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

JEANNE JOHNSON,

Plaintiff,

OPINION AND ORDER

v.

05-C-0129-C

LINDA McMAHON,
Acting Commissioner of Social Security,

Defendant.

This is a social security appeal brought pursuant to 42 U.S.C. § 405(g). Before the court is plaintiff's application for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412. (On January 22, 2007, Linda McMahon became Acting Commissioner of Social Security. I have changed the caption to reflect the change in defendant.) Plaintiff contends that she was the prevailing party in her action for judicial review and that defendant's position was not substantially justified. Plaintiff seeks attorney fees and expenses in the amount of $20,068.94, which is the sum of $18,172.94 for work performed by performed in this court and in the court of appeals before the parties agreed that the case should be remanded to the commissioner for further proceedings, and $1,896 for defending the instant fee petition. 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. Defendant's contention that plaintiff failed to adequately brief in this court the issue that led to remand is not supported by the record. As for the amount of fees requested, I find that with a few exceptions, the amount of time plaintiff's legal team devoted to this case was reasonable.

The following undisputed facts are taken from the record. These facts are material to the question whether defendant's position was substantially justified.

FACTS

On May 21, 2002, plaintiff Jeanne Johnson filed an application for disability insurance benefits under Title II of the Social Security Act, claiming that she was disabled as a result of leg and knee deformities, left shoulder and lower back injuries, depression and anxiety. After the local disability agency twice denied her application, plaintiff requested a hearing before an administrative law judge. On December 17, 2003, the Social Security Administration held a hearing at which plaintiff, a medical expert and a vocational expert testified. On June 7, 2004, the administrative law judge issued a decision concluding that plaintiff had severe impairments that prevented her from returning to her past relevant work

as a certified nursing assistant. However, he found that given plaintiff's age, education, residual functional capacity and work history, plaintiff was able to make a vocational adjustment to other jobs existing in significant numbers in the regional economy, namely, desk clerk or counter clerk. In reaching his conclusion, the administrative law judge determined that plaintiff retained the residual functional capacity to perform work requiring her to lift ten pounds frequently and twenty pounds occasionally; perform routine and repetitive work between table top and chest height; use stairs and ladders occasionally; bend and stoop occasionally; and perform extended repetitive reaching for weights such as pieces of paper. In addition, he found that plaintiff would require a job that had a "sit/stand" option. 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 a complaint in this court requesting judicial review of the commissioner's final adverse determination. In support of her request for reversal of the administrative law judge's decision, plaintiff argued that the administrative law judge committed the following errors: 1) failed to properly evaluate plaintiff's credibility; 2) failed to consider all of plaintiff's physical and mental limitations in combination; 3) improperly gave more weight to the opinion of the medical expert than to the opinions of plaintiff's treating physicians; 4) improperly concluded that plaintiff retained the residual functional capacity for light work; and 5) failed to apply the Medical-Vocational Guidelines properly.

Central to plaintiff's fourth and fifth arguments was her contention that the medical expert had expressed the opinion that plaintiff should be on her feet intermittently for no more than three hours total a day, which, plaintiff insisted, equated to sedentary, not light, work. Plt.'s Mem. In Supp. of Mot. for Summ. Judg. or Remand, dkt. #9, at 24, 26-27. Plaintiff pointed out that the vocational expert testified that, by virtue of the sit/stand option, the desk clerk and counter clerk jobs he had identified could actually be described as sedentary, not light. In response, the commissioner agreed that the medical expert had limited plaintiff's ability to stand or walk, but argued that this merely limited the range of light work that was available to plaintiff and did not require the administrative law judge to find that plaintiff was limited to sedentary work. Def.'s Mem. In Supp. of Comm.'s Dec., dkt. #10, at 17-18.

On November 29, 2005, United States Magistrate Judge Stephen Crocker issued a report and recommendation in which he rejected plaintiff's arguments and recommended affirming the commissioner's determination. The magistrate judge agreed with the commissioner that the medical expert's testimony concerning plaintiff's ability to be on her feet was more consistent with the definition of light work than sedentary work, and therefore, the Medical-Vocational Rules for sedentary work did not apply. On February 10, 2006, I entered an order adopting the magistrate judge's report and recommendation. Judgment was entered the following day.

Plaintiff appealed. After plaintiff filed her opening brief, the commissioner agreed to a voluntary remand. The parties subsequently filed a joint motion in this court for relief from judgment under Rule 60(b), indicating that they had agreed that the case should be remanded to defendant for further proceedings "because the Administrative Law Judge's finding that Ms. Johnson could perform certain jobs was based on conclusions that appear to be inconsistent with Social Security Administration rules and policy." Mot. for Relief from Judgment, dkt. #20, at 2. After I indicated that I would grant the motion, the court of appeals remanded the case; subsequently, this court granted the parties' Rule 60(b) motion, vacated the judgment and remanded the case to the Social Security Administration for further administrative proceedings pursuant to sentence four of § 405(g). Judgment to that effect was entered on November 15, 2006.

OPINION

I. ENTITLEMENT 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). The parties agree that plaintiff is the prevailing party by virtue of this court's order remanding the case. The parties also appear to agree that,

although the remand order encompassed other issues, it was only the lack of clarity surrounding the light-versus-sedentary work issue that prompted the commissioner to agree to remand the case.

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.

Defendant faces an uphill battle in convincing the court that her position was substantially justified. After all, she ultimately agreed with plaintiff that if the only jobs identified by the vocational expert in response to the administrative law judge's hypothetical were sedentary and not light jobs, then the grid rules for sedentary work would apply and

plaintiff would be found disabled at age 50. In arguing that her litigation position was substantially justified, defendant does not contend that her initial position to the contrary was reasonable. Instead, she contends that she simply was not aware until plaintiff filed her opening brief in the court of appeals of the scope of plaintiff's step five argument.

Although defendant has not submitted a copy of plaintiff's appellate brief, I have no reason to doubt defendant's assertion that plaintiff developed her step five argument in her appellate brief more thoroughly that she did in her briefs before this court. Nonetheless, it is untenable for defendant to suggest that she was unaware from plaintiff's district court briefs of the issue on which the case was ultimately remanded. Notably, plaintiff made the following argument in her initial brief:

> In this case, the ALJ based his RFC finding on the ME's testimony. The ME testified that Plaintiff would be quite limited by the pain in her shoulders, knees, and feet: he determined that Plaintiff required a sit/stand option and could only do work at the table-top level without extended reaching in any direction. Given a hypothetical that incorporated the ME's restrictions, the VE found only two jobs in the local economy, desk clerk and counter clerk. The VE admitted that these jobs, when limited by a sit/stand option, qualify as sedentary, rather than light work. The VE also testified that if the hypothetical individual were limited to brief, superficial contacts with the public, even these two jobs would be eliminated. Therefore, the only two jobs that the hypothetical individual qualified for did not provide for the uncontroverted mental limitations, and were in the sedentary category of work. Yet, the ALJ determined that Plaintiff has an RFC for light work.

Plt.'s Mem. in Supp., dkt. #9, at 24.

On pages 26-27, plaintiff cited an excerpt from the vocational expert's testimony in which he testified that a person who was limited to sedentary work with a sit/stand option could perform the desk clerk and counter clerk jobs that he had identified. Plaintiff argued:

> From this testimony and even the ME's testimony, it is clear that Plaintiff's RFC should actually have been for sedentary, not light work because the ME opined that Plaintiff could only be on her feet intermittently for 3 out of 8 hours, which does not equate with the 6 out of 8 hours necessary for light work as stated in 20 C.F.R. 404.1567(b). Furthermore, Plaintiff's attorney pointed out to the ALJ that Plaintiff would be turning 50 on March 28, 2003, and that at that time the grids would direct a finding of disabled for a claimant, like Plaintiff, who was limited to sedentary work.

Id. at 27.

The nature of plaintiff's step five argument should have been clear to defendant from these excerpts. Contrary to defendant's contention, the issue as framed by plaintiff was not merely "whether or not Ms. Johnson could perform light work" but rather was whether the testimony of the medical and vocational experts, taken together, compelled a finding that the only jobs that plaintiff was capable of performing were at the sedentary level of exertion. Defendant now concedes that "[i]t is entirely likely that, if Ms. Johson is truly limited to only two jobs in the national economy--and both those jobs are sedentary--then the Commissioner will apply the grid rules and find Ms. Johnson eligible for disability at age fifty." But that is precisely what plaintiff argued from the outset. Reviewing the administrative law judge's decision in light of plaintiff's argument and defendant's own familiarity with her own policies and rulings, defendant should have recognized after plaintiff

filed her opening brief that the administrative law judge's step five determination rested on a shaky foundation. Her decision to defend what she now admits was an error warranting remand might have been based upon a genuine misunderstanding of plaintiff's argument, but that does not make it reasonable.

Also unpersuasive is defendant's suggestion that plaintiff should be entitled to no fee award because this court found against plaintiff on the other issues in the case. Defendant has conceded error and has indicated that she would not have attempted to defend the administrative law judge's decision had she known of the error when this litigation began. However, I have already found that defendant should have been alerted to the error after plaintiff filed her opening brief. Had defendant properly recognized the error at that time, this court would never have ruled on plaintiff's other objections to the administrative law judge's decision. Defendant should not be allowed to benefit from a ruling occasioned by her own oversight.

As the commissioner now concedes, the evidence adduced at the hearing gave rise to a potential conflict concerning whether plaintiff is disabled. By failing to resolve this conflict, the administrative law judge issued a decision that was not supported by substantial evidence. Not only did the administrative law judge lack a rational factual foundation for his conclusion that plaintiff was not disabled, but defendant compounded the error by defending the administrative law judge's determination in court. Defendant's attempt to

blame her unfounded position on a lack of adequate briefing by plaintiff falls short of meeting her burden to show that her position was substantially justified.

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 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 plaintiff has the burden of proving that the fees she seeks are reasonable by submitting "evidence in support of the hours worked and rates claimed." Id. at 433.

Plaintiff requests compensation for 77.80 hours spent by her attorneys Barbara and Violet Borowski, Fred Daley, and Marcie Goldbloom at the hourly rates of $156.25 for the year 2005 and $160 for 2006. She also requests compensation for 13.25 hours spent by paralegal/law clerk Suzanne Blaz at the rates of $115 in 2005 and $120 in 2006 and for

60.83 hours spent by law clerks Deborah Nall, Laura Platt and K. Hoppe at the rate of $100. Of the 151.88 total hours requested, 13.35 hours were spent preparing and defending plaintiff's fee petition, with the remaining hours spent on the merits of the case. Plaintiff's legal team spent 63.75 hours for work at the district court level and 74.78 hours for work in the court of appeals.

A. Hourly Rate

Defendant does not contest the hourly rates plaintiff requests for her attorneys, which were calculated by applying cost of living adjustments to the $125 statutory hourly rate. Defendant contends, however, that plaintiff's proposed $115/$120 rate for the work performed by Blaz and the $100 rate for the work performed by the law clerks are too high. Although defendant recognizes that the use of law clerks or paralegals can be an effective money-saving measure notwithstanding their lack of experience and commensurate reduced efficiency, defendant argues that that savings is lost in this case because the rates proposed for the law clerks and paralegals are not significantly less than the attorney rates.

Under the Equal Access to Justice Act, a prevailing plaintiff may obtain "reasonable attorney fees . . . based upon prevailing market rates for the kind and quality of the services furnished" not to exceed "$125.00 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). Paralegal and law clerk rates are not set out in the statute. In support of the rates she

requests for her law clerks and the paralegal, Blaz, plaintiff cites what is known as the Laffey Matrix, which is a chart prepared by the United States Attorney's Office for the District of Columbia showing the hourly rates for attorneys of various experience levels and for paralegals and law clerks.[1] According to the matrix submitted by plaintiff, $105 was a "reasonable" hourly rate for paralegals and law clerks in the Washington, D.C. area in 2003-2004. Plaintiff asserts that she arrived at the $115/$120 rate for Blaz by applying cost of living adjustments to that rate. Plaintiff points out that Blaz is completing her final semester of law school, is a certified paralegal and has more than five years' experience working on social security cases at the Daley firm.

The Laffey Matrix has limited utility in determining the reasonableness of the law clerk/paralegal rates proposed by plaintiff. Notably, the matrix shows prevailing market rates only in the Washington, D.C. area. Plaintiff has not cited a corresponding matrix for the Chicago area or any other evidence to show that rates for legal professionals in Washington, D.C. are generally on par with those in Chicago, where the Daley firm is located. (It appears that a separate matrix exists that is based upon a nationwide survey of prevailing market rates. See Sadler v. Barnhart, 2004 WL 419908, *3 (N.D. Ill. Feb. 25, 2004). However, plaintiff has not submitted this matrix or provided any regional or nationwide data.)

In addition to citing the Laffey Matrix, plaintiff supports her proposed hourly rates by citing the court's decision in Embry v. Barnhart, 2003 WL 22478769, *3 (N.D. Ill. Oct.

[1]The "Laffey Matrix" derives from Laffey v. Northwest Airlines, Inc., 572 F. Supp. 354 (D.D.C. 1983) (aff'd in part, rev'd in part on other grounds) 746 F.2d 4 (D.C. Cir. 1984).

30, 2003). In that case, the court noted that the plaintiff (who was represented by the Daley firm) had submitted surveys of billing rates for paralegals and law clerks showing that in the Chicago region paralegal rates ranged from $60 to $120 per hour, with an average of $85. Although plaintiff has not submitted a copy of that survey, I will accept as fact the existence of such a survey. However, in Embry, the court approved an hourly rate for law clerks and paralegals of only $95. In more recent cases from the Northern District of Illinois, courts have approved even lower hourly rates for law clerks and paralegals. Porter v. Barnhart, 2006 WL 1722377, *4 (N.D. Ill. June 19, 2006) ($80 per hour); Sadler, 2004 WL 419908, *3 ($85 per hour); Holland v. Barnhart, 2004 WL 419871, *2 (N.D. Ill. Feb. 3, 2004) (rejecting Laffey Matrix and awarding rate of $50 for paralegal services).

In spite of the lackluster support offered by plaintiff for her proposed hourly rates for the law clerks and paralegal, I am persuaded that $100 an hour for that work is reasonable. The Laffey Matrix provides at least some foundation for a rate that high, and defendant has not proposed an alternate figure or presented any evidence to support a lower rate. Contrary to defendant's position, $100 an hour is substantially lower than the adjusted attorney rate. As will be discussed momentarily, the time logs show that, with a few exceptions, the law clerks performed work that would otherwise be performed by attorneys and that they did so efficiently and with little duplication of effort. Compensating them at the rate of $100 an hour is reasonable and results in a significant savings to the government. Finally, defendant has conceded in other cases that a rate of $100 for law clerk or paralegal services is

reasonable. See, e.g., Smith v. Barnhart, 05-C-0026-C, Opinion and Order (W.D. Wis. Aug. 23, 2006), dkt. #29, at 12-13; Seamon v. Barnhart, 2006 WL 517631, *6 (W.D. Wis. Feb. 23, 2006). See also Nickola v. Barnhart, 2004 WL 2713075, *1 (W.D. Wis. Nov. 24, 2004) (defendant conceded that hourly rate of $95 reasonable).

Although Blaz has more experience than the other law clerks who billed time on this case, I am not persuaded that her experience warrants an increase in the $100 hourly rate. Plaintiff's law firm has submitted no evidence to show that if it was billing a private client, it would charge the client more for Blaz's services than for the work performed by other law clerks. Moreover, an hourly rate much higher than $100 would start to erode the savings earned by allowing lawyers to seek compensation for time spent by law clerks and paralegals. Finally, although I have not adopted the Laffey Matrix, I note that it provides only a single rate for all paralegals and law clerks and does not provide for increasing rates based on years of experience. For all these reasons, I conclude that $100 an hour is a reasonable rate for all the law clerks and paralegals who worked on this case.

B. Hours Billed

Defendant contends that the time plaintiff's legal team spent on this case was unreasonable. With the exception of entries reflecting clerical work, defendant does not object to any specific time entries but argues generally that, based on the expertise of the Daley law firm, 63.75 hours for district court work and "over 70 hours for an opening appellate brief" was excessive. I disagree. The time logs show that Nall, a law clerk,

performed the bulk of the work in this court, spending a total of 46.65 hours reading the record and researching and writing the opening and reply briefs in this court. Blaz spent a mere 7.5 hours drafting the objections to the report and recommendation. Even with a store of expertise at their disposal, the amount of time that Nall and Blaz spent on the briefs was not unreasonable in light of the length of the record (398 pages), the number of issues raised (five) and the length of the briefs produced (28 pages for the initial brief,13 for the reply and 15 for the objections to the report and recommendation). As defendant concedes, the time logs reflect that Daley outlined the issues and edited the briefs, but otherwise there was little duplication of effort between the various members of the Daley firm. Overall, the time spent litigating this case at the district level was reasonable.

The nearly 75 hours spent for work at the appellate level was reasonable as well. The time logs show that the appellate brief reflected a combined effort between law clerk Platt, who drafted the introductory sections, Borowski, a lawyer, who drafted the argument sections, and Daley, who outlined the issues and revised the brief. In all, the firm spent 63.53 hours preparing a 44-page appellate brief; the remainder of the time was devoted mostly to negotiating with defendant about the terms of the remand order. Although 63.53 hours on a single appellate brief is on the high side, I am not persuaded that it is unreasonable given the number and complexity of the arguments raised.

I agree with defendant that a reduction is warranted for fees incurred by plaintiff by time spent by the legal team on tasks that can be characterized as purely secretarial and not requiring any specialized legal skill. Accordingly, I will excise the following entries from

Blaz's time log: .75 hours on February 2, 2005 mailing forms to plaintiff; .1 hour on July 29, 2005 e-filing the reply brief; and .25 hours on January 16, 2006 e-filing the objections to the report and recommendation.

I will also deduct 2 hours spent by K. Hoppe on June 22, 2006 generating the table of contents and reviewing citations for the appellate brief. Although reviewing citations might require legal knowledge, plaintiff has submitted no information about Hoppe's qualifications to warrant compensating him or her at the proposed rate of $100 an hour. Moreover, Hoppe's work appears to duplicate similar work performed by Borowski. For example, Borowski spent 2.5 hours on June 25, 2006, revising the brief, including the table of authorities.

Finally, I will deduct .5 hours spent by Borowski on June 23, 2006 preparing the appendix to the appellate brief, preparing certificates of service and scanning the administrative law judge's decision. These tasks fall into the clerical category.

Although defendant has not had the opportunity to review plaintiff's supplemental request for fees incurred defending the fee petition, I have reviewed it and find that the amount of hours sought by plaintiff in conjunction with defending her fee request (11.85 attorney hours) is reasonable. Accordingly, I find that plaintiff is entitled to an award of attorney fees as follows:

70.98 law clerk/paralegal hours at the rate of $100/hour;

6.75 attorney hours at the rate of $156.25/hour; and

70.55 attorney hours at the rate of $160/hour;

for a total fee award of $19,440.69.

ORDER

IT IS ORDERED that:

1. The petition of plaintiff for an award of attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, is GRANTED IN PART AND DENIED IN PART. Plaintiff is awarded attorney fees and costs in the amount of $19,440.69, to be made payable to plaintiff's attorney, Frederick J. Daley, Jr.

Entered this 13th day of February, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge