

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

***THERESA R. THERRIEN,*** )  
 )  
 ***Plaintiff*** )  
 )  
 ***v.*** )  
 )  
 ***JO ANNE B. BARNHART,*** )  
 ***Commissioner of Social Security,*** )  
 )  
 ***Defendant*** )

***Docket No. 03-176-B-W***

***RECOMMENDED DECISION ON PLAINTIFF’S MOTION FOR ATTORNEY FEES***

The plaintiff has applied for an award of attorney fees pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412, in this action in which she obtained a voluntary remand for further proceedings before the Social Security Administration. EAJA Application for Fees and Expenses (“Application”) (Docket No. 15).

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 commissioner concedes that the plaintiff was a prevailing party for these purposes. Defendant’s Partial Opposition to Plaintiff’s Application for Attorney’s Fees, etc. (“Opposition”) (Docket No. 16) at 1. She makes no argument that her position was substantially justified or that any

special circumstances exist that would make an award unjust. She challenges the hourly rate of \$160 sought by the plaintiff and .7 hours of time charged before the complaint was filed. *Id.* at 2-3.

The .7 hours to which the commissioner objects represents the sum total of two entries on the invoice attached to the application. On September 19, 2003 there is an entry for .4 hours, consisting of “receipt and review of documents and Appeals Council denial from M. Currier.” [Exhibit 1] to Application at [1]. On September 25, 2003 there is an entry for .3 hours, described as “prepare forms and letter to client.” *Id.* The commissioner contends that EAJA compensation is not available “for administrative time spent prior to the remand and filing of the complaint.” Opposition at 2. She cites *Sullivan v. Hudson*, 490 U.S. 877, 890-92 (1989), in support of her position. *Id.* However, that decision does not support the commissioner’s position. In that case, the Supreme Court held that attorney fees were not compensable under the EAJA for time spent representing the claimant in non-adversarial administrative proceedings before the Social Security Administration after judicial remand. *Id.* at 890-92. That is not the situation present here, where reimbursement for time spent determining the basis for seeking judicial review is the subject of the dispute. The amount of time spent in this activity is not unreasonable and the activity was reasonably necessary to the filing of the appeal which led to the voluntary remand. The commissioner’s objection to this time is without merit.

The commissioner also challenges the hourly rate sought by the plaintiff. The EAJA provides, in section 2412(d)(2)(A)(ii), 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, which was amended in 1996 to increase the indicated dollar limit from \$75 to \$125, *see* Pub.L. 104-121, § 232(b)(1); 28 U.S.C. § 2412, Historical and Statutory Notes, 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 commissioner contends that reimbursement in this case should be limited to the statutory maximum hourly rate, or, in the alternative, to \$156 per hour, which she calculates to reflect the increase in the cost of living from 1996 to 2003, when most of the activity for which reimbursement is sought actually took place. Opposition at 3.

The commissioner is aware that this court has not limited EAJA recovery to \$125 per hour for the past several years and has routinely awarded an hourly rate that reflects the increase in the cost of living since 1996. In this case, the number of hours incurred in 2003 is 2.8 and the number incurred in 2004 is 2.4. Exhibit 1 at 1-2. Application of the commissioner’s reduced hourly rate for 2003 would result in a decrease of \$15.20 in the total fee sought of \$982.00. This quibble represents an inconsequential amount not worthy of the court’s time.

For the foregoing reasons, I recommend that the plaintiff be awarded a total of \$982.00 in attorney fees.

### **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 15th day of June, 2004.

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

**Plaintiff**

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**THERESA R THERRIEN**

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V.

**Defendant**

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**SOCIAL SECURITY  
ADMINISTRATION  
COMMISSIONER**

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