

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

FRANCIS L. RIDER,

Plaintiff,

OPINION AND ORDER

v.

09-cv-575-bbc

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

This is a social security appeal. In September 2009, plaintiff Francis L. Rider filed a civil action pursuant to 42 U.S.C. § 405(g) seeking judicial review of a final decision of the Commissioner of Social Security denying her application for Disability Insurance Benefits under the Social Security Act, 42 U.S.C. §§ 416(I) and 423. On May 7, 2010, I entered an order affirming the commissioner's decision denying plaintiff benefits and dismissing plaintiff's appeal. On March 16, 2011, the Court of Appeals for the Seventh Circuit issued a decision vacating this court's decision and remanding the case with instructions to remand the case to the commissioner for further proceedings. Martinez v. Astrue, 630 F. 3d 693 (7th Cir. 2011). I entered an order on March 17, 2010, remanding the case to the commissioner.

Plaintiff has now filed an application for an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. In support of her fee petition, plaintiff contends that she is the prevailing party in an action in which she sought reversal or remand of a

decision of defendant and that defendant's position in this litigation was not substantially justified. Plaintiff is seeking fees and costs in the amount of \$\$16,107.13, including fees for supporting her fee petition. Because I find that defendant's position was unjustified and the fees sought by plaintiff are reasonable, I will grant the petition for an award of fees and costs.

FACTS

The relevant facts are set forth in the opinion and order of May 7, 2011 and in the decision of the Court of Appeals for the Seventh Circuit. To recap, plaintiff contended that the administrative law judge erred in determining the weight to be given the opinion of plaintiff's treating physician, Dr. Cragg; ignored plaintiff's obesity; failed to find that her knee condition met or equaled a listed impairment; and improperly assessed her credibility. I found that the administrative law judge gave good reasons for rejecting Dr. Cragg's opinion, that there was no evidence to support the contention that plaintiff's obesity aggravated her other impairments and that the administrative law judge properly assessed her credibility.

The court of appeals found that the administrative law judge failed to consider Rider's extreme obesity in relation to her knee impairment. The court also found that the administrative law judge did not give good reasons for rejecting Dr. Cragg's opinion that plaintiff could sit only one hour and walk or stand only one hour in an eight hour day. Also in the decision, the court questioned the administrative law judge's credibility assessment. Id., at 698-99.

OPINION

A. Entitlement to 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 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 her 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 which 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 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) (Equal Access to Justice Act requires single substantial justification determination that "simultaneously encompasses and accommodates the entire civil action"). Thus, 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, 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.

In support of his argument that his position is substantially justified, the commissioner contends that the court of appeals is wrong and that the administrative law judge properly considered plaintiff's obesity, Dr. Cragg's opinion and plaintiff's credibility.

This argument is unpersuasive. There is nothing in the record to show that the administrative law judge considered whether plaintiff's obesity aggravated her other impairments. The court of appeal found this was an error. I found only that the plaintiff had not cited evidence in support of her claim that her obesity aggravated her other impairments. Therefore, I cannot find that the commissioner's position on the consideration of plaintiff's obesity was substantially justified.

Further, as plaintiff points out, the court of appeals found that the administrative law judge did not give good reasons for rejecting the opinion of plaintiff's treating physician. This was a violation of 20 C.F.R. §404.1527(d)(2). It was not just a an articulation error, as the commissioner argues. Therefore, the commissioner's position concerning the administrative law judge's weighing of Dr. Cragg's opinion was not justified.

Finally, as the plaintiff points out, the court of appeals found that the administrative law judge's credibility assessment was flawed. Therefore, I cannot find that the commissioner's position on credibility was substantially justified.

B. Reasonableness of Fees

The commissioner's only objection to the requested fees is to the number of hours of work performed by plaintiff's attorney. He contends that although the affidavit documents 84 hours of work, plaintiff requests fees for 99 hours of work. Plaintiff agrees with the commissioner that the fee request should be reduced to 84 hours, or \$14,708.54.

In her reply brief and accompanying affidavit, plaintiff requests fees for briefing on the issue of substantial justification, an additional 8.2 hours of work at \$170.56 hour for a total of \$1,398.59. This request will be granted. I will award plaintiff attorney fees in the amount of \$16,107.13.

ORDER

IT IS ORDERED that plaintiff Francis L. Rider is awarded attorney fees in the amount of \$16,107.13. This amount is to be made payable to plaintiff's attorney, Dana Duncan, conditioned upon counsel's production of an assignment of fee agreement executed by plaintiff and payment of any money owed to the United States.

Entered this 9th day of August, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge