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

NANCY PROCHASKA,

Plaintiff, OPINION AND ORDER

v. 04-C-644-C

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

Plaintiff Nancy Prochaska has filed an application for an award of attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, and a motion for entry of final judgment pursuant to Fed. R. Civ. P. 58. Plaintiff contends that she is the prevailing party in an action in which she sought reversal or remand of a decision by defendant Commissioner of Social Security and that defendant's position in this litigation was not substantially justified. Plaintiff is seeking attorney fees and costs in the amount of $42,192.54, which represents work performed in this court and in the court of appeals. Defendant does not dispute plaintiff's contention that she is a "prevailing party," but contends that plaintiff is not entitled to attorney fees under the Equal Access to Justice Act because defendant's position was substantially justified. Alternatively, defendant contends that the fees requested by plaintiff are unreasonable.

Because I find that defendant's position was not substantially justified, I will grant the petition for an award of fees and costs. However, I agree with defendant that the fee should be reduced because a significant amount of counsel's time was devoted to unsuccessful issues that did not lead directly or indirectly to the court of appeals' order remanding the case. Accordingly, I am reducing the fee award to $9,718.39 to reflect what I conclude is a reasonable fee in light of plaintiff's limited success.

The following undisputed facts are taken from the record. These facts are material to the question whether defendant's position was substantially justified and to the reasonableness of plaintiff's fee request.

FACTS

On August 22, 2000, plaintiff filed applications for disability insurance benefits and supplemental security income, alleging that she was unable to work because of a low back injury. Her applications eventually were considered by an administrative law judge, who determined after a hearing that plaintiff was not disabled. In reaching his conclusion, the administrative law judge applied the familiar five-step sequential process for evaluating disability claims. 20 C.F.R. §§ 404.1520, 416.920. At step four, the administrative law judge concluded that plaintiff could not return to her past work as a machine operator. In reaching this conclusion, he adopted the residual functional capacity findings of plaintiff's treating physician, Dr. Cragg, concluding that plaintiff could lift a maximum of 24 pounds

occasionally; carry 10 pounds occasionally; could not bend, stoop, squat, crawl, or climb heights; could only occasionally reach above shoulder level, crouch kneel, balance, push or pull; could not use her left foot for repetitive movements as in operating foot controls; could not use both feet for repetitive movements; was able to use her right foot for repetitive movements; and was able to sit, stand and walk for four hours each in an eight-hour day.

The finding that plaintiff could not return to her past relevant work meant that the burden shifted to defendant to establish that plaintiff's limitations did not prevent her from performing other jobs and that those jobs existed in significant numbers in the national economy. In concluding that defendant had met her burden, the administrative law judge relied on the testimony of vocational expert Richard Armstrong. At the administrative hearing, Armstrong was presented a hypothetical question in which he was asked to assume a person of plaintiff's age, education and work experience who had all the limitations identified by Dr. Cragg. Armstrong testified that such an individual would be able to perform the jobs of cashier (11,000 jobs in the relevant region); assembly (5,000 jobs); packaging (1,000 jobs); and visual inspection (1,000 jobs). Accordingly, the administrative law judge found that plaintiff was not under a disability at any time through the date of the decision and therefore was not entitled to Disability Insurance Benefits or Supplemental Security Income payments. The administrative law judge's decision became the final decision of the commissioner when the Appeals Council denied plaintiff's request for review.

Plaintiff filed an action for judicial review of defendant's decision. 42 U.S.C. § 405(g). She raised three challenges to the administrative law judge's decision: 1) he failed to consider plaintiff's obesity and depression in combination with her other impairments; 2) he erred at step five of the sequential evaluation process; and 3) he made an improper credibility determination. As part of her step five challenge, plaintiff argued that Armstrong's testimony regarding the jobs plaintiff could perform was insufficient to meet defendant's burden because the testimony of the vocational expert conflicted with the *Dictionary of Occupational Titles* and the administrative law judge failed to explore these discrepancies at the hearing as he was required to do under Social Security Ruling 00-4p. SSR 00-4p (providing that adjudicator has affirmative responsibility to ask vocational expert whether his or her testimony concerning job requirements is consistent with information provided in the DOT).

In response to this argument, defendant conceded that the administrative law judge had failed to comply with SSR 00-4p. However, she argued that the error was harmless because there was no inconsistency between the vocational expert's testimony and the DOT for a significant number of the jobs cited by the administrative law judge. In particular, defendant argued that the jobs of cashier and small products assembler as described in the DOT did not require the performance of tasks beyond plaintiff's residual functional capacity.

In a report and recommendation issued April 19, 2005, Magistrate Judge Stephen Crocker rejected plaintiff's arguments and recommended that the court affirm the

commissioner's decision. In reaching his conclusion, the magistrate judge did not determine whether the administrative law judge's failure to comply with SSR 00-4p was harmless. Instead, relying on language from the Seventh Circuit's decision in Donahue v. Barnhart, 279 F.3d 441, 446 (7th Cir. 2002), the magistrate judge concluded that plaintiff had forfeited her right to challenge the foundation for the vocational expert's testimony by failing to do so at the administrative hearing.

Plaintiff filed objections to the report and recommendation. In an order issued May 10, 2005, I rejected those objections, adopted the magistrate judge's report and affirmed the decision of the commissioner. I subsequently denied a motion by plaintiff to alter or amend the judgment.

On appeal, plaintiff continued to press her claims that the administrative law judge's decision was flawed because he failed to consider plaintiff's obesity and depression in combination with her other impairments, he made an improper credibility determination and he erred at step five of the sequential evaluation process by failing to comply with SSR 00-4p. The court of appeals agreed with this court that plaintiff's first two arguments were "unavailing." Prochaska v. Barnhart, 454 F.3d 731, 736 (7th Cir. 2006). However, it found in favor of plaintiff on her SSR 00-4p claim. In the court's view, the language from Donahue on which the magistrate judge had relied as a basis for concluding that plaintiff had forfeited the claim was merely dicta, for SSR 00-4p had not been promulgated until after Donahue's hearing. Id. at 735. Agreeing with the Third and Tenth Circuits, the court found

that SSR 00-4p clearly imposed an affirmative obligation on the part of the administrative law judge to ask the vocational expert about any potential discrepancies between his or her testimony and the *Dictionary of Occupational Titles* before the administrative law judge could rely on that testimony to support a disability determination. Id. (citations omitted). Because the ruling placed the burden of making the necessary inquiry on the administrative law judge, plaintiff had not forfeited it by failing to raise it herself. Id.

As she did in this court, defendant argued that the administrative law judge's procedural error was harmless because "for a significant number of the jobs that the ALJ cited, there were no inconsistences between the vocational expert's testimony and the DOT." Finding this argument unpersuasive, the court of appeals explained:

> But Prochaska counters that each job, as defined by the DOT, requires specific physical capabilities that are beyond her limitations. She points out, for example, that according to the DOT the packaging and assembly work identified by the expert requires stooping, which the ALJ acknowledged she cannot do. And, she contends, the ALJ asked the expert for work that could be done by someone who could only "occasionally reach above shoulder level" while a cashier's requirements, under the DOT, include "reaching" frequently.
>
> It is not clear to us whether the DOT's requirements include reaching above shoulder level, and this is exactly the sort of inconsistency the ALJ should have resolved with the expert's help. We cannot determine, based on the record, whether the expert's testimony regarding stooping or reaching was actually inconsistent with the DOT. That determination should have been made by the ALJ in the first instance, and his failure to do so should have been identified and corrected by the Appeals Council. We will defer to an ALJ's decision if it is supported by "substantial evidence," but here there is an unresolved potential inconsistency in the evidence that should have been resolved.

Id., at 736 (citation omitted).

After the court of appeals remanded the case, plaintiff filed an application for an award of attorney's fees under the Equal Access to Justice Act, contending that she was a prevailing party and the defendant's position was not substantially justified. After defendant filed her objection to plaintiff's application, plaintiff filed an untimely request for an extension of time in which to reply. The magistrate judge denied that request as well as a subsequent motion by plaintiff for reconsideration. Accordingly, I have reached the conclusions below without considering plaintiff's reply brief.

OPINION

I. ENTITLEMENT TO ATTORNEY FEES

The Equal Access to Justice Act authorizes the payment of attorney fees to a party who prevails in a civil action against the United States unless the court finds that the position of the government was not substantially justified or that special circumstances make an award unjust. 28 U.S.C. § 2412(d)(1)(A). Under § 2412(d)(1)(B),

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which show that the party is a prevailing party and is eligible to receive an award under this subsection . . . .

A final judgment is a "judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G).

Plaintiff's fee application technically is premature, insofar as this court has not yet entered a final judgment pursuant to Fed. R. Civ. P. 58. However, defendant has raised no

objection to the timeliness of the fee petition. Moreover, although neither this court nor the court of appeals specified whether the court was entering an order pursuant to sentence four or sentence six of § 405(g) when it remanded the case to defendant solely for the purpose of conducting the SSR 00-4p inquiry, defendant has not objected to plaintiff's assertion that she obtained a sentence four remand. Finally, defendant has not disputed plaintiff's contention that by virtue of the sentence four remand, she is a "prevailing party." Shalala v. Schaefer, 509 U.S. 292, 301-02 (1993) (plaintiff who obtains sentence-four judgment reversing Secretary's denial of benefits met description of "prevailing party"). Accordingly, I will grant plaintiff's motion for entry of judgment and enter judgment reversing in part the commissioner's decision pursuant to sentence four of § 405(g). Jackson v. Chater, 94 F.3d 274, 277 (7th Cir. 1996) (whether Equal Access to Justice Act applicant is prevailing party is issue that government can waive).[1]

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

[1] In Jackson, 94 F.3d 274, a case involving facts very similar to the instant case, the court questioned whether plaintiff was the prevailing party when the district court's sentence four order merely remanded the case for the taking of additional vocational evidence. The court noted that Jackson had not obtained a reversal of the secretary's decision but had "achieved only another bite at the apple." Id. at 278. Nonetheless, the court proceeded to consider the merits of the fee petition because the secretary did not deny (or dispute the plaintiff's contention that she was a prevailing party). I have discovered no cases since Jackson in which the court was presented with the opportunity to transform Jackson's dicta regarding the prevailing party issue into a holding.

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.

I start with defendant's prelitigation conduct. The decision of the administrative law judge is considered part of the defendant's prelitigation conduct, making an examination of that conduct necessary to the substantial justification inquiry. Golembiewski, 382 F.3d at 724. In this case, the administrative law judge failed to follow defendant's own ruling when he did not make the necessary inquiry of the vocational expert concerning potential discrepancies between the expert's testimony and the *Dictionary of Occupational Titles*. Although SSR 00-4p does not make it explicit, the inquiry's purpose is to insure that the vocational expert's testimony has an adequate foundation and correspondingly, to insure that the defendant's decision is supported by substantial evidence. Donahue, 279 F.3d at

446 ("Evidence is not 'substantial' if vital testimony has been conjured out of whole cloth"). Having found that plaintiff met her burden to establish that she had limitations that prevented her from performing her past relevant work, it became defendant's burden to show that plaintiff could make a vocational adjustment to other jobs existing in significant numbers in the national economy. Without making the SSR 00-4p inquiry, the administrative law judge had no way of knowing whether the vocational expert's testimony regarding the requirements of various jobs was reliable or the foundation on which it rested.

Admittedly, the promulgation of SSR 00-4p imposed a significant new responsibility on administrative law judges: prior to the ruling, administrative law judges were free to accept even a "bottom line" conclusion from a vocational expert without question. See Donahue, 279 F.3d at 446. However, plaintiff's administrative hearing was held approximately one year after SSR 00-4p went into effect. Accordingly, the administrative law judge should have been aware of the ruling and should have complied with it. His failure to do so was a clear legal error.

By failing to make the necessary inquiry of the vocational expert, the administrative law judge failed to develop the record on an element of proof critical to finding that plaintiff was not disabled. What's more, when plaintiff pointed out the error to the Appeals Council and identified several potential discrepancies between the vocational expert's testimony and

the Dictionary, the Appeals Council failed to take any corrective measures. For this reason, defendant's prelitigation conduct cannot be said to have been substantially justified.[2]

The same is true of defendant's position in the ensuing litigation. In arguing that she was substantially justified, defendant essentially reiterates her unsuccessful argument that the administrative law judge's omission was harmless and insists that she had a reasonable basis for arguing that the vocational expert's testimony was not inconsistent with the Dictionary for a significant number of the jobs cited by the administrative law judge. The doctrine of harmless error is "fully applicable to judicial review of administrative decisions." Keys v. Barnhart, 347 F.3d 990, 994-95 (7th Cir. 2003) (citations omitted). However, in this case defendant did not merely point to evidence before the administrative law judge that arguably supplied the missing evidentiary link but instead asked the court to venture beyond the record and review the *Dictionary of Occupational Titles* to make its own determination about the reliability of the vocational expert's testimony. As the court of appeals noted, however, the determination whether the vocational expert's testimony was consistent with

[2] In the Third Circuit, the lack of substantial justification for the agency's prelitigation position automatically triggers an award of Equal Access to Justice Act fees even if the government's litigation position was reasonable. Hanover Potato Products, Inc. v. Shalala, 989 F.2d 123, 128 (3d Cir. 1993) ("[U]nless both the agency's litigation and pre-litigation positions [were reasonable], the government's position is not substantially justified") (citation omitted). Although stopping short of adopting this *per se* rule, the courts of appeals in the Ninth and Tenth Circuits have determined that under INS v. Jean, 496 U.S. 154 (1990), "fees generally should be awarded where the government's underlying action was unreasonable even if the government advanced a reasonable litigation position." United States v. Marolf, 277 F.3d 1156, 1159 (9th Cir. 2002); Hackett v. Barnhart, 469 F.3d 937, 944 (10th Cir. 2006).

the Dictionary was an "unresolved potential inconsistency in the evidence" that "should have been made by the ALJ in the first instance." Prochaska, 454 F.3d at 736. In essence, the government's "harmless error" argument was a cloaked invitation to violate the "simple but fundamental rule of administrative law" rule that prohibits courts from supplying grounds for an agency's determination that were not invoked by the agency. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947) (where "th[e] grounds invoked by the agency [to justify its determination] are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis"); Mengistu v. Ashcroft, 355 F.3d 1044, 1046 (7th Cir. 2004) (reiterating that Chenery doctrine "forbids the lawyers for an administrative agency to defend the agency's decision on a ground different from that stated or at least discernible in the decision itself"). The government did not have a reasonable basis in law or fact for taking a litigation position contrary to this principle. Compare Hackett v. Barnhart, 469 F.3d 937, 944 (10th Cir. 2006) (where commissioner posited "entirely new legal theories" from those cited by Administrative Law Judge to attempt to reconcile vocational expert's hearing testimony with pertinent job descriptions in *Dictionary of Occupational Titles*, commissioner did not properly invoke harmless error doctrine or take reasonable litigation position), with Jackson, 94 F.3d at 279 (government substantially justified in defending adequacy of vocational expert's testimony even though it conflicted with Dictionary and another employment periodical

where "there was other evidence in the record that supported [the vocational expert's] assessment of the marketplace").

I recognize that the court of appeals did not use "strong language" critical of defendant's position in its opinion. At the same time, however, the court gave no indication that it viewed the SSR 00-4p issue as a close one. Moreover, the presence or absence of strong language is only one factor the court considers in determining the reasonableness of the government's litigation position. Hallmark Construction, 200 F.3d at 1079. In this case, the language used by the court of appeals is a neutral factor that neither supports nor refutes the finding that defendant's position was not substantially justified.

Finally, I am not persuaded by defendant's contention that the court of appeals' agreement with her position on all but the SSR 00-4p issue shows that she was "at least rational in her decision to defend the case." It is true that an administrative law judge's decision is composed of various findings, some of which may be correct and others which may be incorrect, but the overarching issue in any disability case is whether substantial evidence in the record supports the agency's determination. Although the administrative law judge in this case might have done everything else correctly, the fact remains that because of his clear procedural error, the record was inadequate to establish the existence of substantial evidence to support his conclusion that plaintiff was capable of performing a significant number of jobs in the national economy. Defendant certainly knew that it could not stave off reversal merely by showing that the administrative law judge's decision was

adequate in all other respects. In light of this, and in light of the unreasonableness of defendant's position on the SSR 00-4p issue, I find that defendant's litigation position as a whole was not substantially justified. As discussed below, however, the degree of plaintiff's success is a factor relevant to determining the reasonableness of the fee request.

In sum, because defendant was not substantially justified in either her prelitgation or litigation positions, plaintiff is entitled to an award of EAJA fees.

II. REASONABLENESS OF FEES

In INS v. Jean, 496 U.S. 154 (1990), the Supreme Court held that the district court's task of determining what fee is reasonable under the Equal Access to Justice Act is essentially the same as that described in Hensley v. Eckerhart, 461 U.S. 424 (1983). Jean, 496 U.S. at 161. Under Hensley, the starting point for determining a reasonable fee is to multiply the number of hours reasonably expended by a reasonable hourly rate. Hensley, 461 U.S. at 433. The court should exclude from this initial fee calculation hours that were not "reasonably expended," such as those that are excessive, redundant, or otherwise unnecessary, considering factors such as the novelty and difficulty of the questions, the skill required to perform the legal service properly, the customary fee and other factors. Id. at 434 n.9. Whether the hours would be properly billed to a client guides the inquiry. Id. at 434.

The court may also adjust the fee upward or downward depending on the "results obtained." Id. "A reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Id. at 440. Thus, "[w]here the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claims should be excluded in considering the amount of a reasonable fee." Id. However, when a plaintiff's claims "involve a common core of facts" or are "based on related legal theories . . . [m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." Id. at 435. As a result, in cases involving interrelated claims, "time spent on related claims that ultimately prove unsuccessful should not be automatically excluded from the attorney's fee calculation." Spanish Action Committee of Chicago v. City of Chicago, 811 F.2d 1129, 1134 (7th Cir. 1987).

For work performed in connection with the merits phase of this case, plaintiff requests compensation for 45.9 hours spent in 2004 by her attorneys, Federick J. Daley, Jr. and Barbara Borowski, at the hourly rate of $151.25; 140.65 hours spent in 2005 by Daley and Borowski at the hourly rate of $156.25; 77.11 hours spent in 2006 by Daley and Borowski at the hourly rate of $160; and 5 hours spent by a paralegal at the rate of $100. Most of the work on the case was performed by Borowski, who logged a total of 244.36 hours for work in this court and the court of appeals.

Defendant raises two general objections to the amount of fees sought by plaintiff. First, she contends that the amount of time spent on this case by plaintiff's lawyers was unreasonable in light of the relatively short transcript, the routine nature of the issues raised, the length of the briefs produced and the experience of the Daley law firm. Second, she argues that a reduction is warranted for time spent on unsuccessful claims.

I do not reach defendant's first argument because I agree with her contention that plaintiff's fee request is unreasonable insofar as she seeks compensation for time spent by her lawyers on unsuccessful claims. At the outset, I note that Hensley's partial-recovery template is not readily adaptable to appeals from administrative denials of social security benefits. First, as in this case, the court is often asked to award attorney fees without knowing whether plaintiff will obtain any tangible relief (namely, the award of social security benefits) from the agency on remand, so it is difficult to assess the scope of relief in comparison to the litigation as a whole. Second, most appeals from administrative denials advance only the single "claim" that the agency's decision is not supported by substantial evidence. Although plaintiffs typically support that claim by attacking several different aspects of the adjudicator's decision, those attacks are more properly viewed as arguments than "claims."

Nonetheless, these distinctions are not so significant as to warrant a departure from the guidelines the Court established in Hensley or to preclude the court from treating the various arguments made by a plaintiff in the course of seeking reversal of an adverse

administrative decision as "claims" for the purpose of assessing the relationship between the success obtained and the amount of the fee award. Applying these guidelines, plaintiff is entitled to Equal Access to Justice Act fees only for the work performed in connection with the SSR 00-4p issue. That issue, which was the sole basis for the court of appeals' remand order, was both factually and legally distinct from plaintiff's other claims. Unlike her contentions that the administrative law judge failed to account for her obesity and mental impairments and made an improper credibility determination, success on the SSR 00-4p issue did not require plaintiff to critique the administrative law judge's decision in detail or point to specific pieces of evidence in the record that the administrative law judge allegedly failed to consider that undermined his findings. Instead, plaintiff won the SSR 00-4p issue by pointing to facts that were undisputed, namely, the vocational expert's testimony and the administrative law judge's failure to make the SSR 00-4p inquiry, and by showing that the vocational expert's testimony potentially conflicted with the *Dictionary of Occupational Titles*. None of the arguments advanced in support of claimant's other claims led, either directly or indirectly, to the court of appeals' decision to remand the matter for performance of the SSR 00-4p inquiry; in fact, the court affirmed the administrative law judge's decision in all respects save for the step five determination. Counsel's work on the arguments advanced in support of claimant's assertions that the administrative law judge had failed to take all of plaintiff's impairments into account and had conducted a faulty credibility determination must, therefore, be viewed as "work on an unsuccessful claim" and cannot properly be

deemed to have been "expended in pursuit of the ultimate result achieved." Hensley, 461 U.S. at 435. Consequently, claimant is not entitled to recover attorney's fees for efforts related to contesting the administrative law judge's evaluation of her impairments or her credibility.

To determine the amount of fees related to the SSR 00-4p issue, I have proceeded as follows: First, I have identified those entries that reflect time spent solely on that issue. On Borowski's time log those entries are the following: 12/6/04 (second entry); 12/10/04 (last entry); 1/25/05 (last entry); 5/2/05 (third and fourth entries); 9/14/05 (second entry); 1/6/06 (both entries); and 1/9/06 (first entry). Plaintiff will recover the full amount of attorney fees incurred in connection with this work.

Second, I have excised time entries that clearly reflect work performed exclusively on other issues. Specifically, I have excised the following entries from Borowski's time log: 12/6/04 (first and third entries), 12/7/04-12/9/04 (first entry); 12/10/04 (first and second entries); 1/19/05 (first and third entries); 1/20/05;1/24/05 (first and second entries); 1/25/05 (first and second entries); 1/26/06 (first entry); 4/30/05; 5/2/05 (first and second entries); 5/22/05-5/27/05 (work performed on motion for reconsideration); 9/12/05-9/13/05; 9/14/05 (first entry); 9/20/05 (last entry); 12/28/05; 1/3/06-1/5/06. I will not award plaintiff any fees incurred in connection with this work. I have also excised 1.1 hours spent by Borowski on 8/31 and 9/1/06 on a motion for an extension of time to file her brief in the Seventh Circuit.

The government should not have to bear the costs associated with the inability of plaintiff's attorneys to comply with the Seventh Circuit's briefing schedule.

The remainder of the entries either fail to specify the particular issue on which the lawyer worked or consist of tasks devoted to the briefs or the oral argument as a whole, such as reading the record, revising and editing the brief and preparing for oral argument. With respect to these entries, I will award plaintiff 25 percent of the fees requested. In arriving at the 25 percent figure, I have assumed that plaintiff's attorneys divided their "unspecific" time roughly equally among the four issues in this case. (Although the parties and the courts represented that plaintiff raised three issues, a review of the briefs and plaintiff's time log indicates that plaintiff's first argument, that the administrative law judge failed to give adequate consideration to all of her impairments, consisted of two separate claims related to obesity and mental impairments.) Further, when the time spent by plaintiff's attorneys on the SSR 00-4p issue in each of the various briefs is calculated as a percentage of the total time spent (using only those particularized entries set out above), that percentage varies between a low of 12 percent (for the initial brief) and a high of 32 percent (for the objections to the report and recommendation). Thus, 25 percent appears to be a fair estimate of the non-specific time that was reasonably spent litigating the successful SSR 00-4p issue.

Applying this approach to plaintiff's time log leads to a total fee award of $9,718.39. This amount reflects the total of 8.29 compensable hours spent by Daley and Borowski in 2004 at the rate of $151.25; 29.94 compensable hours spent by Daley and Borowski in

2005 at the rate of $156.25; 20.54 compensable hours spent by Daley and Borowski in 2006 at the rate of $160; and 5 hours of paralegal time at the rate of $100.

Defendant has raised no objection to plaintiff's request for costs in the amount of $436. Accordingly, that amount will be awarded.

ORDER

IT IS ORDERED that:

1. The clerk of court shall enter judgment in favor of plaintiff, Nancy Prochaska, reversing the decision of the Commissioner in part and affirming the decision in part, and remanding the case pursuant to sentence four of § 405(g). The decision of the commissioner is REVERSED only with respect to the administrative law judge's finding that plaintiff is able to perform work existing in significant numbers in the national economy. The decision is AFFIRMED in all other respects. The case is REMANDED so that the administrative law judge may perform the necessary inquiry under SSR 00-4p and resolve whether there are jobs in the national economy which plaintiff can perform.

2. The petition of plaintiff for an award of attorney fees and expenses under the Equal Access to Justice Act is GRANTED IN PART AND DENIED IN PART. Plaintiff is awarded

fees in the amount of $9,718.39 and costs in the amount of $436, to be made payable to plaintiff's attorney, Frederick J. Daley.

Entered this 29th day of January, 2007.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge