

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 commissioner concedes that the plaintiff was a prevailing party for these purposes. Opposition at 1. She makes no argument that any special circumstances exist that would make an award unjust, nor does she contest the hourly rate requested by plaintiff's counsel.

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.* Here, the defendant contends that her position was substantially justified on the determinative issue because, despite the administrative law judge's failure to indicate what weight, if any, was given to the determination of the Veterans' Administration that the plaintiff's decedent was totally disabled, the applicable regulation, 20 C.F.R. § 404.1504, states that a finding by another government agency that a claimant is disabled is not binding on the commissioner. Opposition at 3-4. This argument incorrectly confounds the lack of binding authority inherent in such a finding with the need to give such a finding some consideration. As I noted in my recommended decision on the merits, "every federal court of appeals that has considered the issue has held that a determination of disability made by the Veterans' Administration is entitled to some weight in determining a claim for Social Security benefits." Report and Recommended Decision (Docket No. 13) at 7. The commissioner correctly notes, Opposition at 4, that the First Circuit has not addressed this issue, but when at least ten circuits are in agreement, Recommended Decision at 7, the administrative law judge's choice to ignore that body of case law can hardly be said to represent a substantially justified position. Nothing in the opinion in *Schock v. United States*, 254 F.3d 1,

4-6 (1st Cir. 2001), a case construing the EAJA in connection with a contract claim against the FDIC, cited by the commissioner, Opposition at 2, requires a different conclusion.

The commissioner has more success with her contention, Opposition at 5, that 8.3 of the hours included in the bill submitted by counsel for the plaintiff should be excluded because they were devoted to an untimely motion for remand filed by the plaintiff and stricken by the court. Recommended Decision at 1 n.3. These hours are noted on the bill as “Research: evidence of serious heart condition,” 4.60 hours on January 22, 2004, and “Motion to remand,” 3.70 hours on February 16, 2004. Invoice Submitted to: James S. Pinkham (Exh. A to Affidavit in Support of Application for EAJA Fees, submitted with Docket No. 18) (“Invoice”) at [2]. It is clear from the bill and from the motion to remand submitted by the plaintiff on February 20, 2004 (Docket No. 10) that all of these hours were related to that motion. I agree that the plaintiff was not a prevailing party as to this motion and that fees should not be recovered in any event for an untimely motion that was stricken from the record.

Counsel for the plaintiff, in an exercise of “billing judgment,” reduced the amount of the request for fees by reducing the time spent by an associate to 32 hours “despite the fact that more actual hours were expended.” Motion at 2. This resulted in a voluntary reduction from \$6,045.50 to \$4,544.00, or approximately 24.8 per cent. Invoice at 2. Reducing the original amount by the \$871.50 charged in connection with the motion for remand, *id.*, leaves a balance of \$5,174.00. Applying the same rate of voluntary reduction to that amount generates a result of \$3,891.00. That fee is appropriate under the circumstances.

Conclusion

For the foregoing reasons, I recommend that the plaintiff’s motion for attorney fees be **GRANTED**, but only in the amount of \$3,891.00.

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 24th day of May, 2004.

/s/ /David M. Cohen
David M. Cohen
United States Magistrate Judge

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