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

CHARLES C. SMITH,

Plaintiff, OPINION AND ORDER

v. 05-C-0026-C

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

This is a social security appeal brought pursuant to 42 U.S.C. § 405(g). Before the court is plaintiff's application for an award of attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Plaintiff contends that he was the prevailing party in his action for judicial review and that defendant's position was not substantially justified. Plaintiff seeks attorney fees in the amount of $16,691.46, which is the sum of $15,776.46 for work performed by performed in this court and in the court of appeals before the parties agreed that the case should be remanded to the commissioner for further proceedings, and $915 for defending the instant fee petition. Defendant opposes an award of attorney's fees, arguing that plaintiff's failure to articulate clearly the argument on which the parties ultimately agreed to remand the case until his opening appellate brief constitutes either a "special circumstance" making an award of fees unjust or shows that defendant's position was substantially justified. In the event fees are awarded, argues defendant, this court should reduce the amount sought by plaintiff because it is excessive.

Because I find that defendant's position was not substantially justified and that no special circumstance exists making an award of fees unjust, I will grant the petition for an award of fees. The contention that plaintiff sandbagged defendant by failing to raise in this court the issue that led to remand is not supported by the record. As for the amount of fees requested, I find that with a few exceptions, the amount of time plaintiff's lawyers devoted to this case was reasonable in light of the degree of success obtained.

The following undisputed facts are taken from the record. These facts are material to the question whether defendant's position was substantially justified or whether special circumstances exist making an award of fees unjust.

DISCUSSION

On August 16, 2001, plaintiff Charles Smith filed applications for disability insurance benefits and supplemental security income under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 416, 423, 1381a and 1382c, claiming that he became disabled on July 19, 2001, as a result of hip dysplasia and severe rheumatoid arthritis of the hips. After the local disability agency twice denied his applications, plaintiff requested a hearing before an administrative law judge. On October 8, 2002, the Social Security Administration held a hearing at which plaintiff and a vocational expert testified. On February 5, 2003, the ALJ issued a decision concluding that plaintiff had severe impairments that prevented him from returning to any of his past relevant work as an assembler, dump truck driver or delivery

truck driver. However, he found that given plaintiff's age, education, residual functional capacity and "past relevant work experience," plaintiff was able to make a vocational adjustment to other jobs existing in significant numbers in the regional economy, namely, entry-level jobs as a clerk/receptionist. The ALJ's decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review.

Plaintiff filed a complaint in this court requesting judicial review of the commissioner's final adverse determination. Plaintiff made four arguments in support of his request for reversal of the ALJ's decision: 1) the ALJ erred at step five of the sequential evaluation process by relying on plaintiff's short-term work attempt as a part-time clerk/receptionist as proof that plaintiff could make a vocational adjustment to such jobs; 2) the ALJ erred by failing to follow SSR 96-9p when formulating plaintiff's residual functional capacity; 3) the ALJ erred in finding that plaintiff did not meet Listing 1.02(A); and 4) the ALJ made an improper credibility determination and misapplied SSR 96-7p. Plaintiff's step five argument was essentially that the ALJ could not rely on plaintiff's past work as a telemarketer or office worker because plaintiff had not performed either job long enough to have developed any skills or proficiency that could be transferred to other work. Plt.'s Mem. in Supp. of Reversal, dkt. #9, at 12-14. Plaintiff pointed out that the ALJ had found that plaintiff had acquired no transferable skills from his past relevant work, which the ALJ found consisted of unskilled work as a factory assembler, dump truck driver and delivery truck driver.

Plaintiff honed his argument in his reply brief, pointing out that the ALJ's conclusion that plaintiff could perform the semi-skilled job of clerk/receptionist was inconsistent with his finding that plaintiff had acquired no transferable skills from any of his past relevant work, which was all unskilled. Plaintiff argued: "SSR 82-41 is crystal clear, when an individual has no transferable skills, like Plaintiff, that individual only qualifies for jobs that are unskilled at step five of the sequential process." Plt.'s Reply Brief, dkt. #11, at 18. Plaintiff pointed out that the clerk/receptionist jobs that the vocational expert had identified required a specific vocational preparation (SVP) of three or four, which corresponded to semi-skilled work. *Id*. at 17-18.

On July 27, 2005, United States Magistrate Judge Stephen Crocker issued a report and recommendation in which he rejected most of plaintiff's arguments and recommended affirming the commissioner's determination. Although the magistrate judge agreed that plaintiff's short-term work attempt prior to his hearing did not constitute substantial evidence to support the ALJ's conclusion that plaintiff had acquired skills that would transfer to the semi-skilled clerk/receptionists jobs identified by the ALJ, the magistrate judge determined that the error was harmless in light of other evidence in the record that supported the ALJ's step five determination. On September 12, 2005, I entered an order adopting the magistrate judge's report and recommendation and entered judgment affirming the commissioner's determination that plaintiff was not disabled and therefore not eligible for either supplemental security income or disability insurance benefits.

Plaintiff appealed. After plaintiff filed his opening brief, the commissioner agreed to a voluntary remand. The parties subsequently filed a joint motion in this court for relief from judgment under Rule 60(b), indicating that they had agreed that the case should be remanded to defendant for further proceedings "because the administrative law judge's finding that Mr. Smith could perform certain jobs was based on conclusions that appear to be inconsistent with Social Security Administration rules and policy as set forth in Social Security Ruling 82-41." Parties' Joint Mot. for Relief from Judgment, dkt. #17, at 2. After I indicated that I would grant the motion, the court of appeals remanded the case; subsequently, this court granted the parties' Rule 60(b) motion, vacated the judgment and remanded the case to the Social Security Administration for further administrative proceedings pursuant to sentence four of § 405(g).

OPINION

I. ENTITLEMENT 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). The parties agree that plaintiff is the prevailing party by virtue of this court's order remanding the case. The parties also appear to agree that,

although the remand order encompassed other issues, it was only the transferability of skills issue on which the commissioner conceded error that prompted the remand.

A. SPECIAL CIRCUMSTANCES

The EAJA's "special circumstances" exception "explicitly directs a court to apply traditional equitable principles in ruling upon an application for counsel fees by a prevailing party." Oguachuba v. I.N.S., 706 F.2d 93, 98 (2d Cir. 1983). This rule "'gives the court discretion to deny awards where equitable considerations dictate an award should not be made.'" Id. (quoting H.R.Rep. No. 1418, 96th Cong., 2d Sess. at 11 (1980)).

Defendant argues that an award of fees in this case is unjust because "it was not until Plaintiff filed a brief associated with his appeal before the Seventh Circuit that he presented a fully developed argument on [the transferability of skills] issue and convinced the Commissioner that further administrative review was necessary." Def.'s Br. in Opp. to Plt.'s App. for EAJA Fees, dkt. # 25, at 3-4. Defendant asserts: "[A]s soon as Plaintiff brought this highly technical defect in the ALJ's decision to the attention of the Commissioner, the Commissioner acted reasonably and took corrective action." Id., at 7. Plaintiff disagrees, asserting that although he presented his transferability of skills argument more clearly in his appellate brief than he did in his briefs before this court, he nonetheless presented the argument in this court with sufficient clarity to have fairly alerted the commissioner to the substance of it.

I agree. Plaintiff presented the following argument in his opening brief:

> Although the ALJ is correct when he notes that he may take [plaintiff's short-term] attempts to work into account, even though they do not constitute [substantial gainful activity], in that they "may show that he [Plaintiff] is able to do more work than he has done," however, the ALJ cannot take those two work attempts into account to show skills or proficiency unless [sic] they meet the other two requirements, specifically duration . . . The ALJ even states in his findings that Plaintiff "has no transferable skills from any past relevant work." Therefore, the only possible explanation for the ALJ's finding that Plaintiff specifically can perform clerk/receptionist jobs is that, at the time of the hearing, Plaintiff was employed part-time in what the VE categorized as a "clerk/receptionist" job . . . The VE testified that a clerk/receptionist job has a skill level of 3, semi-skilled "*because it takes about a month, at least to learn how to do those jobs.*" Thus, the ALJ cannot state that Plaintiff can perform work as a clerk/receptionist because of this one week as "previous related work". The Commissioner's own rulings make perfectly clear that to qualify as previous related work experience, the Plaintiff must have held the job long enough to have learned it, which the VE plainly stated requires at least a month.

Plt.'s Mem. in Supp. of Reversal, dkt. #9, at 13-14.

Admittedly, plaintiff's argument is not a model of clarity. He never invoked SSR 82-41 but referred instead to SSR 82-61 and SSR 82-62. These rulings address the circumstances under which the commissioner can deem a claimant's past work experience to be "past relevant work" at step four of the sequential evaluation process; they do not address the specific issue of transferability of skills, which is a step five consideration. However, plaintiff made clear in his brief that he was challenging the commissioner's determination at step five. The point heading to that section of his brief reads: "The ALJ Erred by Basing his Finding at Step Five of the Sequential Evaluation Process Upon Past Relevant Work Experience That, at the Time of Onset, Plaintiff Had Not Yet Performed,

and Upon the Answer of the VE to a Question the ALJ Never Asked." Overall, the brief conveys the gist of plaintiff's argument that the ALJ could not rely on plaintiff's short-term work attempt as a basis for finding that plaintiff had acquired skills sufficient to allow him to perform semi-skilled work as a clerk/receptionist. Reviewing the ALJ's decision in light of plaintiff's argument and her own familiarity with her own policies and rulings, the commissioner should have recognized at that point that the ALJ had erred in his step five determination.

Moreover, even if plaintiff's argument was not entirely clear from his opening brief, he clarified it in his reply brief. In that brief, he referred specifically to SSR 82-41, pointing out that the ALJ's conclusion that plaintiff had acquired no transferable skills from past work was inconsistent with his finding that plaintiff could perform semi-skilled work as a clerk/receptionist. When read in conjunction with his opening brief, plaintiff's reply brief made clear the error he was alleging with respect to the ALJ's step five determination. Indeed, the magistrate judge recognized that plaintiff was raising a transferability of skills argument. Rep. and Rec., dkt. #12, at 22 (agreeing with plaintiff that his "recent, short-term work attempt prior to his hearing does not constitute substantial evidence to support the ALJ's conclusion that plaintiff had acquired the skills to allow him to make a vocational adjustment to the clerk/receptionist jobs identified by the VE."). Even if, as defendant contends, plaintiff arguably waived his SSR 82-41 argument by failing to raise it until his reply, see, e.g., Estate of Phillips v. City of Milwaukee, 123 F.3d 586, 597 (7th Cir. 1997),

it is not credible for defendant to claim that she remained unaware of the error until plaintiff filed his opening brief in the court of appeals.

The inconsistency of defendant's assertions diminish the strength of her appeal to equity as a basis for denying plaintiff's fee petition. She asserts, first, that she would have taken "immediate" action as soon as she became aware of the error and second, that she was aware of the error after plaintiff filed his reply but took no action on the basis of a waiver theory. In any event, I have already determined that plaintiff sufficiently presented his argument in his opening brief to have alerted the commissioner to the nature of the alleged error. No special circumstances exist in this case making an award of fees to plaintiff unjust.

B. SUBSTANTIAL JUSTIFICATION

Defendant next contends that plaintiff's fee petition should be denied in its entirety because defendant's position was substantially justified. 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.' " Young v. Sullivan, 972 F.2d 830, 835 (7th Cir. 1992) (quoting Pierce v. Underwood, 487 U.S. 552, 566 n.2 (1988)). The Court of Appeals for the Seventh Circuit has described the substantial justification standard as requiring the government to show that its position was grounded in (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the

theory propounded; and (3) a reasonable connection between the facts alleged and the legal theory advanced. United States v. Hallmark Construction Co., 200 F.3d 1076, 1080 (7th Cir. 2000). Put another way, "[t]he 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. Marcus v. Shalala, 17 F.3d 1033, 1036 (7th Cir. 1994). The commissioner can meet her burden if there was a "genuine dispute," or if reasonable people could differ as to the propriety of the contested action. Pierce, 487 U.S. at 565.

Defendant's substantial justification argument differs little from her special circumstances argument. She argues that this court's agreement with her position on every issue apart from the transferability of skills issue shows that she had a rational basis for defending the ALJ's decision. As for the transferability of skills issue, she contends that her position was justified by plaintiff's failure to clearly present his argument until he filed his appellate brief.

Defendant's contention that she was justified in her litigation position with respect to the transferability of skills issue fails in light of my finding that defendant should have been aware of that error from plaintiff's opening brief. Further, it ignores the fact that conduct at the administrative level is also relevant to the question whether the government's position was substantially justified. 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).

Also unpersuasive is defendant's suggestion that plaintiff should be entitled to no fee award because this court found against plaintiff on the other issues in the case. The commissioner has conceded error and has indicated that she would not have attempted to defend the ALJ's decision had she known of the error when this litigation began. However, I have already found that the defendant should have been alerted to the error after plaintiff filed his opening brief. Had defendant properly recognized the error at that time, this court would never have ruled on plaintiff's other objections to the ALJ's decision. Defendant should not be allowed to benefit from a ruling occasioned by her own oversight.

In any event, the substantial justification inquiry under the EAJA focuses on the issue or issues on which the case ultimately was remanded. Lewis v. Barnhart, 281 F.3d 1081, 1086 (9th Cir. 2002). As the commissioner now concedes, the ALJ's determination that plaintiff was not disabled turned in part on his misapplication of the commissioner's clearly-stated policy concerning when a claimant acquires skills from past work. Not only did the ALJ lack a rational legal foundation for this conclusion, but the commissioner compounded the error by defending the ALJ's determination in court. The commissioner has not met her burden to show that her position was substantially justified.

C. REASONABLENESS OF FEES

In INS v. Jean, 496 U.S. 154 (1990), the Supreme Court indicated that the district court's task of determining what fee is reasonable under the EAJA is essentially the same as that described in Hensley v. Eckerhart, 461 U.S. 424 (1983). Jean, 496 U.S. at 161. Under Hensley, the starting point for determining a reasonable fee is to multiply the number of hours reasonably expended by a reasonable hourly rate. Hensley, 461 U.S. at 433. The court should exclude from this initial fee calculation hours that were not "reasonably expended," such as those that are excessive, redundant, or otherwise unnecessary, considering factors such as the novelty and difficulty of the questions, the skill required to perform the legal service properly, the customary fee and other factors. Id. at 434 n. 9. Whether the hours would be properly billed to a client guides the inquiry. Id. at 434. The court may also adjust the fee upward or downward depending on the "results obtained." Id. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Id. at 440.

Plaintiff requests compensation for 76.75 hours spent by his attorneys at the hourly rates of $151.25 for the year 2004, $156.25 for the year 2005 and $157.76 in 2006. He also requests compensation for 46.5 hours spent by a law clerk and a paralegal at the hourly rate of $100. Of the 123.25 total hours requested, 8 hours (6 hours by a law clerk and 2 by

an attorney) were spent defending plaintiff's fee petition, with the remaining hours spent on the merits of the case.[1]

Defendant does not contest the hourly rates but raises two objections to the reasonableness of plaintiff's fee request. First, she contends that 70.7 hours was too much time for plaintiff's lawyers to have spent litigating this matter in this court. Second, she asserts that plaintiff should not be compensated at a paralegal rate for time that the paralegal spent performing "purely clerical" tasks. (Reiterating her appeal to equity, defendant also contends that plaintiff should receive no fees at all for work performed by his lawyers at the court of appeals because of his failure to raise the remand issue until that proceeding. I have already rejected this argument.)

In support of her first objection, defendant asserts that plaintiff's lead lawyer, Fred Daley, is an experienced practitioner in social security cases, that the issues raised were "uncomplicated and routine" and that most of counsel's time was devoted to unsuccessful issues. Having carefully reviewed plaintiff's time log and considered defendant's objections and plaintiff's response, I am convinced that no reduction is warranted in this category, with one exception. The time log reflects that Daley spent 1.5 hours on August 26, 2005 revising a draft. However, plaintiff's objections to the report and recommendation were filed on

[1]I see nothing on plaintiff's time log to reflect time spent preparing the initial EAJA petition.

August 15, 2005 and plaintiff submitted no other briefs after that date. Because the August 26, 2005, entry appears to be erroneous, I will excise it.

As revised, plaintiff's time log shows that plaintiff's lawyers and law clerks spent a total of 28 hours writing, editing and filing the opening brief, 18.25 hours on the reply, and 18.35 hours on the objections to the report and recommendation. The opening brief was 28 pages in length, the reply was 18 pages, and the objections were 13 pages. In each of these documents, plaintiff presented carefully thought-out arguments and pointed objections to the ALJ's decision, the commissioner's response, and the magistrate judge's report, respectively. In the briefs, plaintiff did not rely heavily on "boilerplate" language but instead focused on explaining why the ALJ's decision was wrong in light of the specific facts in the record. In the opening brief, plaintiff attacked four aspects of the ALJ's decision, presenting multiple arguments in the course of that attack. The detailed, thorough nature of the briefs reflects the time that plaintiff's legal team put into them. The time spent by plaintiff's lawyers on briefing was not unreasonable, even for a law firm as experienced in social security matters as the Daley firm.

It is worth noting that the time log does not reflect any significant duplication of effort by the various members of plaintiff's legal team. Moreover, because plaintiff's attorneys did not represent him at the administrative level, they required additional time to become familiar with the case and to identify the appealable issues. Finally, the reply brief

was drafted by a law clerk whose time was billed at a lower hourly rate, resulting in a lower total fee request. Overall, the time spent on plaintiff's case in this court was not excessive.

Defendant argues that I should reduce the fee because the time log indicates that plaintiff's lawyers devoted only a small percentage of their time to the transferability of skills issue on which plaintiff prevailed. However, in Hensley, 461 U.S. at 435, the Court observed that

> [w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee. The result is what matters.

Here, plaintiff obtained "excellent results" insofar as he succeeded in obtaining a reversal and remand of the commissioner's decision. Although each of plaintiff's arguments was presented as a separate attack on the ALJ's decision, they were all part of his single claim that the ALJ had committed errors of fact and law meriting reversal of the commissioner's determination that plaintiff was not disabled. Moreover, although this court found against plaintiff with respect to his attacks on the ALJ's findings concerning plaintiff's credibility, residual functional capacity and failure to meet a listing, all of those asserted grounds for reversal were well-founded and provided arguable, alternative bases for reversal. Under these circumstances, I decline to find that plaintiff achieved only limited success warranting a reduction in the lodestar amount.

I agree with defendant that a reduction is warranted for fees incurred by plaintiff by time spent by the paralegal, Suzanne Blaz, performing clerical tasks, although I disagree with defendant's characterization of the entries that fall into that category. See Def.'s Response in Opp. to Plt.'s App. for Atty. Fees, dkt. #25, at 17-18. Of the 6.15 hours to which defendant objects, I find that only 1.35 of those hours were spent on tasks that can be considered purely secretarial in nature. That includes 0.75 hour spent on December 17, 2004 mailing forms to plaintiff; 0.25 hour on February 7, 2005 for preparing and sending proof of service to the court; 0.1 hour returning a phone call to the United States Attorney's office on May 19, 2005; and 0.25 hour on June 15, 2005 e-filing a document. Adding these deductions to the 1.5 hour deduction previously noted amounts to a fee award for work on the merits of $15,407.

Although defendant has not had the opportunity to review plaintiff's supplemental request for fees incurred defending the fee petition, I have reviewed it and find that the amount of hours sought by plaintiff in conjunction with defending his fee request (6 law clerk and 2 attorney hours) is reasonable. Accordingly, plaintiff is entitled to fees totaling $16,322.10.

ORDER

IT IS ORDERED that:

1. The clerk of court shall enter judgment in favor of plaintiff, Charles Smith.

2. The petition of plaintiff for an award of attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, is GRANTED IN PART AND DENIED IN PART. Plaintiff is awarded attorney fees and costs in the amount of $16,322.10, to be made payable to plaintiff's attorney, Frederick J. Daley, Jr.

3. Plaintiff's request for costs will be granted in a separate order.

Entered this 23rd day of August, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge