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

KATHLEEN KUSILEK,

Plaintiff, OPINION AND ORDER

v. 04-C-310-C

JO ANNE B. BARNHART, Commissioner of Social Security,

Defendant.

Plaintiff Kathleen Kusilek 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 and costs in the amount of $6,797.35. Defendant does not dispute the amount of the fees and costs sought but disputes the characterization of her position as unjustified. Because I find that defendant's position was 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.

DISCUSSION

On October 3, 2001, plaintiff Kathleen Kusilek applied for disability insurance benefits under sections 216(I) and 223 of the Social Security Act, codified at 42 U.S.C. §§ 416(I) and 423(d), alleging that she had been disabled since July 21, 2001 as a result of a compression fracture at the T-12 vertebrae and back pain. After the local disability agency twice denied her claim, plaintiff requested a hearing before an administrative law judge. On November 21, 2003, the Social Security Administration held a hearing at which plaintiff, a medical expert and a vocational expert testified. On February 11, 2004, the ALJ issued a decision concluding that plaintiff had severe impairments that prevented her from returning to her past relevant work as a barber. However, he found that plaintiff retained the residual functional capacity to perform a significant number of other jobs in the national economy, including work as a telemarketer, security monitor or information clerk, and therefore she was not under a "disability" as that term is defined in the Social Security Act. On April 16, 2004, the ALJ's decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review.

In her briefs before this court, plaintiff waged three attacks on the commissioner's decision: 1) the administrative law judge failed to consider plaintiff's impairments in combination when considering whether plaintiff's condition met or equaled the criteria of a listed impairment; 2) the judge failed to properly evaluate plaintiff's subjective complaints; and 3) the judge failed to adequately account for plaintiff's mental limitations in his

hypothetical to the vocational expert. With respect to the third point, plaintiff pointed out that the ALJ had credited the report of an examining psychologist, Mary Kay Fisher, who was of the opinion that plaintiff's anxiety and depression would interfere with her persistence, pace and motivation. Plaintiff also pointed out that the state agency reviewing psychologist, Dr. Hodes, had found that plaintiff was moderately limited in her ability to: 1) maintain attention and concentration for extended periods; 2) make simple work-related decisions; 3) complete a normal workday and workweek without interruption; 4) perform at a consistent pace; 5) accept instructions and respond appropriately to criticism from supervisors; 6) get along with coworkers or peers; 7) respond appropriately to changes in the work setting; and 8) set realistic goals or make plans independently of others. Finally, plaintiff pointed out that the ALJ made his own finding that plaintiff had mild limitations in daily activities and social functioning and moderate limitations in concentration, persistence or pace when he evaluated the severity of plaintiff's mental impairment. According to plaintiff, the ALJ's failure to incorporate these various limitations in his mental residual functional capacity assessment and corresponding hypothetical meant that his decision was not supported by substantial evidence.

In defending the adequacy of the mental residual functional capacity assessment and corresponding hypothetical, the commissioner argued that the administrative law judge had accounted for plaintiff's deficiencies in concentration, persistence or pace by limiting plaintiff to unskilled or simple semi-skilled work. As evidence that plaintiff was capable of performing

such work, the commissioner pointed out that Dr. Hodes had adopted the assessment of plaintiff's mental residual functional capacity made by the disability specialist, who had concluded that plaintiff retained the residual functional capacity to perform "low stress routine work." Also, the commissioner noted that Fisher had stated that plaintiff had the intelligence and competence to do some kind of work other than her prior physically demanding work.

In his report, the magistrate judge rejected plaintiff's challenges to the administrative law judge's evaluation of the listings and to his assessment of plaintiff's credibility. However, he agreed that the case should be remanded to the commissioner to "clarify the extent of plaintiff's limitations in persistence and pace and include these limitations in his [sic] residual functional capacity and corresponding hypothetical to the vocational expert." Rep. and Recc., Nov. 19, 2004, dkt. #12, at 32-33. The magistrate judge was not convinced that the report of agency physician Hodes was sufficient to support the administrative law judge's conclusion that plaintiff retained the mental capacity to perform unskilled or simple, semi-skilled work. The magistrate judge explained:

> First, the ALJ gave no indication that he was relying on Dr. Hodes's conclusion that plaintiff was capable of performing low stress routine work. In fact, the ALJ indicated that he was discounting the opinions of the state agency consultants because those opinions were made without an opportunity to examine, interview or observe plaintiff. Second, even if the ALJ had relied on Dr. Hodes's functional capacity assessment, the commissioner cites no evidence to support her suggestion that the ALJ's limitation in his hypothetical to jobs with an SVP of 3 or 4 is equivalent to a "low stress routine work" limitation or that it adequately accounts for all the other limitations found by Dr. Hodes. Although one reasonably could infer that a job that can be learned in no more

> than six months is likely to be "routine," it is equally reasonable to infer that some jobs that are easy to learn are stressful, such as jobs involving high production quotas or those involving significant contact with the public. Accordingly, even if it were clear that the ALJ relied on Dr. Hodes's functional capacity assessment, his hypothetical was inadequate because it did not account for the "low stress" limitation that Dr. Hodes identified.

Id., at 27.

The magistrate judge also found that Fisher's report was not adequate to support the commissioner's position. The magistrate judge concluded that it was clear from Fisher's report that in remarking that plaintiff had the "intelligence and competency" to pursue another line of work, Fisher was commenting on plaintiff's cognitive functioning only and not on her ability to maintain the persistence, pace and concentration required of any type of simple work.

The magistrate judge found that the facts before him were similar to those in Kasarsky v. Barnhart, 335 F.3d 539 (7th Cir. 2003), wherein the Court of Appeals for the Seventh Circuit remanded the case to the commissioner because the administrative law judge had failed to account for his own finding that the plaintiff suffered frequent deficiencies of concentration, persistence, or pace. The magistrate judge also reasoned that even if the limitation to simple work might account for plaintiff's limitations in concentration, it did not adequately account for the limitations on persistence and pace because "an individual with deficiencies in pace might be able to perform simple tasks, but not over an extended period of time." Rep. and Recc., dkt. #12, at 30 (quoting Ramirez v. Barnhart, 372 F.3d 546, 554 (3d Cir. 2004)). Finally, the magistrate judge noted that the deficiencies in the

administrative law judge's hypothetical might prove to be harmless because the vocational expert had identified some jobs that did not appear to require any production quotas or a certain output level; however, he found remand was necessary because it was not clear from the record that the jobs identified by the vocational expert did not exceed plaintiff's abilities.

Neither party filed objections to the report and recommendation. Accordingly, on December 9, 2004, I adopted the report and recommendation and ordered the case reversed and remanded to the commissioner.

I. ENTITLEMENT TO ATTORNEY FEES

As a general matter, there is no dispute that plaintiff prevailed in this litigation by obtaining a favorable decision from this court. 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). 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. See 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 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 the 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 reasonable people could disagree whether the administrative law judge had adequately accounted for plaintiff's mental limitations by limiting her to unskilled or simple semi-skilled work as opposed to stating her mental residual functional capacity in terms of her functional limitations. Defendant cites cases from the Seventh Circuit and other courts of appeals that have upheld the decision of the commissioner in circumstances similar to those in this case. See Def.'s Response to Pltf.'s Mot. for Atty. Fees, dkt. # 22, at 5-7 (citing cases). Having reviewed the cases cited by the commissioner, I agree that there does not appear to be a consensus among the circuits or within the Seventh Circuit regarding whether it is proper for an administrative law judge to phrase his mental residual functional capacity and corresponding hypothetical in terms of the work a plaintiff can perform, for example, "simple, unskilled, low stress work," as opposed to simply setting forth plaintiff's limitations and allowing the vocational expert to conclude on his own what types of work plaintiff can perform. Although the Court of Appeals for the Seventh Circuit expressed its disapproval of the former in Young v. Barnhart, 362 F. 3d 995 n. 4 (7th Cir. 2004), it declined in that case

to decide whether the error warranted reversal in light of its conclusion that the hypothetical was "fatally flawed" for other reasons. Id. The lesson of the cases so far appears to be that an administrative law judge is free to formulate his mental residual functional capacity assessment in terms such as "able to perform simple, routine, repetitive work" so long as the record adequately supports that conclusion.

Thus, the commissioner was substantially justified in arguing that the administrative law judge did not err in failing to include in his mental functional capacity assessment all of the mental limitations endorsed by the state agency physician or found by the administrative law judge himself. It is a closer question whether it was reasonable for the commissioner to argue that substantial evidence in the record, namely, Dr. Hodes's opinion that plaintiff was capable of performing "low stress routine work," supported the administrative law judge's conclusion that plaintiff could perform unskilled or simple, semi-skilled work notwithstanding her "moderate" limitations in concentration, persistence and pace. I agree with the magistrate judge that "low stress routine work" is not exactly the same as "unskilled or simple, semi-skilled work." Nonetheless, it was not unreasonable for the commissioner to take the position that in limiting plaintiff to simple, easy-to-learn jobs, the administrative law judge was *de facto* limiting plaintiff to low stress, routine work. The magistrate judge's concern that the limitation to "simple" work did not appear to address plaintiff's problems with persistence and pace was a fine point not raised directly by plaintiff in her submissions and unsupported by any evidence in the record that plaintiff could not perform the jobs identified by the

vocational expert if a "moderate" limitation on persistence and pace was factored into the hypothetical. Indeed, the magistrate judge noted that the error might prove to be harmless.

Further, the essence of the magistrate judge's report was not that the administrative law judge had failed to consider important evidence, but rather that he failed to articulate a clear basis for his conclusion that plaintiff's moderate mental limitations would not prevent her from performing simple work. As the Court of Appeals for the Seventh Circuit has noted, the failure of the administrative law judge to articulate the basis for his decision "in no way necessitates a finding that the Secretary's position was not substantially justified." Stein v. Sullivan, 966 F.2d 317, 319-320 (7th Cir. 1992). Given the fact-specific nature of social security cases, the flexible nature of the rational articulation rule and the existence of some support in the record for the administrative law judge's conclusion, it was not unreasonable for the commissioner to defend the administrative law judge's assessment of plaintiff's mental residual functional capacity.

ORDER

Accordingly, IT IS ORDERED that the application of plaintiff Kathleen Kusilek for an award of attorney's fees and costs fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, is DENIED.

Entered this 2nd day of March, 2005.

BY THE COURT:

BARBARA B. CRABB
District Judge