

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

JAMES YOUNG,

Plaintiff,

OPINION AND ORDER

v.

02-C-257-C

JO ANNE B. BARNHART, Commissioner
of Social Security,

Defendant.

Plaintiff James Young has applied for an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. Plaintiff contends that he is the prevailing party in an action in which he sought reversal or remand of a decision of defendant Commissioner of Social Security and that defendant's position in this litigation was not substantially justified. Plaintiff is seeking fees and costs in the amount of \$20,637.94. Defendant concedes that the amount of the fees and costs sought are reasonable but disputes the characterization of her position as unjustified. 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 James Young applied for disability insurance benefits in 1998, alleging that he had been unable to work since December 31, 1992 as a result of an adjustment disorder with mixed features, anger control and personality problems. Plaintiff asserted that his problems resulted from a 1987 motorcycle accident and a resultant extended coma that left him with residual brain injuries.

After the local disability agency twice denied his application, plaintiff's claim was heard by an administrative law judge. The evidence before the administrative law judge included opinions from seven psychological professionals who had either examined or evaluated plaintiff. On June 16, 2000, the administrative law judge issued a decision, finding that plaintiff was not disabled at any time through March 31, 1998 (the date on which plaintiff was last insured for disability insurance benefits) because there were a significant number of jobs in the national economy that he could perform despite his limitations. In reaching this conclusion, the administrative law judge concluded that although plaintiff suffered from severe residuals of a closed head injury and an adjustment disorder, the limitations resulting from those impairments did not prevent him from performing simple, routine, repetitive, low stress work that required only limited contact with coworkers and the public. A vocational expert had testified at the hearing that a hypothetical individual with such limitations could perform various jobs in the national economy. On the basis of that testimony, the administrative law judge found that plaintiff

was not disabled. The administrative law judge's decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review.

In his briefs before this court, plaintiff waged three attacks on the commissioner's decision: 1) the administrative law judge had erred in discounting the opinion of Dr. Varvil-Weld, a consultative examiner who had found significant deficits in plaintiff's ability to maintain attention, persistence and concentration; 2) the residual functional capacity assessment and corresponding hypothetical asked of the vocational expert upon which the administrative law judge relied did not reflect all of plaintiff's limitations; and 3) the administrative law judge made an erroneous credibility determination. With respect to the second point, plaintiff argued that the administrative law judge had erred by failing to include in his residual functional capacity assessment limitations that he had identified in his decision, namely the fact that plaintiff had "some difficulties with impulsivity" and "often has deficiencies in concentration, persistence or pace." Plaintiff also criticized the administrative law judge for posing a hypothetical question that "answered itself" by starting with the assumption that plaintiff could perform "simple, unskilled, routine, repetitive, low stress work with limited contact with coworkers and the public" rather than presenting the vocational expert with plaintiff's limitations and allowing the expert to draw his own conclusions about the type of work that plaintiff could perform.

On December 3, 2002, Magistrate Judge Stephen Crocker issued a report and recommendation in which he recommended affirming the commissioner's decision. The

magistrate judge concluded that it was clear from the administrative law judge's decision why he had rejected Dr. Varvil-Weld's opinion and that evidence in the record supported those reasons. As for the administrative law judge's failure to include all of plaintiff's limitations in his residual functional capacity and corresponding hypothetical, the magistrate judge agreed that he should have phrased the hypothetical in terms of plaintiff's limitations instead of in terms of the type of work plaintiff could perform. However, Judge Crocker ultimately concluded that this error was harmless, noting that substantial evidence in the record supported the conclusion that plaintiff could perform such routine, low stress work notwithstanding his concentration deficits. As for plaintiff's problems with impulsivity, the magistrate judge noted that the administrative law judge had accounted for this limitation by limiting plaintiff's contact with coworkers and the public. Finally, he found no flaws in the credibility determination. On December 27, 2002, I issued an order adopting the magistrate judge's report and recommendation.

Plaintiff appealed from the judgment. On April 2, 2004, the United States Court of Appeals for the Seventh Circuit issued an opinion in which it reversed this court's decision and remanded the case to the commissioner for further proceedings. Young v. Barnhart, 362 F. 3d 995 (7th Cir. 2004). The court of appeals agreed that the administrative law judge had not erred in discounting Dr. Varvil-Weld's opinion concerning plaintiff's cognitive and memory problems. Id. at 1001-1002. However, it found that even without Dr. Varvil-Weld's opinion, other evidence in the record indicated that plaintiff had limitations for

which the administrative law judge had not accounted in his residual functional capacity assessment or hypothetical. In particular, the court found that the administrative law judge's decision made "short shrift" of plaintiff's social and temperamental impairments, including his impulsivity, poor social judgment and limitations in his ability to respond to criticism from supervisors. Id. at 1004. The court cited to several pieces of evidence in the record that the administrative law judge had credited that supported such limitations, including reports from Dr. Hathaway, the Veterans Administration, Dr. Ostrowsky and the state agency physicians, Drs. Spear and Hodes. Id. The court noted that although the administrative law judge's residual functional capacity required that plaintiff have limited contact with the public and coworkers, "it says nothing of limiting contact with supervisors, despite the fact that there was substantial evidence within the record that Young has difficulty accepting instruction, responding appropriately to criticism, and interacting with others on the job." Id. at 1002. In addition, the court found that the administrative law judge "fail[ed] to explain how he reconciles Young's two conflicting limitations—the fact that Young will have difficulty accepting instruction and criticism from others on the one hand and the fact that he has difficulty making plans independently and setting realistic goals on his own on the other hand." Id.

DISCUSSION

I. ENTITLEMENT TO ATTORNEY FEES

As a general matter, there is no dispute that plaintiff prevailed in this litigation by obtaining reversal of the commissioner's decision by the court of appeals. Also, there is no dispute about the standard that applies in determining whether plaintiff is entitled 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). 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." See 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 that the government 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) (citations omitted). The government carries the burden of proving that its position was substantially justified. See Marcus v. Shalala, 17 F.3d 1033, 1036 (7th Cir. 1994).

When considering whether the government's position was substantially justified, the court must consider not only the government's litigating position but also its position with respect to the original government action which gave rise to the litigation. See 28 U.S.C. § 2412(d)(1)(B) (conduct at administrative level is relevant to determination of substantial justification); Gotches v. Heckler, 782 F.2d 765, 767 (7th Cir. 1986). "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) (EAJA requires single substantial justification determination that "simultaneously encompasses and accommodates the entire civil action"). Thus, EAJA 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, EAJA 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 arguing that her position was substantially justified, defendant commissioner argues that the court of appeals remanded the case because it found that the administrative law judge had failed adequately to articulate his reasoning, as opposed to finding that the commissioner's decision lacked substantial evidentiary support. The commissioner points out that because the articulation rule is a "deliberately flexible" standard, she was justified

in defending the administrative law judge's decision. See Stein v. Sullivan, 966 F.2d 317, 319-320 (7th Cir. 1992) (failure of administrative law judge to adequately articulate basis for decision "in no way necessitates a finding that the Secretary's position was not substantially justified").

It is true that in general, the commissioner is more likely to satisfy her burden of showing that her position was justified in a case reversed for lack of articulation. However, this is not such a case. The commissioner appears to rely on language from the appellate decision in which the court noted that the administrative law judge had not "connected the dots" between plaintiff's impairments and his residual functional capacity finding and that he had failed to "explain how he reconcile[d]" the conflict between plaintiff's difficulty accepting instruction and criticism on one hand and his problems making plans independently and setting realistic goals on his own on the other hand. Young, 362 F.3d at 1002. However, the remainder of the court's opinion indicates that the court was not concerned merely that the administrative law judge might not have considered evidence that *might* have shown that plaintiff had more severe limitations than the administrative law judge had found; rather, the appellate court found that plaintiff *actually was* more limited than the administrative law judge had found. Notably, after reciting various pieces of evidence concerning plaintiff's social and temperamental impairments, the court found that "the hypothetical question is fundamentally flawed because it is limited to the facts presented in the question and does not include all of the limitations supported by medical evidence in the

record.” *Id.* at 1005. The court invoked the articulation requirement only in response to the commissioner’s argument that the administrative law judge’s residual functional capacity *had* accounted for all of plaintiff’s limitations. *Id.* at 1002 (“*If* the ALJ meant to capture all of Young’s social and temperament problems with [his] RFC,” he failed to build accurate and logical bridge from evidence to conclusion) (emphasis added). Reviewing the appellate decision as a whole, it is clear that the court perceived the administrative law judge’s decision as lacking substantial evidentiary support as opposed to being merely inarticulate.

Nonetheless, defendant’s position may have been substantially justified even if this case was not of the Stein variety. 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). It is difficult in this case to conclude that there was no “genuine dispute”; after all, this court sided with the commissioner. Apart from that, however, there are other reasons why I conclude the commissioner was substantially justified in contending that substantial evidence in the record supported the conclusion that plaintiff’s temperament problems would not prevent him from performing unskilled, routine, low stress, repetitive work that did not involve significant contact with the public or coworkers. First, although it is true that the record contains substantial evidence indicating that plaintiff is impulsive and temperamental, each of the evaluators who was asked to rate the degree to which those problems would affect plaintiff’s ability to accept criticism from supervisors concluded that plaintiff was not limited

in this area so as to be precluded from performing unskilled, routine work. Dr. Spear concluded on the “Summary Conclusions” section of his report that plaintiff was “moderately” limited in his ability to accept criticism from supervisors, but he indicated in his narrative summary that plaintiff was nonetheless capable of performing unskilled work activity. Dr. Spears’s summary indicates that he reached his conclusion on the basis of Dr. Ostrowski’s evaluation of October 1998, in which that doctor had noted that although plaintiff complained of temper problems, there was no evidence of legal problems and plaintiff was cooperative and related well during the evaluation. AR 146. Dr. Spears noted Dr. Ostrowski’s opinion that plaintiff would be able to carry out work related activities. Dr. Spears noted also that “unskilled work deals mainly with objects, rather than people or data,” indicating that he had taken plaintiff’s impaired social abilities into account. Id.

Similarly, although Dr. Hodes indicated that plaintiff suffered from mental impairments characterized by anger control problems and pathological dependence, passivity or aggressivity, he found that plaintiff was not significantly limited in his ability to accept instruction and respond appropriately to supervisors and that ultimately, he was capable of doing simple, routine work. AR 130.

Finally, Dr. Varvil-Weld, who conducted a psychological evaluation of plaintiff on February 22, 2000, found that plaintiff retained a good ability to follow work rules, relate to co-workers, deal with the public and interact with supervisors. AR 158. Although both this court and the court of appeals upheld the administrative law judge’s determination that

Dr. Varvil-Weld's opinion was entitled to little weight, that determination was limited to Dr. Varvil-Weld's assessment of plaintiff's ability to maintain concentration and attention. The administrative law judge questioned the credibility of that assessment because it was based upon test scores that the administrative law judge determined were unreliable. However, Dr. Varvil-Weld's assessment of plaintiff's ability to relate to others in the workplace did not depend on any test scores. The commissioner could reasonably conclude that, apart from his findings concerning attention and concentration, Dr. Varvil-Weld's opinion was consistent with the other reports that indicated that plaintiff was not unable to work with others, including supervisors.

Thus, the administrative law judge had before him opinions from three psychologists who believed either that plaintiff had no significant limitations in his ability to accept instruction from supervisors or, if he had limitations, that they would not preclude him from performing simple, unskilled work. In addition, Dr. Howell noted after seeing plaintiff in July 1999 that of plaintiff's two problems, his cognitive impairment and personality change manifested by an increased tendency to become irritable, it was the former that had interfered with plaintiff's job performance. Of the latter, Dr. Howell noted that plaintiff was "coping adequately." AR 175-176. Presented with this evidence, the commissioner was substantially justified both at the administrative and litigation stages in taking the position that a residual functional capacity that limited plaintiff to simple, routine, repetitive, low

stress work that involved only limited contact with co-workers and the public adequately accounted for plaintiff's documented social and temperamental impairments.

It is worth noting that in arguing for reversal of the administrative law judge's decision, plaintiff did not contend that the administrative law judge should have included in his residual functional capacity a limitation on working with supervisors, as the court of appeals suggested he should have done. In fact, apart from arguing that the administrative law judge should have accounted for his own conclusion that plaintiff had some problems with impulsivity, plaintiff did not spend much time discussing his temperamental impairments at all. Rather, plaintiff focused in his briefs on his concentration and attention problems, arguing that the administrative law judge should have credited Dr. Varvil-Weld's findings on this point and his own finding that plaintiff would "often" have deficiencies in concentration, persistence or pace. It is difficult to conclude that the commissioner was not substantially justified in defending the administrative law judge's assessment of plaintiff's temperamental problems when plaintiff did not focus on that deficiency in his briefs.

Finally, I note that both this court and the court of appeals agreed with plaintiff that the administrative law judge had erred in phrasing the hypothetical in terms that purported to tell the vocational expert what types of work plaintiff could perform rather than setting forth plaintiff's limitations and allowing the expert to conclude on his own what types of work plaintiff could perform. However, this court found that error to be harmless. The court of appeals did not decide the question, finding the hypothetical to be "fatally flawed"

for other reasons. Id. at n.4. I predict that, had the court of appeals addressed the question directly, it would have disagreed with this court that the flawed hypothetical had no effect on the outcome. Nonetheless, it did not decide the case on that ground. Thus, because neither court concluded that the administrative law judge's suggestive hypothetical had affected the outcome, I am unable to conclude that the commissioner was not substantially justified in defending the form of the hypothetical. In light of the evidence discussed above, the commissioner was justified in arguing that there was substantial evidence to support the administrative law judge's ultimate conclusion that plaintiff retained the ability to perform a limited range of unskilled work. However, I am likely to be less charitable to the commissioner in future cases involving hypotheticals phrased in terms of types of work rather than vocational limitations.

In sum, the evidence in this case concerning the severity of plaintiff's temperamental and social impairments was not so one-sided that the commissioner was not substantially justified in concluding that those impairments would not prevent plaintiff from performing at least some types of work. This was not a case where the administrative law judge ignored entire pieces of evidence that supported plaintiff's claim. To the contrary, his decision shows that he considered all of the evidence. The lesson of the court of appeals' opinion may be that the commissioner should be wary of adopting the "residual functional capacity assessments" of state agency consulting physicians. However, for the reasons discussed above, the commissioner was substantially justified in doing so in this case.

ORDER

IT IS ORDERED that the motion of plaintiff James Young for an award of attorney fees under the Equal Access to Justice Act is DENIED.

Entered this 30th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge