicial review pursuant to 42 U.S.C. § 405(g). Plaintiff asked the court to reverse the decision of the commissioner and remand the case for an award of benefits, or in the alternative, for a new hearing. Plaintiff filed a brief in support of his petition for review in which he contended that the administrative law judge did not properly consider whether plaintiff's condition met a listed impairment, did not properly evaluate the opinion of Dr. Holly Duck, one of plaintiff's treating physicians, gave too much weight to the opinions of the state agency physicians, improperly evaluated plaintiff's subjective complaints, did not properly consider the requirements of plaintiff's past relevant work, and did not properly consider all of plaintiff's medical impairments.

On February 6, 2002, Magistrate Judge Stephen Crocker issued a report and recommendation, recommending that the court reverse and remand the commissioner's decision pursuant to sentence four of § 405(g). The magistrate judge found that the administrative law judge had not articulated an adequate foundation for his conclusions regarding plaintiff's credibility and his residual functional capacity. In particular, the

magistrate judge found that the administrative law judge had failed to consider whether plaintiff's failure to seek treatment may have been a result of a lack of financial resources, made medical findings that were not supported by the record and failed to articulate a nexus between plaintiff's daily activities and the finding that plaintiff could perform medium work. Because these same reasons formed the basis for the administrative law judge's decision to adopt the residual functional capacity assessments of the state agency physicians, the magistrate judge also concluded necessarily that the administrative law judge should reevaluate plaintiff's residual functional capacity, if necessary, on remand. However, the magistrate judge upheld the ALJ's findings with respect to whether plaintiff had a listed impairment, the weight to be afforded Dr. Duck's opinion and plaintiff's past work.

Both plaintiff and defendant filed objections to the magistrate judge's report and recommendation. On March 15, 2002, I entered an order adopting the magistrate judge's report and recommendation and remanded the case to the commissioner for further proceedings.

## DISCUSSION

### I. ENTITLEMENT TO ATTORNEY FEES

As a general matter, there is no dispute that plaintiff prevailed in this litigation by obtaining a favorable decision from this court. Also, there is no dispute about the standard that applies in determining whether plaintiff is entitled to attorney fees. Under the Equal

Access to Justice Act, a successful plaintiff in litigation against the United States or its agencies is entitled to fees "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). Under the substantially justified standard, a party who succeeds against the government is not entitled to fees if the government took a position that had "a reasonable basis in law and fact." See Young v. Sullivan, 972 F.2d 830, 835 (7th Cir. 1992) (quoting Pierce v. Underwood, 487 U.S. 552, 566 n.2 (1988)). "The test for substantial justification is whether the agency had a rational ground for thinking it had a rational ground for its action." Kolman v. Shalala, 39 F.3d 173, 177 (7th Cir. 1994). The government carries the burden of proving that its position was substantially justified. See Marcus v. Shalala, 17 F.3d 1033, 1036 (7th Cir. 1994).

When considering whether the government's position was substantially justified, the court must consider not only the government's litigating position but also its position with respect to the original government action which gave rise to the litigation. See 28 U.S.C. § 2412(d)(1)(B) (conduct at the administrative level is relevant to determination of substantial justification); Gotches v. Heckler, 782 F.2d 765, 767 (7th Cir. 1986). "EAJA fees may be awarded if either the government's prelitigation conduct or its litigation position are not substantially justified. However, the district court is to make only one determination for the entire civil action." Marcus, 17 F.3d at 1036 (internal citations omitted); see also Jackson v. Chater, 94 F.3d 274, 278 (7th Cir. 1996) (EAJA requires single substantial

justification determination that "simultaneously encompasses and accommodates the entire civil action"). Thus, EAJA fees may be awarded where the government's prelitigation conduct was not substantially justified despite a substantially justified litigation position. Marcus, 17 F.3d at 1036. Conversely, EAJA fees may be denied even when the government's litigation position was not substantially justified, provided the litigation position was offset by substantially justified prelitigation conduct. Id.

As support for her contention that her position was substantially justified, defendant commissioner points out that this court found in her favor on several issues, including her contention that the administrative law judge had properly determined that plaintiff did not meet the requirements of Listing 1.05C, Dr. Duck's opinion was not entitled to controlling weight and Social Security Ruling 82-59 did not apply to plaintiff's case. See Jackson v. Chater, 94 F.3d 274, 279 -280 (7th Cir. 1996) ("being incorrect on one point does not translate into lacking substantial justification for one's litigation position during the entirety of a civil action.") As for the credibility issue on which the case was ultimately remanded, defendant argues that it was reasonable to argue in support of the administrative law judge's finding in light of the deference that is owed to credibility findings and the existence of arguable evidence in the record to support that finding. Plaintiff, on the other hand, cites to the various deficiencies noted by the magistrate judge in his report and recommendation and argues that these deficiencies indicate that neither the government's prelitigation nor litigation positions were substantially justified.

Having carefully reviewed the administrative law judge's decision and the commissioner's brief in support of that decision, I conclude that the commissioner's position was substantially justified. There was evidence in the record to support the commissioner's decision; in fact, this court noted that the record contained at best borderline evidence to support plaintiff's claim of disability. This court remanded the case so that the commissioner could articulate more completely his rationale for concluding that plaintiff's activities and medical treatment history were not consistent with his allegations of disability. An administrative law judge's failure to articulate sufficiently the path of his reasoning "in no way necessitates a finding the [commissioner's] position was not substantially justified" within the meaning of the EAJA. Stein v. Sullivan, 966 F.2d 317, 320 (7th Cir. 1992). As the court noted in Stein, the articulation requirement is "deliberately flexible" and "far from precise." Id. Here, the administrative law judge considered all of the important medical evidence and the relevant credibility factors as required by the commissioner's regulations, including plaintiff's daily activities, treatment history, measures for pain relief and testimony regarding his functional limitations. This court found simply that it was unclear from the administrative law judge's decision whether he had considered whether plaintiff's failure to obtain frequent treatment for his back pain may have been due to a lack of financial resources and that he had failed to explain adequately why plaintiff's daily activities were consistent with medium work. The court also found that the administrative law judge had placed too much weight upon the fact that plaintiff had not been found to be a candidate

for surgery and on his use of only over-the-counter medications for pain relief. Although these errors may sound significant, in reality this was a close case and one that a different court may have decided differently. Under these circumstances, it was not unreasonable for the commissioner to have taken the position she did at the administrative and litigation stages of this case. Because the commissioner has satisfied her burden to show that her position was substantially justified, plaintiff's motion for an award of attorney fees under the EAJA must be denied.

ORDER

IT IS ORDERED that the motion of plaintiff Robert W. Hernes for an award of attorney fees under the Equal Access to Justice Act is DENIED.

Entered this 30th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge