

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

SANDRA LEMBKE,

Plaintiff,

OPINION AND ORDER

v.

06-C-306-C

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Before the court is plaintiff Sandra Lembke's application for an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. Plaintiff contends that she is the prevailing party in an action in which she sought reversal or remand of a decision by defendant Commissioner of Social Security and that defendant's position in this litigation was not substantially justified. Plaintiff is seeking attorney fees in the amount of \$6,988, which represents work performed in both the merits and fee litigation. Defendant does not dispute plaintiff's contention that she is a "prevailing party," but contends that plaintiff is not entitled to attorney fees under the Equal Access to Justice Act because defendant's position was substantially justified. Because I find that defendant's position was substantially 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 and supplemental security income on January 9, 2003. After her claim was denied twice at the state agency level, plaintiff's claim was heard by an administrative law judge. On December 14, 2004, the administrative law judge issued a decision, finding that plaintiff was not disabled; the Appeals Council denied plaintiff's request for review.

On June 9, 2006, 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 raised four grounds for reversal of the administrative law judge's decision: 1) the administrative law judge failed to adequately explain how he arrived at his mental residual functional capacity assessment, which included less severe restrictions than found by the disability determination service's consulting psychologists; 2) he improperly rejected reports from plaintiff's counselor, Kathleen Rasmussen, and from an examining consulting psychologist, Dr. Cummings; 3) he made an improper credibility determination; and 4) he relied on unfounded vocational evidence when he found that plaintiff could perform the jobs of mail clerk and kitchen helper.

On December 29, 2006, 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 explained adequately how he had accounted for the various limitations found by the state agency consulting psychologists when he fashioned his residual functional capacity assessment. The magistrate judge also found that the administrative law judge had not accurately or completely portrayed Dr. Cummings's report, although he noted that the administrative law judge's errors in this regard were "not acute." Rep. and Rec., dkt. #11, at 28-29. The magistrate judge upheld the administrative law judge's findings with respect to Rasmussen's report, plaintiff's credibility and plaintiff's ability to make a vocational adjustment to the jobs of mail clerk and kitchen helper.

Having received no objections to the report from defendant, on January 26, 2007, this court entered an order adopting the magistrate judge's report and recommendation and ordered the case remanded to the commissioner pursuant to sentence four of 42 U.S.C. § 405(g).

OPINION

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 substantial justification 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)). This requires 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 his burden if there was a "genuine dispute" or if reasonable people could differ as to the propriety of the contested action. Pierce v. Underwood, 487 U.S. 552, 565 (1988).

When considering whether the government's position was substantially justified, the court must consider not only the government's position during litigation but also its position with respect to the original government action that gave rise to the litigation. 28 U.S.C. § 2412(d)(1)(B) (conduct at administrative level relevant to determination of substantial justification); Gotches v. Heckler, 782 F.2d 765, 767 (7th Cir. 1986). A decision by an administrative law judge constitutes part of the agency's pre-litigation conduct. Golembiewski v. Barnhart, 382 F.3d 721, 724 (7th Cir. 2004). "EAJA fees may be awarded if either the government's prelitigation conduct or its litigation position [is] 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) (Equal Access to Justice Act requires single substantial justification determination that "simultaneously encompasses and accommodates the entire civil action").

As an initial matter, I am not persuaded by plaintiff's argument, unsupported by any citation to authority, that defendant waived his right to argue that his position was substantially justified when he failed to file objections to the magistrate judge's report and recommendation. A decision by a party not to challenge a magistrate judge's recommendation (and thereby forgo an appeal) is not necessarily an admission that the party's litigation position did not have a reasonable basis in fact or law. The government may reach its decision not to file objections after considering a variety of factors, including the likelihood of success before the district court, the cost of filing objections and the possibility of increased EAJA fees if the district court rules against the commissioner. Adopting the rule espoused by plaintiff would drive up litigation costs unnecessarily in cases in which the commissioner has decided to abide by the magistrate judge's recommendation, perhaps for tactical reasons having little to do with the merits of the case.

As support for his contention that his position was substantially justified, defendant points out that this court found in his favor with respect to his defense of the administrative law judge's credibility finding and reliance on the vocational expert's testimony at step five of the sequential evaluation process. Jackson, 94 F.3d at 279 -280 ("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 administrative law judge's residual functional capacity assessment, defendant argues that he had a reasonable basis for arguing that the judge's reasoning was sufficiently spelled out in his decision, insofar as the judge discussed all the evidence of record, including the opinions of the state agency consulting psychologists, with which he "essentially concurred." As he did in the merits phase of the litigation, defendant points out that the state agency psychologists determined that in spite of various moderate limitations and one marked mental limitation, plaintiff was not disabled. Defendant also notes that the administrative law judge found plaintiff to be moderately limited in several respects and accommodated those limitations by fashioning a very restrictive residual functional capacity assessment that restricted plaintiff to work where interpersonal contact with the general public or co-workers was only incidental to the work performed; complexity of tasks was simple, with 1-2 step tasks; and the work performed was task-oriented, not quota-driven. Plaintiff responds that these arguments fail to address the error found by the magistrate judge, which was the administrative law judge's failure to provide an explicit explanation for his decision not to adopt each of the marked or moderate limitations found by the state agency psychologists.

Although the commissioner has not mustered a particularly compelling argument in defense of the administrative law judge's decision or his own litigation position, in the end I am persuaded that he has met his burden of showing that his position was substantially

justified. Although the administrative law judge's failure to articulate the path of his reasoning formed the basis for remand in this case, that failure "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. The magistrate judge determined that the administrative law judge had not built an adequate bridge from the evidence to his residual functional capacity assessment. However, a different court reviewing the administrative law judge's decision could have found the bridge supplied by the consultants' conclusion that plaintiff was not disabled, the administrative law judge's discussion of plaintiff's mental health records that tended to show moderate symptoms at most and the evidence indicating that plaintiff had not had significant problems working as a waitress. As for Dr. Cummings's report, the magistrate judge noted that the administrative law judge's errors were "not acute" and suggested that he would not recommend remand on that sole issue. Under these circumstances, it was not unreasonable for the commissioner to have taken the position he did at the administrative and litigation stages of this case. Because the commissioner has satisfied his burden to show that his position was substantially justified, plaintiff's motion for an award of attorney fees under the EAJA must be denied.

ORDER

IT IS ORDERED that plaintiff's application for an award of attorney fees under the Equal Justice Act, 28 U.S.C. § 2412, is DENIED.

Entered this 26th day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge