

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

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KENNETH L. SCHILLING,  
Plaintiff,

v.

MEMORANDUM AND ORDER

JO ANNE B. BARNHARDT,  
Commissioner of Social Security,

05-C-105-S

Defendant.

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On April 14, 2005 this Court remanded the above entitled matter to the Commissioner for further proceedings. On May 12, 2005 plaintiff moved for attorney fees under the Equal Access to Justice Act. This motion has been fully briefed and is ready for decision.

Plaintiff is entitled to attorney fees when the Court finds that the defendant's position was not substantially justified. 28 U.S.C. § 2412(d)(1)(A). The substantial justification standard requires the government to show 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. U.S. v. Hallmark, 200 F.3d 1076, 1080 (7<sup>th</sup> Cir. 2000). This

standard is less stringent than the substantial evidence standard that governs review of the merits of disability determinations. See Cummings v. Sullivan, 950 F.2d 492, 498 (7<sup>th</sup> Cir. 1994).

This Court found that the ALJ failed to set forth adequate reasons for rejecting the opinions of plaintiff's three treating physicians. The Court stated, "Specifically he has not shown that the three doctors' opinions are not well supported by medically accepted clinical and laboratory techniques nor that they were inconsistent with other substantial evidence in the record."

The Commissioner's position cannot be substantially justified where the ALJ did not properly follow the regulations concerning consideration of the opinion of treating physicians. (20 C.F.R. §404.1527(d)(2)). See Henderson v. Barnhart, 257 F. Supp.2d 1163, 1168 (E.D. Wis. 2002). Accordingly, plaintiff is entitled to attorney fees.

Plaintiff requests attorney's fees in the amount of \$8,093.37. The Commissioner objects to the hourly rate requested for the hours worked in 2004. Plaintiff agrees that the 2004 hourly rate should be \$148.00. Plaintiff worked 30.6 hours in 2004. Adjusting plaintiff's request for attorneys' fees using the lower hourly rate for 2004 reduces the requested fees to \$7,876.11.

The Commissioner also argues that the amount of hours expended was excessive and should be reduced. The Court does find that 45.8

hours is excessive and will reduce the amount of hours for 2004 by a third to 20.4 hours at \$148.00.

20.4 hours at \$148.00 an hour = \$3,019.20

15.2 hours at \$155.10 an hour = \$2,357.52

2.9 hours at \$155.10 an hour = \$ 449.79

7.2 paralegal hours at \$75.00 an hour = \$ 540.00

This adjustment totals \$6,366.51, the amount of attorney fees to be awarded plaintiff.

ORDER

IT IS ORDERED that plaintiff's request for attorney fees and costs under the Equal Access to Justice Act is GRANTED in the amount of \$6,366.51 and that judgment shall be entered accordingly.

Entered this 3<sup>rd</sup> day of June, 2005.

BY THE COURT:

/s/

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JOHN C. SHABAZ  
District Judge