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

MARGARET SEAMON,

Plaintiff, OPINION AND ORDER

v. 05-C-0013-C

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

Plaintiff Margaret Seamon 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 by 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 $14,392.43, which is the sum of $11,100.69 for work performed in the initial litigation and $3,291.74 for preparing and defending the instant fee petition. Defendant disputes both the amount of the fees and costs sought and the characterization of her position as unjustified. Because I find that defendant's position was unjustified, I will grant the petition for an award of fees and costs. However, I am reducing the fee award to $12,191.52 to reflect what I conclude is a reasonable fee in light of the difficulty of the issues presented, plaintiff's limited success and other factors explained below.

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 Margaret Seamon filed an application for Disability Insurance Benefits on June 17, 2002, alleging that she was disabled from various physical and mental impairments. Plaintiff's claim eventually was considered by an administrative law judge, who held a hearing at which plaintiff, her husband, a medical expert and a vocational expert testified. On April 30, 2004, the administrative law judge found that although plaintiff had several exertional and non-exertional work-related limitations, she still was able to perform a significant number of jobs in the national economy and therefore was not disabled. That decision became the final decision of the defendant commissioner when the Appeals Council denied plaintiff's claim for review.

In her briefs before this court, plaintiff waged three attacks on the commissioner's decision: 1) the administrative law judge failed to provide plaintiff with information sufficient to ensure that her waiver of counsel was valid and failed adequately to develop the record; 2) the judge's determination that plaintiff could perform a significant number of jobs in the national economy was not supported by substantial evidence because the hypothetical question upon which it was based failed to account for evidence that the administrative law judge credited in his decision; and 3) the judge made a flawed credibility determination.

With respect to her invalid waiver claim, plaintiff argued that the administrative law judge failed at the hearing to provide her with the information required by Binion v. Shalala, 13 F.3d 243, 244 (7th Cir. 1994), regarding the ways in which a lawyer could help her and the possibility of free counsel or contingency arrangements. Plaintiff insisted that this omission was prejudicial because the administrative law judge failed to fully develop the record. Specifically, plaintiff contended that the judge should have asked plaintiff's therapist whether plaintiff's mental condition had actually improved, as plaintiff asserted at the hearing, and should have explored how plaintiff's fibromyalgia and obesity limited her ability to work. With respect to her second argument, plaintiff pointed out that the administrative law judge's determination that plaintiff be limited to unskilled work requiring only brief, superficial contact with the public failed to account for credible evidence in the record, namely the reports of Dr. Fuhrer and Dr. Bartholow, that indicated that plaintiff was also limited in her ability to relate to coworkers and supervisors. She also complained that the judge had failed to incorporate into his hypothetical the various "moderate" limitations found by the state agency psychologists. As for the credibility determination, plaintiff argued in part that the administrative law judge had placed undue weight on plaintiff's failure to comply with mental health treatment and her assertion that her condition had improved in light of the record, which showed that plaintiff's mental impairments were characterized by a strong degree of suspiciousness toward others, including her doctors.

In response to plaintiff's invalid waiver claim, defendant argued that the administrative law judge's failure to provide plaintiff with all of the Binion information was immaterial because plaintiff had received this information before the hearing via notices that had been sent to her by the Social Security Administration. Further, defendant argued, even if the notices were not adequate, the administrative law judge had developed the record fully and fairly by questioning plaintiff thoroughly about her impairments, allowing her husband to testify, calling a medical expert and assisting plaintiff obtain additional records.

In defending the adequacy of the mental residual functional capacity assessment and corresponding hypothetical, defendant argued that the administrative law judge had accounted for plaintiff's limitations by limiting her to unskilled work with no high production goals and no more than brief, superficial contact with the public. She argued that Dr. Fuhrer's report was at best equivocal regarding plaintiff's ability to relate to coworkers and supervisors, pointing out that the doctor had stated merely that it was "questionable" whether plaintiff was limited in that area. As proof that plaintiff could respond adequately to supervisors and coworkers, defendant pointed out that plaintiff had described herself on her résumé as a "team player" and had performed volunteer work that involved working with people. Defendant also argued that any limitations plaintiff had with respect to coworkers or supervisors were immaterial because the administrative law judge had limited plaintiff to unskilled work, which requires working mainly with things rather than with people. Also, defendant posited that Dr. Fuhrer's statements in his initial evaluation

were undermined by his subsequent testing of plaintiff, which indicated that plaintiff had a tendency to exaggerate her symptoms. Finally, she pointed out that the administrative law judge had noted that none of plaintiff's treating or examining physicians had offered the opinion that she was disabled or unable to work.

In defense of the administrative law judge's credibility finding, defendant disagreed with plaintiff's contention that the judge found that plaintiff's condition had improved, arguing that in referring to plaintiff's testimony on that point in his decision, the judge merely was"reciting" it and not drawing any inferences from it. Defendant also maintained that the judge had not implied that plaintiff had failed to comply with prescribed psychiatric treatment but rather had concluded only that "nothing associated with the course of the medical treatment" would preclude plaintiff from performing the tasks outlined in the residual functional capacity assessment.

In a report and recommendation entered July 29, 2005, the magistrate judge determined that the case should be reversed and remanded to the commissioner for two reasons: 1) the administrative law judge's decision "fail[ed] to make clear how he evaluated important evidence in the record indicating that plaintiff's mental impairments adversely affect her ability to relate to coworkers and supervisors"; and 2) in reaching his determination, the administrative law judge appeared to have relied on plaintiff's testimony that her condition had improved after June 2003. Although the magistrate judge was not persuaded by plaintiff's suggestion that the administrative law judge's hypothetical should

have included all the "moderate" limitations endorsed by the state agency physicians, he agreed that the judge's hypothetical appeared to have given short shrift to the reports of Dr. Fuhrer and Dr. Bartholow and other evidence in the record indicating that plaintiff had problems working with coworkers and supervisors. Noting that the administrative law judge had found the reports of Dr. Fuhrer and Bartholow to be credible, the magistrate judge was unable to discern any reason why he accounted for plaintiff's social difficulties and temperament problems in his residual functional capacity only by finding that she was limited in her ability to deal with the public without also finding that plaintiff was limited in her ability to interact with supervisors or co-workers. Rep. and Rec., July 29, 2005, dkt. # 11, at 38. The magistrate judge observed that "[p]laintiff's temperament would not be [a] problem limited solely to public contact; to the contrary, plaintiff's volatility suggests that she would be even more limited in her ability to relate to supervisors and other workers." Id. at 35-36. The magistrate judge found that, insofar as the administrative law judge *had* purported to account for plaintiff's limitations in relating to supervisors and co-workers, he failed to articulate his reasoning adequately in his decision. Id. at 38-39. The magistrate judge rejected the commissioner's attempts to fill in the gaps, finding the commissioner's arguments either unpersuasive or improper *post-hoc* rationales. Id. at 36-38.

The magistrate judge also criticized the administrative law judge for relying on plaintiff's testimony that she had stopped seeing her psychiatrist and taking her medications and could "conduct herself in a way that she could not do a year ago." Id. at 41-42. The

magistrate judge found that it was unclear from the administrative law judge's decision whether he was faulting plaintiff for her lack of compliance or crediting her assertion that she had improved. In either case, the magistrate judge found, the administrative law judge had failed to take plaintiff's mental illness into account. Although the magistrate judge was unable to determine how much weight the judge had given to this testimony or for which purpose he had relied on it when concluding that plaintiff was not disabled, he rejected defendant's assertion that the administrative law judge merely had "recited" plaintiff's testimony. Id. Accordingly, the magistrate judge recommended that upon remand the commissioner be instructed to reevaluate plaintiff's claim without considering plaintiff's testimony regarding the improvement of her condition after she stopped seeing her doctors. Id. at 43.

The magistrate judge rejected plaintiff's remaining arguments. Although he gave plaintiff the "benefit of the doubt" and found that her receipt of written materials was insufficient to meet the Binion requirements, he found that the administrative law judge had fully and fairly developed the record and that plaintiff had failed to present any evidence showing a prejudicial gap in the record. Id. at 22-27.

Neither party filed objections to the report and recommendation. Accordingly, on August 23, 2005, 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 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. See 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). "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. 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).

Contrary to defendant's suggestion in her brief, the government cannot meet its burden simply by showing that it prevailed on some of the issues in the case. (As discussed below, however, the degree of plaintiff's success is a factor relevant to determining the reasonableness of the fee request.) Rather, the substantial justification inquiry under the EAJA focuses on the issue or issues on which the case ultimately was remanded. Lewis v. Barnhart, 281 F.3d 1081, 1086 (9th Cir. 2002). "Strong language against the government's position in an opinion discussing the merits of a key issue" supports an award of EAJA fees. Golembiewski, 382 F.3d at 724.

Applying these standards, I conclude that the government's position in this case was not substantially justified. As the magistrate judge explained, the record was rife with evidence indicating that plaintiff had a "prickly temperament" and problems relating to and trusting others. Although the administrative law judge credited the reports of plaintiff's doctors, who indicated that these features of plaintiff's personality would make it difficult for her to tolerate supervision and might also affect her ability to relate to coworkers, he addressed plaintiff's social limitations in his hypothetical only by limiting her to jobs that involved brief and superficial contact with the public without saying anything about her ability to relate to supervisors and co-workers. In doing so, he violated the rule that a hypothetical question must include all of the claimant's limitations that are supported by medical evidence in the record. Steele v. Barnhart, 290 F.3d 936, 941 (7th Cir. 2002).

With no apparent sense of irony, defendant defends her position by making the same post hoc arguments that the magistrate judge rejected in the merits litigation, arguing that there was evidence in the record from which the administrative law judge could have found that plaintiff did not require additional mental limitations beyond those he incorporated into the residual functional capacity assessment. However, the magistrate judge explained why none of defendant's arguments were persuasive. In particular, the magistrate judge noted that even if the administrative law judge *had* relied on the evidence cited by the commissioner, the evidence failed to support the apparent distinction drawn by the administrative law judge between plaintiff's ability to relate to supervisors and coworkers but not the public. Thus, it was not reasonable for defendant to rely on such evidence in urging this court to uphold her decision.

Finally, defendant points out that on page 39 of his report, the magistrate judge found that even assuming the record supported defendant's contention that plaintiff was only "moderately" limited in her ability to relate to supervisors and coworkers, the case would have to be remanded because the administrative law judge failed to build an accurate and logical bridge from those limitations to his residual functional capacity assessment. Defendant points out that the Court of Appeals for the Seventh Circuit has held that an administrative law judge's failure to articulate his consideration of the evidence adequately "in no way necessitates a finding the Secretary's position was not substantially justified." Stein v. Sullivan, 966 F.2d 317, 320 (7th Cir. 1992). However, defendant acknowledges

that the magistrate judge 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. As the magistrate judge noted, not only was defendant's proffered rationale absent from the administrative law judge's decision, it was not apparent even from the record. Unlike Stein, this was not a case where the administrative law judge merely failed to make clear that he considered evidence supporting plaintiff's position; this was a case in which the administrative law judge's own findings appeared to conflict with his ultimate conclusion that plaintiff was not disabled.

In sum, given the substantial evidence in the record indicating that plaintiff would have problems relating to supervisors and coworkers, the administrative law judge was not substantially justified in failing to account for this evidence in his residual functional capacity assessment and his corresponding hypothetical. The commissioner compounded that error by defending the decision in this court.

II. REASONABLENESS OF FEES

In INS v. Jean, 496 U.S. 154 (1990), the Supreme Court indicated that the district court's task of determining what fee is reasonable under the EAJA 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.

For work performed in connection with the merits phase of this case, plaintiff requests compensation for 67.2 hours spent in 2005 by her attorneys, Frederick J. Daley, Jr., Marcie Goldbloom and Violet Borowski, at the hourly rate of $157.50; 0.1 hours spent by a law clerk at Daley's firm in 2005 at the hourly rate of $100; and another 3.35 hours of attorney time spent in 2004 at the rate of $151.25. Plaintiff requests additional compensation for 20.9 hours spent by her attorneys at the rate of $157.50 preparing and defending the EAJA petition.

Defendant does not contest the hourly rates but argues that the time spent on this case by the Daley firm is excessive. Although defendant has raised some specific objections to plaintiff's fee request, she argues primarily that plaintiff's counsel spent too much time drafting the briefs in what defendant characterizes as a garden-variety social security appeal.

As an initial matter, I note that plaintiff represents that Borowski spent 37.25 hours on the initial brief and 19.25 hours on the reply brief. From my review of plaintiff's attorneys' time log, plaintiff arrived at the 37.25 figure by including 3.5 hours spent by Borowski on May 15, 2005 meeting with Daley and drafting and enhancing arguments. (Daley's time log records 2.5 hours on that date for the following: "Reviewed draft, record and meet with [V]iolet. Made comments and marginal notations.") However, plaintiff's brief was filed on April 28, 2005; defendant did not file her responsive brief until May 31, 2005. It is not reasonable to award plaintiff 6 hours' worth of fees for work on a brief that already had been filed and to which defendant had not yet replied. These hours will be deducted from plaintiff's fee request.

Minus the 3.5 hours for May 15, 2005, Borowski spent a total of 33.75 hours researching, drafting and filing the initial brief. Her time log reflects that this time can be broken down as follows: 9.25 hours reading the record and taking notes; 6.75 hours drafting the procedural history and statement of the case; and 17.75 hours researching, drafting and editing the argument section. The brief was 31 pages long, 18 of which set out the procedural history and the evidence in the record, one which set forth the standard of review, and 11 ½ of which were argument. Although this court has noted in the past that it is loath to second-guess how much time was reasonable for counsel to spend on a brief, in this case I find that 33.75 hours was unreasonable. As defendant points out, none of the issues raised were new or novel but were arguments that plaintiff's attorneys have litigated previously in

other cases. (Contrary to defendant's contention, however, the fact that plaintiff's attorneys might have raised similar arguments in briefs filed *after* those in this case is irrelevant to deciding the reasonableness of the fees requested in this case.) Although plaintiff suggests in her reply that this case was Borowoski's first involving the issues raised, the government should not have to bear the cost of training a new attorney, particularly one who works for a firm specializing in the area of disability benefits and has a store of briefs and expertise at her disposal. See Hensley, 461 U.S. at n.13 (noting that fee reduction based partly on attorney's inexperience was proper).

Moreover, even allowing for time reasonably spent by Borowski reading and updating the case law and tailoring the briefs to the facts, 17.75 hours of research and drafting was simply too much in this case. The legal issues were straightforward and many of the facts that counsel referred to in her argument section were cut and pasted from the facts section of the brief. Overall, I conclude that counsel should have been able to produce a brief of this nature in 30 hours. Accordingly, the fee request shall be reduced by an additional 3.5 hours. No specific deduction shall be made with respect to the 19.25 hours spent by attorney on the reply brief. That was not an unreasonable amount of time to spend reviewing defendant's brief, researching the cases cited and crafting arguments in response to those raised by defendant.

I agree with defendant that a reduction is warranted for fees incurred by plaintiff for time spent by her attorneys performing clerical tasks, namely, .25 hours billed by Daley for

"review[ing] service of summonses and . . . sending out proof of service to Court" and time billed by Borowski for filing the briefs. The time log indicates that Borowski spent 0.5 hours filing the reply, but it is unclear how much time she spent filing the initial brief. I will assume that she spent the same amount of time filing the initial brief as she did the reply, 0.5 hours. In total, 1.25 hours will be deducted for work that should reasonably have been performed by clerical staff, not an attorney.

Finally, I find that a reduction in the lodestar amount is warranted for time spent by plaintiff pursuing her unsuccessful waiver claim. A significant portion of both of plaintiff's briefs was devoted to the waiver issue and her unsupported contention that the record was not developed adequately with regard to her mental condition, fibromyalgia or obesity. As the magistrate judge observed, plaintiff failed to explain how the outcome of her case might have been different had the administrative law judge explored these areas in more detail. Although plaintiff ultimately obtained all the relief she had asked for when this court ordered the case remanded, none of the arguments she made in support of her invalid waiver claim contributed to that success. Plaintiff should have known that without evidence showing an evidentiary gap in the record, the claim was destined to fail. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). Because the work spent on the invalid waiver issue was not necessary to the issues on which plaintiff prevailed and was a loser in its own

right, a reduction in the lodestar amount is warranted. Fine v. Ryan International Airlines, 305 F.3d 746, 757 (7th Cir. 2002) (court did not abuse discretion in reducing fee award by 10 percent for unsuccessful claim, even though plaintiff recovered full monetary award). See also Hensley, 461 U.S. at 440 (where plaintiff achieves only limited success, district court should award only amount of fees that is reasonable in relation to results obtained).

It appears from plaintiff's time log that Borowski spent at least 2.75 hours on the waiver issue in the reply brief, but it is unclear how much time she spent on that issue in her initial brief. Even if that amount was ascertainable, however, it would not be appropriate to excise all fees for the work spent on that issue. As noted previously, plaintiff did ultimately obtain all the relief she asked for and the waiver claim, though questionable, was not frivolous. Accordingly, I find that the fees requested for work performed on the merits litigation, after the previous deductions totaling 11 hours at the rate of $157.50 per hour, should be reduced by an additional 5 percent. By my calculations, this amounts to a fee award for work on the merits of $8,899.78.

Finally, I conclude that the $3,291.74 incurred by plaintiff for preparing and defending her EAJA petition were reasonable. Plaintiff requests fees for a total of 20.9 hours spent by Borowski and Daley. Although two hours seems a bit much for Borowski to have spent tailoring (apparently in some haste, judging from the erroneous last paragraph) a canned petition, it is not patently unreasonable. The remaining 18.9 hours spent on the

reply were reasonable, insofar as plaintiff had to refute defendant's contention that her position was substantially justified and defend the reasonableness of plaintiff's fee request.

Totaling the amount requested for work on the EAJA petition with the $8,899.78. found to have been reasonably incurred on the merits litigation leads to a total fee award of $12,191.52.

ORDER

IT IS ORDERED that:

1. The clerk of court shall enter judgment in favor of plaintiff, Margaret Seamon.

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 $12,191.52, to be made payable to plaintiff's attorney, Frederick J. Daley.

Entered this 23rd day of February, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge