

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

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KATHLEEN BERGER,

Plaintiff,

OPINION AND ORDER

v.

03-C-463-C

JO ANNE B. BARNHART, Commissioner  
of Social Security,

Defendant.

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OPINION

Plaintiff Kathleen Berger has applied 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 of defendant Commissioner of Social Security and that defendant's position in this litigation was not substantially justified. Plaintiff is seeking fees in the amount of \$5,575.44. Defendant concedes that an award of fees is appropriate but contends that the amount sought by plaintiff is unreasonable. In particular, defendant objects to the number of hours plaintiff's attorney has billed for preparing the briefs in this matter, arguing that substantial portions of the briefs were "cut and pasted" from other documents prepared by counsel in the administrative proceedings in this case and in other cases. Defendant recommends that the number of hours for preparing the initial brief be reduced from 23.8 to 8 and those spent on the reply brief reduced from 12 to 6.

In Commissioner v. Jean, 496 U.S. 154, 161 (1990), the Supreme Court held that the district court's task of determining what fee is reasonable under the EAJA is the same as that described in Hensley v. Eckerhart, 461 U.S. 424 (1983), for determining the reasonableness of fees under 42 U.S.C. § 1988. The district court is to exclude from the fee calculation hours that were not "reasonably expended," such as those that are excessive, redundant or otherwise unnecessary. Hensley, 461 U.S. at 434.

Having reviewed the briefs in light of the hours claimed by plaintiff's counsel, I conclude that some reduction in the fee request is warranted, though not to the extent suggested by defendant. The fact that plaintiff's counsel may have recycled portions of briefs that he prepared previously in this and other cases is not by itself a reason to reduce the fee award; such a practice might actually benefit the government by reducing the amount of time that counsel spends on a brief. Nonetheless, the fact that some portions of the brief were pre-prepared is relevant to considering whether the total amount requested by counsel for preparing the brief is reasonable.

Counsel asserts that he spent 23.8 hours preparing the initial brief, which consisted of 3.9 hours reviewing the transcript, 4.4 hours preparing the facts section, 14 hours drafting the argument section of the brief and 1.5 hours editing the brief. I am reducing the fee award by the 1.5 hours claimed for editing the brief because that entry is dated December 17, 2003, six days after plaintiff submitted her brief to this court. In addition, I am reducing the remaining 22.3 hours for work preparing the initial brief by an additional 2.3 hours to

reflect a total of 20 hours. That amount reflects what I believe to be a reasonable amount of time to expend on the initial brief, given that approximately 25-30 percent of it was standard boilerplate that counsel has used in previous cases or copied verbatim from plaintiff's brief to the Appeals Council. For example, pages 51-59 are copied from the Appeals Council brief, pages 29-35 consist of standard boilerplate language concerning the procedure for awarding disability and the standard of review, pages 39-42 consist of standard boilerplate language concerning the weight to be afforded to treating physician's opinions and pages 62-64 consists of standard boilerplate concerning credibility. (These last three pages are also largely a repetition of the discussion on pages 51-54.) In addition, much of the facts section is copied verbatim from plaintiff's brief to the Appeals Council.

This case did not involve any novel or complex legal issues. Plaintiff attacked the ALJ's decision on the ground that he had failed to comply with the order of the Appeals Council, made a factual error concerning an opinion from a treating physician, and failed to articulate accurate and logical reasons for rejecting the opinion of the treating physician and plaintiff's subjective complaints. Apart from presenting a narrative of the facts, counsel's task in this case was largely to apply familiar, ready-made legal arguments to the facts, and much of that he had already done in his brief to the Appeals Council.

I note that plaintiff's initial brief was 68 pages in length. However, even if length can be used as a guidepost for assessing reasonableness, the length of plaintiff's brief is deceptive because counsel used a large font and large margins, resulting in fewer words per page.

Overall, plaintiff's brief is no longer than the briefs this court typically receives from plaintiffs in social security appeals. More than 22 hours was simply too much time for experienced counsel to spend on a brief that involved facts and legal arguments with which he was already familiar and in some cases, had already written. That said, however, defendant's suggestion that counsel could have prepared his brief in 8 hours does not adequately account for the time necessary to re-review the transcript, add facts and arguments that were not included in the brief before the Appeals Council, tailor the boilerplate portions of the brief to the facts and edit the brief.

As for the reply brief, I find that the time requested by plaintiff is reasonable, with one exception. Plaintiff requests fees for time spent preparing the appendix to that brief, which consists mostly of extra-record resource materials concerning fibromyalgia. The preparation of this appendix was unnecessary. Plaintiff attached these documents apparently to support her contention that the Social Security Administration has recognized that fibromyalgia is a medically determinable impairment and that one of the symptoms of fibromyalgia is fatigue. However, as plaintiff's counsel should be aware from previous cases, these are facts with which this court is well acquainted, so attaching 50-plus pages of documents to make this point was unnecessary. The fibromyalgia issue was whether the administrative law judge had adequately considered plaintiff's limitations and subjective complaints resulting from her fibromyalgia, a point that could be argued on the basis of the administrative law judge's decision and the record without resort to extra-record research.

Unfortunately, it is difficult to know how much time counsel spent on the appendix because that work is included in an omnibus entry for February 24, 2004, that also includes other matters. From the size of the appendix, I estimate that counsel spent at least one hour preparing it. Accordingly, I will reduce the hours requested by that amount.

Defendant argues that further reductions are necessary because the reply brief raised new issues that were not in response to defendant's brief or raised in the initial brief. Although I agree that in some instances plaintiff appeared to use the reply to bolster her initial arguments, for the most part her brief was a direct response to the arguments raised by defendant. Defendant asserts that plaintiff raised the new issue of a sentence six remand, but defendant herself devoted two pages of her brief to that issue. The two paragraphs that plaintiff spent on that issue in her reply brief were not unreasonable. Overall, it was not unreasonable for counsel to spend 11 hours on the reply brief.

In sum, I find that a fee reduction of 4.8 hours is appropriate. Subtracting that amount from the hours submitted by plaintiff's counsel leaves a balance of 34.2 hours. Multiplying that amount by the \$142.96/hour rate claimed by plaintiff (which defendant has not challenged), results in a fee award of \$4,889.23. Plaintiff has executed an agreement assigning any award of fees to her attorney. Accordingly, the fee award shall be made payable to her attorney, Dana Duncan.

ORDER

IT IS ORDERED that:

1. The clerk of court shall enter judgment in favor of plaintiff, Kathleen Berger;
2. Plaintiff's motion for attorney fees is GRANTED, in part;
3. Plaintiff is awarded fees in the amount of \$4,889.23. The fees are payable to plaintiff's counsel, Dana Duncan.

Entered this 22nd day of September, 2004.

BY THE COURT:

BARBARA B. CRABB  
District Judge