

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHARON L. SNOW,
Plaintiff

v.

Civil No. 97-331-P-C

KENNETH S. APFEL, COMMISSIONER
OF SOCIAL SECURITY,
Defendant

GENE CARTER, District Judge,

**ORDER GRANTING PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES
AND COSTS**

In the case at bar, Plaintiff submitted a Motion for Award of Attorney's Fees and Costs with supporting memorandum and documentation (Docket No. 9), seeking a total amount of \$3,497 in fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (d)(1)(A), to be paid to Plaintiff's attorney for work on this case in federal court. Plaintiff also requests an award of \$150 in costs for this Court's filing fee. The Commissioner opposes Plaintiff's motion. Defendant's Opposition to Plaintiff's Application for Attorney's Fees (Docket No. 12).

ANALYSIS

Plaintiff filed this case seeking review of the administrative law judge's determination that Plaintiff was capable of performing work that exists in substantial numbers in the national economy and, thus, was ineligible for social security disability benefits. Citing insufficiency of the evidence, Magistrate Judge Cohen vacated the Commissioner's decision on June 22, 1998,

and remanded the case with further orders to award benefits to Plaintiff. Recommended Decision (Docket No. 4). First on July 13th and then in an Amended Order on July 14th, 1998, this Court affirmed the Recommended Decision of the Magistrate Judge. Order Affirming the Recommended Decision of the Magistrate Judge (Docket Nos. 7, 8).

A. PROOF OF SUBSTANTIAL JUSTIFICATION OF GOVERNMENT’S POSITION

The Equal Access to Justice Act, 28 U.S.C. § 2412(b) (“EAJA”), allows for recovery of “reasonable fees and expenses of attorneys” by the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his or her official capacity. 28 U.S.C. § 2412(b). A plaintiff seeking an award of fees must file within thirty days of final judgment in the action. 28 U.S.C. § 2412(d)(1)(B). Under the EAJA, a court may therefore award attorney’s fees and costs to a prevailing plaintiff in a suit against the Commissioner of Social Security regarding disability benefits. However, the EAJA precludes a prevailing plaintiff’s entitlement to attorney’s fees if the government’s position was “substantially justified” or if “special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A); *Trinidad v. Secretary of Health and Human Services*, 935 F.2d 13, 15 (1st Cir. 1991). In the case at bar, the Commissioner has not set forth any special circumstances that would bar awarding attorney’s fees in this case. In addition, the Commissioner does not dispute that Plaintiff is the prevailing party to this action and timely filed her request for fees after final judgment in this case was entered. Therefore, the issue facing this Court in regard to whether a fee award is appropriate in this case is whether the government’s position was substantially justified.

The government has the burden of proving that its position was substantially justified and must show that it had a reasonable basis for the facts alleged, that it had a reasonable basis in law for the theories it advanced, and that the former supported the latter. *Trinidad*, 935 F.2d at 15 (citing cases).

The Commissioner's view regarding whether his position on this appeal was substantially justified is not clear from his opposition papers.¹ Notwithstanding the Commissioner's internally inconsistent argument, the Commissioner fails to present any analysis whatsoever of why the government's position was substantially justified in this case. The Commissioner does not assert his reasonable basis for the facts he alleged or the basis in law for the theories he advanced. Because the Commissioner fails to meet his burden on this element, this Court finds that the government's position was not substantially justified. Having determined that Plaintiff was the prevailing party, that the Commissioner's position was not substantially justified, and that no special circumstances exist that make an award unjust, the only issue facing the Court under the EAJA is the reasonableness of Plaintiff's fee request.

¹ On page three of his Opposition to Plaintiff's Application for Attorney's Fees, the Commissioner asserts that "the government's position in this case, whether viewed as a whole, or viewed specifically with respect to the issue on which the District Court based its decision to remand, was substantially justified." Docket No. 12 at 3. The Commissioner contends that, when considering the appropriateness of a fee award, the Court should determine whether the government's position was substantially justified in the case on the whole rather than on the issue upon which Plaintiff prevailed. *Id.* at 3-6. The Commissioner then surprisingly concludes that the "[c]ommissioner argues that his position in this case was *not* substantially justified" *Id.* at 6 (emphasis added). It is unclear whether this statement was the result of a typographical error or a stipulation that Plaintiff has met this element.

B. HOURLY RATE

The Supreme Court has written that “the most useful starting point for determining the amount of a reasonable fee is the number of hours expended on the litigation multiplied by a reasonable hourly rate” -- what has since become known as the lodestar. *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 564, 106 S. Ct. 3088, 3097 (1986). Title 28 United States Code section 2412(d)(2)(A) provides in relevant part,

attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the costs of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A). The statutory hourly rate of \$125 for attorney’s fees was put into effect in March of 1996. Pub. L. No. 104-121 (codified as amendment at 28 U.S.C. § 2412(d)(2)(A)). Plaintiff’s counsel asks this Court to increase the hourly fee to \$130 per hour in order to reflect a cost-of-living increase since 1996.

In support of his request for an increase of the hourly fee from \$125 to \$130 per hour, Plaintiff’s counsel submits his affidavit including a compensation request, a Consumer Price Index for the cost of services in this region as reported by the Bureau of Labor Statistics, and an affidavit of a second attorney who litigates social security disability cases in the region. Emery Affidavit 1 (Docket No. 10); Consumer Price Index (Docket No. 10); Bell Affidavit (Docket No. 15). In his affidavit, Plaintiff’s counsel notes his experience litigating social security disability appeals and the unique procedural aspects of this case. Emery Affidavit 1 at 2-3. Specifically, the procedural aspects were that he did not litigate this case at the administrative level, but first took the case on appeal and, thus, had to familiarize himself with the record. Emery Affidavit 1

at 3.² He further notes that this case involved use of a vocational expert and required litigating the issue of when a direction for the award of benefits is appropriate as opposed to remand for further proceedings. *Id* at 2-3. The supporting affidavit submitted by a second attorney attests to the novelty and difficulty of representing social security disability claimants; notes the fact that social security disability cases are universally handled on a contingency fee basis and recover only 25, rather than the traditional 30, percent of the judgment; and asserts that private attorneys willing to take on such cases are scarce in the region. Bell Affidavit at 1-2. The affiant further attests that \$130 per hour is a customary fee for social security cases and vouches for the quality of Plaintiff's counsel's services. *Id* at 3.

First, the Court will consider whether any of the factors presented by Plaintiff's counsel in his request for fees and supporting documentation constitute special factors that justify the higher rate of \$130 per hour that he requests. In *Pierce v. Underwood*, 487 U.S. 552, 572-74, 108 S. Ct. 2541, 2554 (1988), the Supreme Court wrestled with the question of when it is appropriate for a fee in excess of the statutory amount to be awarded under the EAJA. The Court explained that the "special factor" language of the statute suggests that Congress thought that the statutory amount was "generally quite enough public reimbursement for lawyers' fees, whatever the local or national market might be." *Id.* at 572, 109 S. Ct. at 2554. Although declining to list specifically other items that might constitute "special factors" envisioned by the statutory exception, the Supreme Court ruled out as special factors those items relied upon by the district court in *Pierce*, including: the novelty and difficulty of issues, the undesirability of the case, the

² The administrative proceedings took place in Bozeman, Montana because the Plaintiff was a resident of that state at the time of the hearing. Plaintiff moved from Montana to Maine while the matter was pending before the Appeals Council.

work and ability of counsel, the results obtained, customary fees and awards in other cases, and the contingent nature of the fee. *Id.* at 573, 108 S. Ct. at 2554. The Court noted that many of these factors are too generally applicable to warrant departure from the statutory cap. *Id.*

The EAJA allows for adjusting the hourly cap upwards based upon the increased cost of living. 28 U.S.C. § 2412(d)(2)(A); *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 523 (1st Cir. 1987); *We Who Care, Inc. v. Sullivan*, 781 F. Supp. 57, 60 (D. Me. 1991). Plaintiff's counsel asks this Court to increase the hourly fee to \$130 in order to reflect a cost-of-living increase. Defendant objects to the increase. Plaintiff submitted an affidavit from an attorney in the region who litigates social security disability cases who testified that he normally receives the reasonable market rate of \$130 an hour. Bell Affidavit at 2. In addition, Plaintiff's counsel submitted the Consumer Price Indices reported by the Bureau for Labor Statistics for urban areas in New England and argues that under the regional consumer price index, an hourly fee of \$130 would be appropriate in this case. Consumer Price Index. Defendant contests that the Index is too little supporting documentation warranting a cost-of-living adjustment. Defendant's Opposition to Plaintiff's Application for Attorney's Fees at 6-7. This Court agrees with Plaintiff that it is proper in this case for the hourly fee to reflect the demonstrated rising cost of living.

The amended statutory cap of \$125 an hour took effect on March 29, 1996. Pub. L. No. 104-121 (codified as amendment at 28 U.S.C. § 2412(d)(2)(A)). The Consumer Price Index reported by the Bureau of Labor Statistics shows a four-percent increase in the cost of living for urban consumers in Maine from March 29, 1996, to this date. Bureau of Labor Statistics Data, *Consumer Price Index - All Urban Consumers*, August 9, 1998. Applying this cost-of-living increase to \$125 an hour yields an hourly rate of \$130. Here, if the inflation factor of 4% is

multiplied by the statutory cap of \$125 under the EAJA (equaling 5), the adjusted hourly rate is \$130. Courts have held that the Consumer Price Index may be used to determine cost-of-living adjustments under the EAJA. *We Who Care, Inc.*, 781 F. Supp. at 61 (citing cases).

Accordingly, this Court will award Plaintiff's counsel fees at the rate of \$130 per hour in order to reflect what it considers to be a reasonable cost-of-living adjustment. *See Sierra Club*, 820 F.2d at 523 (holding that federal courts remain able to augment hourly rates by considering changes in the cost of living).

B. COMPENSABLE HOURS

Plaintiff's counsel submits his compensation request for 21.5 hours spent on the appeal of this case in federal court plus 5.4 hours spent replying to Defendant's opposition to Plaintiff's counsel's fee request, for a total of 26.9 hours. Emery Affidavit 2 (Docket No. 14) at 2; Emery Affidavit 1 at 3. Defendant contests solely on the ground that the requested hourly rate is excessive and does not contend that certain hours should not be reimbursed. Defendant's Opposition to Plaintiff's Application for Attorney's Fees at 6-7. However, having determined that the hourly rate of \$130 is reasonable, this Court will conduct its own analysis of what hours of work should be compensated.

Under the EAJA, a prevailing plaintiff is entitled to fees incurred for doing core legal work. *Trinidad*, 935 F.2d at 17. Work that requires little substantive analysis or is not necessary in the sense that it does not effectuate the ultimate ruling in the case is not compensable under the statute. *Id.* Having carefully examined the itemization submitted by Plaintiff's counsel, the Court has identified 1.1 noncore hours, virtually all of which were spent on what this Court considers basic

nonlegal correspondence for which it would be improper to charge a client at the usual hourly rate.³

Hence, for these 1.1 hours, Plaintiff's counsel will be reimbursed at \$65 per hour, half the usual hourly rate.

In addition, the Court notes that a disproportionately high number of hours were spent on fee preparation (9.7 of the 26.9 total hours billed, thus approximately 36 % of the total time spent on the case).⁴ Hence, this Court will disregard 7.0 of such hours, allowing a total of 2.7 hours to be billed for fee preparation. Otherwise, the Court is satisfied that the remaining 18.8 hours billed by Plaintiff's counsel are neither excessive, redundant, nor unnecessary and, as such, will be reimbursed fully.

³ The Court included the following in its calculation of time spent on noncore legal work.

10/22/97	.4	call from client
10/31/07	.3	call client
6/13/98	.4	call client
<u>Total:</u>	1.1	

⁴ The Court included the following in its calculation of time spent on litigating EAJA fees:

7/29	.6	preliminary drafting motion for EAJA fees; affidavits
8/9/98	1.0	preparation drafting motion for EAJA fees; affidavits
8/10/98	1.7	preparation motion and supporting materials; research
8/11/98	1.0	finalize motion for EAJA fees and supporting materials
8/24/98	.5	review Defendant's Opposition
8/25/98	1.4	research; draft reply memorandum; call M. Bell
8/28/98	2.8	research; draft reply memorandum; affidavit
8/27/98	.7	revise memorandum; review affidavit; call M. Bell; draft letter clerk
<u>Total</u>	9.7	

C. COSTS

The Court will allow costs of \$150, constituting the filing fee for this civil action, to be awarded to Plaintiff's Counsel.

Therefore, using the lodestar calculation, the total amount allowable for attorney's fees in this case under the EAJA is 18.8 hours at \$130 per hour (\$2,444.00), 1.1 hours at \$65 per hour (\$71.50), plus \$150 for costs, for a total award of \$2,665.50 in fees and costs under the EAJA. Accordingly, it is ORDERED that Plaintiff's Motion for Award of Attorney's Fees and Costs be, and it is hereby, GRANTED in the amount of Two Thousand Six Hundred Sixty-Five dollars and Fifty Cents (\$2,665.50).

So ORDERED.

GENE CARTER
District Judge

Dated at Portland, Maine this 22nd day of October, 1998.

