

5 of the defendant's evaluation process and contending that the defendant needed to further develop the record, Defendant's Motion for Remand (Docket No. 4) at 1-2. The plaintiff opposed the motion, citing my decision in *Field v. Chater*, 920 F. Supp. 240 (D. Me. 1995), in support of his contention that the admitted error required remand with an order to pay benefits, Plaintiff's Objection to Defendant's Motion for Remand, etc. (Docket No. 5) at 1-2.

Oral argument was held and I issued a recommended decision to the effect that the cause should be remanded for payment of benefits. Report and Recommended Decision (Docket No. 7) at 7. The court affirmed the recommended decision. Order Affirming the Recommended Decision of the Magistrate Judge (Docket No. 10). The defendant appealed to the First Circuit, which held that remand for payment of benefits was not appropriate and ordered the case remanded to the defendant for further proceedings. *Freeman v. Barnhart*, 274 F.3d 606, 610 (1st Cir. 2001). After holding a new hearing, an administrative law judge awarded benefits to the plaintiff. Motion and Memorandum in Support of Reopening This Case and Affirming the Commissioner's Final Decision Finding That Plaintiff was Disabled (Docket No. 18) at 2-4. Judgment was then entered in favor of the plaintiff. Docket No. 20.

The plaintiff filed the instant motion on April 16, 2003. Docket No. 21.

II. Discussion

Attorney fees are available in Social Security benefit cases pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, which provides, in relevant part:

[A] court shall award to a prevailing party . . . fees and other expenses, in addition to any costs awarded . . . , 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.

seeks.

28 U.S.C. § 2412(d)(1)(A). The parties agree for purposes of the pending motion that the plaintiff is a prevailing party and that the plaintiff fits the definition of “party” set forth in 28 U.S.C. § 2412(d)(2)(B). The defendant does not contend that any special circumstances make the award sought unjust. The only matter in dispute, therefore, is whether the position taken by the defendant in this case was substantially justified.

The defendant’s position 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). The position must have a reasonable basis both in law and fact. *Id.* The defendant could take a position that is substantially justified even if she lost. *Id.* at 569. Here, the defendant contends that her position was substantially justified, notwithstanding the administrative law judge’s obvious error in finding that the plaintiff could perform three specific jobs that the vocational expert testified he could not perform, because “there were a significant number of jobs he could perform (as the vocational expert testified).” Opposition at 4-5. I agree that the point where this case reached this court is the appropriate point at which to determine whether the defendant’s position was substantially justified, despite the fact that the plaintiff ultimately was awarded benefits by the commissioner after remand. *See generally Commissioner, INS v. Jean*, 496 U.S. 154, 158-62 (1990). I do not agree that the defendant’s position at the relevant time was substantially justified, however.

The plaintiff agrees that the vocational expert at his first hearing identified jobs other than those adopted by the administrative law judge as jobs that the plaintiff could perform given the limitations included by the administrative law judge in a hypothetical question to the vocational expert. Reply Memorandum to Defendant’s Response to Plaintiff’s Application for Attorney’s Fees, etc. (Docket No. 26) at 3. However, the plaintiff also correctly points out that he “challenged [the] applicability [of those jobs] in writing.” *Id.*; Itemized Statement of Errors Pursuant to Local Rule

16.3, etc. (included in Docket No. 3) at 3-6; Transcript of Oral Argument (Docket No. 13) at 7. Simply identifying the jobs that the vocational expert testified the plaintiff could still perform, without more, as the defendant does here, Opposition at 4, is not sufficient to allow the court to conclude that her position at that time was substantially justified, particularly in circumstances where, as here, the plaintiff has provided evidence that he contested that testimony.

The defendant also suggests that her position was substantially justified because she moved for remand before the case was argued in this court and prevailed on appeal in the First Circuit. *Id.* at 5. The motion for remand cannot transform a position on the merits that has not been shown to have been substantially justified into one that was so justified, particularly given the defendant's contention in the same brief that her position on the merits was substantially justified at the time. The result of the appeal cannot be considered independently on the question of substantial justification. *Jean* directs that the proceeding be considered as a whole for purposes of EAJA attorney-fee applications. 496 U.S. at 159.

It is for this reason that the defendant's alternate argument — that reimbursement for attorney fees incurred after she moved for remand should be denied — also fails. Opposition at 6-8. The defendant's reliance on *Hensley v. Eckerhart*, 461 U.S. 424 (1983), in this regard is misplaced. The Supreme Court was not dealing with the substantial justification exception in that case. It was addressing an argument that the plaintiffs should not recover all of the attorney fees requested when they did not succeed on all of the claims asserted in their complaint. 461 U.S. at 429-31. Indeed, the language of that opinion actually supports the plaintiff's position here:

Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . . In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

* * *

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount.

Id. at 435-36. If the focus is to be placed on the outcome, the fact that the plaintiff's recovery in this case was not "limited in comparison to the scope of the litigation as a whole," *id.* at 440, means that his fee recovery should not be reduced with respect to the Step 5 issue on which the First Circuit eventually overruled my established position. An argument similar to that made by the defendant was rejected in *Pettyjohn v. Chater*, 888 F. Supp. 1065, 1067-68 (D. Colo. 1995). It should be rejected in this case as well.

III. Conclusion

For the foregoing reasons, I recommend that the plaintiff's motion for an award of attorney fees be **GRANTED**.

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 21st day of May, 2003.

David M. Cohen
United States Magistrate Judge

Plaintiff

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V.

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