

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CARMEN RIOUX, et al.,)	
)	
Plaintiffs)	
)	
v.)	Docket No. 00-302-P-H
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant)	

RECOMMENDED DECISION ON PLAINTIFFS’ MOTION FOR ATTORNEY FEES

The plaintiffs have applied for an award of attorney fees, costs and expenses pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412, in this action in which (i) nine of the eighteen plaintiffs prevailed in this court on their claims under the Social Security Act, (ii) judgment was entered against one of the plaintiffs, and (iii) the claims of the remaining plaintiffs were remanded to the defendant for further action. The defendant “does not contest that plaintiffs ultimately prevailed in this litigation,” Defendant’s Opposition to Plaintiffs’ Application for Attorney’s Fees Under the Equal Access to Justice Act, etc. (“Opposition”) (Docket No. 40) at 4, but opposes the application on the ground that her position in the litigation was substantially justified.

The EAJA provides, in relevant part:

[A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, 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 position of the United States was substantially justified if it was justified to a degree that could satisfy a reasonable person. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). *See also United States v. Yoffe*, 775 F.2d 447, 449 (1st Cir. 1985) (citing cases from other circuits). “The burden to prove substantial justification rests on the [commissioner].” *Blaisdell v. Secretary of Health & Human Servs.*, 623 F. Supp. 973, 975 (D. Me. 1985). Both the underlying decision of the government and its litigation position must be substantially justified. *McDonald v. Secretary of Health & Human Servs.*, 884 F.2d 1468, 1475-76 (1st Cir. 1989). In the present case, it is necessary only to consider the latter.

The defendant contends that her position was substantially justified because “the interaction of S[ocial] S[ecurity] R[uling] 97-3 and the governing statutory provision at 42 U.S.C. § 424a” was “an issue of apparent first impression,” and there was an “absence of guidance in the First Circuit case law.” Opposition at 4-5, 6. That argument bears little weight in the context of the pending motion, however, because the defendant’s position in the underlying action was not based on the interaction of the Ruling and the statute but rather on an assertion that the Maine Workers’ Compensation Board lacked the power under state law to amend lump-sum settlement awards. Report and Recommended Decision (“Recommended Decision”) (Docket No. 27) at 12; Defendant’s Memorandum in Support of Motion for an Order Dismissing the Complaint, etc., attached to Defendant’s Motion for an Order Dismissing the Complaint, etc. (Docket No. 21), at 11-18. I concluded, Recommended Decision at 12-13, that it was highly unlikely that the Maine Law Court would adopt the defendant’s view of Maine law given the Board’s authority to correct errors of omission in settlement awards, 39-A M.R.S.A. § 318, and to determine matters covered by the settlement agreement at any time, 39-A M.R.S.A. § 321. The court adopted my recommended decision and entered judgment accordingly. Docket Nos. 32 & 33.

“That the government lost in the underlying litigation does not create a presumption that its position was not substantially justified.” *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 517 (1st Cir. 1987). However, the reason why the government lost has everything to do with the question whether its position was substantially justified. Here, the defendant chose to rely on an argument interpreting state law in a manner that a reasonable person could not have concluded was justified, given the language of the state statutes at issue. Accordingly, I conclude that the defendant’s position was not substantially justified.

The defendant argues in the alternative that the amount of attorney fees requested is excessive because (i) it includes services rendered in administrative proceedings before the Social Security Administration which must be excluded; (ii) it includes excessive, redundant or unnecessary hours; and (iii) the hourly rate requested is too high. Opposition at 6-9.

With respect to the first issue, the Supreme Court has held that attorney fees may be recovered in connection with proceedings before the Social Security Administration that follow a remand by the court where the court retains continuing jurisdiction over the case pending a decision from the commissioner which will determine a claimant’s entitlement to benefits. *Sullivan v. Hudson*, 490 U.S. 877, 888, 892 (1989). Because this court did not expressly retain jurisdiction after remanding the claims of all but one of the plaintiffs either for recalculation of benefits or further proceedings, Final Order (Docket No. 32) and Judgment (Docket No. 33), the defendant argues that the claim for hours associated with the proceedings before the agency after remand must be excluded. Opposition at 7. The plaintiffs argue in response that the time spent by counsel after remand was necessary to ensure the agency’s compliance with the remand order. Plaintiffs’ Reply Memorandum to Defendant’s Opposition to Plaintiffs’ EAJA Application (“Reply Memorandum”) (Docket No. 41) at 4. In *Trinidad v. Secretary of Health & Human Servs.*, 935 F.2d 13, 17 (1st Cir. 1991), the First Circuit

held that “where, as here, a district court has remanded a case to the [agency] while retaining jurisdiction, attorney’s fees should ordinarily be awarded.”

The remand in this case clearly was not made for the taking of additional evidence before the commissioner, often called a “sentence six” remand under 42 U.S.C. § 405(g). The remand in this case could only have been a “sentence four” remand, made under the power granted to the courts by section 405(g) to affirm, modify or reverse the commissioner’s decision, with or without remand. In this case, the court reversed the commissioner’s decision as to eight of the plaintiffs and remanded merely for recalculation of benefits, affirmed as to one of the plaintiffs, and remanded for further consideration of an issue that did not require consideration of additional evidence as to the remaining eight plaintiffs, all as requested by the parties. In *Shalala v. Schaefer*, 509 U.S. 292, 299 (1993), the Supreme Court held that a district court may not retain jurisdiction when a remand is made under sentence four. Accordingly, this court could not have retained jurisdiction after this case was remanded and a necessary element for recovery of fees incurred in post-remand proceedings before the commissioner is absent. Therefore, 12.55 hours of attorney time included in the application (after October 17, 2001), Affidavit of Michael A. Bell (“Bell Aff.”) (Docket No. 35) at 12-14, must be excluded.

With respect to the second issue, the defendant contends that the application seeks 15.65 hours spent by a paralegal in the period from February 9 to February 22, 2001 comparing certified administrative transcripts with office files in support of motions that were denied; seeks 31.20 hours to draft the initial brief, which was allegedly similar to a memorandum filed with the administrative law judge whose decision was under review; and fails to provide sufficient detail for an entry on February 26, 2001 for 8.15 hours. Opposition at 7-8. The plaintiffs respond that the claim for paralegal time was for 11.45 hours that were incurred in “an effort to simplify matters for the Court”

(although it is not entirely clear how the paralegal's work accomplished this purpose), that the time spent preparing the plaintiffs' brief was reasonable, and that "[t]he bulk of the time spent on 2/26/01 was to edit down the initial Memorandum." Reply Memorandum at 4-5 & n.2.

The plaintiffs have correctly counted the total paralegal hours claimed. Apparently, 7.25 of these hours were spent "[c]ompar[ing] our files to Transcript Record," and 3.5 hours were spent drafting the motions that were denied. Bell Aff. at 8. The plaintiffs' reply memorandum suggests that the former activity was necessary in order to ensure that the administrative record submitted by the defendant was "complete and accurate." Reply Memorandum at 4-5. However, the only evidence in the court's record suggesting that the record was not complete and accurate is the 15 plaintiffs' motions to correct or supplement the record (Docket Nos. 4-18), all but one of which were stricken.¹ Report of Conference of Counsel and Order ("April 9, 2001 Conference Report and Order") (Docket No. 22) at 2. The defendant cites no authority in support of its necessarily-implied contention that paralegal time devoted to motions that were denied is not compensable. This court must determine whether the plaintiffs' counsel "exercised billing judgment in submitting the fee application" and whether the time charged was reasonably expended in advancing the clients' interests. *FDIC v. Singh*, 148 F.R.D. 6, 10 (D. Me. 1993) (citation and internal quotation marks omitted). Excessive, redundant or unnecessary hours must be excluded from a fee request. *Weinberger v. Great Northern Nekoosa Corp.*, 801 F. Supp. 804, 811 (D. Me. 1992) (citation and emphasis omitted). With respect to the paralegal time at issue here, my order of April 9, 2001 makes clear that "motions to correct and/or supplement the record were never contemplated in the process and schedule agreed to" by counsel at a conference with the court on November 20, 2000, *see* Docket No. 2, and that the motions were stricken for this reason. I struck the motions rather than denying them for that reason — they were beyond the

¹ The single allowed motion sought to substitute as a party plaintiff a surviving child for a parent, originally a named plaintiff, who died. (continued on next page)

scope of the procedure to which counsel had already agreed. April 9, 2001 Conference Report and Order. Under these particular circumstances, unique to this case, I recommend that the 10.75 hours of paralegal time devoted to these motions be disallowed.

My review of counsel's affidavit shows 29.20 hours recorded on February 23-25 and 27-28, 2001 in connection with the preparation of the plaintiffs' brief for this court. Bell Aff. at 9. The plaintiffs' clarification to the effect that the "bulk of" the time recorded in the entry for February 26, 2001 was devoted to editing the memorandum brings the total time involved to 37.35 hours.² The memorandum at issue consists of 20 pages. Issue on Review and Record (Docket No. 19). The defendant has provided the court with a copy of the memorandum filed by plaintiffs' counsel in the initial administrative proceeding, a 15-page document included in the administrative record at pages 442-60. Guidance on the question whether the recorded time devoted to the production of the memorandum for this court is excessive is provided by the First Circuit's opinion in *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945 (1st Cir. 1984). In that case, the court found reasonable a claim for 16 hours in drafting a 37-page brief, approximately 30 per cent of which presented arguments not presented to the district court. *Id.* at 953. It found excessive a claim for 55 hours in preparation of a 17-page petition for rehearing. *Id.* at 954. Here, the claimed time involved in preparing the plaintiffs' memorandum does appear to be excessive. While the memorandum submitted to this court includes constitutional arguments not presented to the administrative law judge, Docket No. 19 at 14-20, the remainder of the memorandum covers the same ground as the memorandum presented to the administrative judge, occasionally in identical language. I conclude that a claim for anything more

Motion [of Joel Deschaines] to Correct and Supplement the Record. Docket No. 8.

² The defendant chose not to object to any of the 5.00 hours shown for March 1, 2001 which included "[f]inal research & revise." Bell Aff. at 9.

than 25 hours for the preparation of the memorandum submitted to this court would be unreasonable and accordingly recommend reducing the plaintiffs' claim on this item by 12.35 hours.

With respect to the third issue, the defendant contends both that the \$142.05 hourly rate sought by counsel for the plaintiffs is excessive and that a lower rate should apply to certain activities. Objection at 8-10. However, the defendant does not identify any entries for which it contends a lower hourly rate should apply nor does she suggest what an appropriate rate would be for such activities. Accordingly, I recommend no reduction on this basis. The defendant does argue that the plaintiffs have failed to establish that a reasonable hourly rate for their counsel would exceed the maximum of \$125 set by 28 U.S.C. § 2412(d)(2)(A)(ii) and that therefore no inflation adjustment should be considered. *Id.* at 9. She asserts that this court has “established” an adjusted hourly rate of \$110, which she apparently contends should be applied in this case. *Id.* at 10.

Section 2412(d)(2)(A)(ii) provides in relevant part that “attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee.” This subsection of the statute was amended in 1996 to increase the indicated dollar limit from \$75 to \$125. Pub.L. 104-121, § 232(b)(1); 28 U.S.C. § 2412, Historical and Statutory Notes. It also provides that the amount of fees awarded “shall be based upon prevailing market rates for the kind and quality of the services furnished.” The plaintiffs have submitted satisfactory evidence that the prevailing market rates for services like those provided in this case exceed \$125 per hour. Affidavit of Jack H. Simmons (Docket No. 38) ¶¶ 4-11; Affidavit of Daniel W. Emery (Docket No. 39) ¶¶ 3-12. Contrary to the defendant’s argument, *Bowker v. Bowen*, 706 F. Supp. 88 (D. Me. 1989), decided by this court when the statutory maximum rate was \$75 per hour, does not “establish” that an “adjusted” rate of \$110 per hour is appropriate under the statute in 2002. Both the statutory maximum and prevailing market rates have increased since 1989.

The plaintiffs have submitted consumer price index information for the period since the \$125 statutory maximum rate was enacted, Bell Aff. ¶¶ 13-14 & Attachment, as well as evidence of an agreed hourly rate of \$130 negotiated by their attorney and counsel for the defendant in other cases resulting in court orders dated between June 17, 1999 and February 20, 2001, Reply Memorandum at 6 and Attachments 1-6. In light of this evidence, I conclude that an hourly rate of \$135 is reasonable.

The plaintiffs also seek for an additional 5.5 hours incurred on November 19 and 20, 2001 “in Reply,” Reply Memorandum at 7, which is most likely intended to refer to time spent in preparing the reply memorandum which was filed on December 21, 2001. The plaintiffs are entitled to reimbursement for this time. *McDonald*, 884 F.2d at 1480. The defendant has not objected to any of the costs for which the plaintiffs have requested reimbursement; such reimbursement should therefore be allowed.

For the foregoing reasons, I recommend that the plaintiffs be awarded a grand total of \$14,025.40, representing 100.0 hours of attorney time (119.4 minus 24.9 plus 5.5) at \$135 per hour (\$13,500), 0.7 hours of paralegal time at \$55 per hour (\$38.50), costs of \$150 and other expenses of \$336.90.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this ___th day of January, 2002.

David M. Cohen
United States Magistrate Judge

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