

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

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WALTER REESE,

Plaintiff,

v.

CAROLYN W. COLVIN,<sup>1</sup>  
Acting Commissioner of Social Security,

Defendant.

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OPINION AND ORDER

12-cv-172-bbc

In an order enter on January 11, 2013, I reversed the decision by defendant Commissioner of Social Security denying plaintiff Walter Reese's application for supplemental social security income and remanded for further consideration of plaintiff's mental limitations. Plaintiff has now filed a motion for fees and costs under the Equal Access to Justice Act, 42 U.S.C. § 406(b), in the amount of \$10,641.81, including fees for supporting his fee petition. Dkts. ##24, 32. 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.

Plaintiff also filed a motion for default judgment, dkt. #33, because defendant did not file a response to his second motion for fees incurred in filing the fee petition. However,

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<sup>1</sup> Carolyn Colvin is now the acting Commissioner of Social Security, replacing Michael J. Astrue.

defendant challenged the merits of the fee petition, and the second motion was dependent on the first, so defendant had not failed to defend the fee petition. In any case, I am granting the second fee petition, so the motion for default is moot.

## FACTS

The relevant facts are set forth in the opinion and order of January 11, 2012. To recap, plaintiff contended that the administrative law judge erred by (1) ignoring the findings of state agency psychologists that plaintiff had mental limitations; (2) discounting the opinion of plaintiff's treating physician that he needed more than four unscheduled, 15-minute breaks; and (3) failing to call a vocational expert.

I concluded that the administrative law judge erred in two respects: by failing to consider the report of one state agency psychologist, Kyla King, and by failing to explain the weight he gave to the conclusions of a second psychologist, Colette Cullen. Although I noted that the record contained "substantial evidence" that plaintiff can perform light work, I was unable to determine with certainty that any reasonable administrative law judge would conclude that plaintiff was able to perform light work. In addition, I concluded that the administrative law judge erred by failing to explain his reasons for discounting the opinion of plaintiff's treating physician adequately but did not err by choosing not to call a vocational expert.

## 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 entitled to fees if the government took a position that lacked "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)). To avoid a fee award, the government must 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); Marcus v. Shalala, 17 F.3d 1033, 1036 (7th Cir. 1994). The commissioner can meet her burden if reasonable people could differ as to the propriety of the contested action. Pierce, 487 U.S. at 565.

When considering whether the government's position was substantially justified, the court must consider not only the government's position during litigation on appeal 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); Jackson v. Chater, 94 F.3d 274, 278 (7th Cir. 1996). 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 its briefs on appeal in this case, defendant did not acknowledge that the administrative law judge ignored King's opinion. Instead, defendant argued that the administrative law judge did not err because King's opinion was not supported by the other medical evidence, which the administrative law judge did consider. Dft.'s Br., dkt. #20, at 4-5. In opposition to the fee petition, defendant now contends that it was reasonable for it to argue King's report was not adequately supported because I noted that the record contained substantial evidence that plaintiff can perform light work.

Defendant's theory in this case is based on a misunderstanding of the role of a social security appeal. Because defendant had conceded implicitly that the administrative law judge violated Social Security Ruling 96-6p, I interpreted defendant's argument as a harmless error argument. However, defendant did not cite any cases explaining the harmless error doctrine in Social Security appeals and it misapplied the standard in its argument. An administrative law judge's failure to consider evidence may be considered harmless only if defendant shows that the decision denying benefits was so "overwhelmingly supported by the record" that "remanding is a waste of time," Spiva v. Astrue, 628 F.3d 346, 353 (7th Cir.

2010), because the court can “predict with great confidence what the result on remand will be.” McKinzey v. Astrue, 641 F.3d 884, 892 (7th Cir. 2011). In essence, defendant’s argument was that the administrative law judge’s error was harmless because the evidence he ignored was not convincing in light of the other evidence. Defendant did not undertake a thorough analysis of the evidence to show the outcome was inevitable on remand. The Court of Appeals for the Seventh Circuit has chastised defendant for taking this litigating position. E.g. Spiva, 628 F.3d at 353. In short, the administrative law judge’s decision did not provide a reasonable basis for litigating this case, and defendant obscured that fact by failing to cite or apply the correct legal standard. Because defendant’s theory lacked a reasonable foundation in the law and a reasonable connection between the facts alleged and theory advanced, a fee award is appropriate.

Defendant has not objected to the time entries or the hourly rate in plaintiff’s proposed fee award. In addition, defendant did not file an opposition to plaintiff’s second motion for fees, except to challenge the merits of the fee petition. (In response to plaintiff’s motion for default judgment, defendant argued for the first time that plaintiff’s second motion was untimely, but defendant waived this argument.) Accordingly, I will grant plaintiff’s motion and award plaintiff’s fees of \$9,825.54 for litigating the appeal and \$816.27 for litigating the motion for fees, for a total of \$10,641.81.

Last, defendant argues that the fees should be paid to plaintiff, rather than plaintiff’s counsel under Astrue v. Ratliff, 130 S. Ct. 2521, 2524 (2010) (“We hold that a § 2412(d) fees award is payable to the litigant and is therefore subject to a Government offset to satisfy

a pre-existing debt that the litigant owes the United States.”). Plaintiff’s counsel does not deny that the fee is awarded to plaintiff and thus subject to an offset for any money that plaintiff owes the United States. However, it is the typical practice of this court to award fees (less offsets) to plaintiff’s counsel directly when plaintiff has assigned the EAJA fees to counsel, and defendant has not shown that Ratliff requires a different result. Id. at 2528 (describing government’s practice of issuing fees directly to attorney when party signed fee assignment). If plaintiff’s counsel produces the relevant assignment, the court will issue the award to counsel.

ORDER

IT IS ORDERED that plaintiff Walter Reese is awarded attorney fees in the amount of \$10,641.81. 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. Plaintiff’s motion for default judgment, dkt. #33, is DENIED as moot.

Entered this 27<sup>th</sup> day of June, 2013.

BY THE COURT:

/s/

BARBARA B. CRABB  
District Judge