

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

DOROTHY BRUEGGEN,

Plaintiff,

OPINION AND ORDER

v.

06-C-154-C

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

Before the court is plaintiff Dorothy Brueggen's application 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 attorney fees in the amount of \$8,599.12, which represents work performed in both the merits and fee litigation. 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. Because I find that defendant's position was substantially justified, I will deny the petition for an award of fees and costs.

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

FACTS

Plaintiff applied for disability insurance benefits in July 2003, alleging that she was disabled by chronic diarrhea, stomach pain and nausea. After her claim was denied twice at the state agency level, plaintiff's claim was heard by an administrative law judge. On July 7, 2005, the administrative law judge issued a decision, finding that plaintiff's only work-related limitations were the need to have ready access to a bathroom and the ability to take bathroom breaks "as needed." Finding that plaintiff's past relevant work accommodated these limitations, the administrative law judge found that plaintiff was not disabled. The Appeals Council denied plaintiff's request for review.

On March 24, 2006, plaintiff filed a civil action for judicial review pursuant to 42 U.S.C. § 405(g). Plaintiff asked the court to reverse the decision of the commissioner and remand the case for four reasons: 1) the administrative law judge's conclusion that plaintiff could perform her past work was not supported by substantial evidence absent a finding regarding the frequency and duration of plaintiff's bathroom use; 2) the administrative law judge made an improper credibility determination; 3) she failed to properly evaluate evidence relating to plaintiff's cirrhosis; and 4) she erred in affording more weight to the opinion of the consulting physician than to the opinion of plaintiff's treating physician.

On December 15, 2006, Magistrate Judge Stephen Crocker issued a report and recommendation, recommending that the court reverse and remand the commissioner's decision for a specific finding concerning the frequency and duration of plaintiff's bathroom

usage. In light of vocational expert testimony indicating that too many unscheduled or lengthy absences from the work station would preclude competitive employment, the magistrate judge found that the absence of such a finding was an “apparent gap that would seem to require remand.” Rep. and Rec., dkt. #20, at 1. In reaching his conclusion, the magistrate judge noted that none of the commissioner’s arguments in defense of the adequacy of the administrative law judge’s findings had addressed directly plaintiff’s argument regarding the need for a specific finding regarding the duration and frequency of plaintiff’s bathroom visits. Id. at 13-15. Noting that “there may be convincing counter-arguments to plaintiff’s position, but the commissioner hasn’t made them,” id. at 13, the magistrate judge recommended remand on that sole issue. In all other respects, however, the magistrate judge found the administrative law judge’s decision to be “thorough and well-reasoned.” Id. at 2.

Having received no objections to the report from defendant, on January 8, 2007, this court entered an order adopting the magistrate judge’s report and recommendation and ordered the case remanded to the commissioner pursuant to sentence four of 42 U.S.C. § 405(g).

OPINION

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 his 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 that 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 [is] 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").

Having carefully reviewed the administrative law judge's decision, the commissioner's brief in support of that decision and the parties' briefs in connection with the fee litigation, I conclude that the commissioner has met his burden of showing that his position was substantially justified. As the commissioner points out, the essence of the sole error found by the magistrate judge was a lack of articulation on the part of the administrative law judge, who did not explain thoroughly enough why the ability to access the bathroom "as needed" was sufficient to accommodate plaintiff's bowel incontinence. An administrative law judge's failure to articulate the path of her reasoning "in no way necessitates a finding the [commissioner's] position was not substantially justified" within the meaning of the EAJA. Stein v. Sullivan, 966 F.2d 317, 320 (7th Cir. 1992). As the court noted in Stein, the articulation requirement is "deliberately flexible" and "far from precise." Id. The administrative law judge considered all of the important medical evidence and the relevant

credibility factors as required by the commissioner's regulations, including plaintiff's daily activities, treatment history, measures for pain relief and testimony by collateral sources. In defending the administrative law judge's position, the commissioner relied on this evidence and the thoroughness with which the administrative law judge addressed it. A significant amount of the evidence tended to discredit plaintiff's allegation of disabling diarrhea, including the testimony of one of plaintiff's coworkers, who testified that plaintiff continued to be a good producer at work despite her frequent trips to the bathroom, and plaintiff's own report that she quit her last job in part because she moved.

In remanding the case, this court found that, because the vocational expert testified that a person who needed to use the bathroom too often or for too long could not work competitively and that seven breaks a day (plaintiff's alleged minimum) would be too many, the administrative law judge ought to have made a specific finding concerning the number and duration of bathroom breaks that plaintiff credibly would require before concluding that she could work. Although this error might sound significant, in reality this was a close case and one that a different court may have decided differently. Indeed, the magistrate judge noted that "an argument could be made that because the evidence indicated that plaintiff was able to perform her past job in spite of her frequent trips to the bathroom," it was not necessary for the administrative law judge to make a specific finding regarding precisely how often and for how long plaintiff would be away from her work station. Rep. and Rec., dkt. #20, at 13.

It is true that defendant did not make this argument and that the magistrate judge found the arguments that he did make to be unresponsive to the point raised by plaintiff. However, “[w]hile the parties' postures on individual matters may be more or less justified, the EAJA--like other fee-shifting statutes--favors treating a case as an inclusive whole, rather than as atomized line-items.” Commissioner, I.N.S. v. Jean, 496 U.S. 154, 161-162 (1990). The government’s failure to articulate a convincing response to plaintiff’s argument does not mean that its position was wholly unreasonable. At both the administrative and litigation stages, the commissioner took the position that plaintiff’s diarrhea was not so debilitating as to prevent her from returning to her past relevant work. As noted above, there is substantial evidence in the record to support this conclusion. Although the administrative law judge might not have been as clear as she could have been in providing a bridge between the vocational expert’s testimony and her conclusion that plaintiff did not need to use the bathroom so often or for so long a time period as to prevent her from working, that relatively minor gap does not undermine the reasonableness of the commissioner’s position as a whole. In sum, because the commissioner has satisfied her burden to show that her position was substantially justified, plaintiff’s motion for an award of attorney fees under the EAJA must be denied.

ORDER

IT IS ORDERED that plaintiff's application for an award of attorney fees under the Equal Justice Act, 28 U.S.C. § 2412, is DENIED.

Entered this 26th day of July, 2007.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge