

when most of the work was performed), and by the commissioner's calculations should be reduced to \$156. *See id.* at 2-3. The plaintiff states that she disagrees but is willing to forgo extended discussion of the matter, leaving it to the court's discretion. *See* EAJA Reply Memorandum ("Reply") (Docket No. 19) at 4. I take this to be a concession. In any event, as the commissioner points out, *see* Opposition at 2-3, the lion's share of the work in question (all but 1.1 of the originally billed 72.8 hours) was performed in 2003, *see* Invoice dated April 8, 2004 submitted to Jeffrey N. Greene from Jackson & MacNichol ("Invoice"), attached as Exh. A to Application, and accordingly should be adjusted as of then. The plaintiff does not contest the commissioner's method of calculation. *See* Reply at 4. Accordingly, I find an award of \$156 per hour for Jackson's work on this case appropriate.¹

2. That the requested hourly rate of \$150 for work performed by Jackson's associate, Deanna L. White, is unreasonable given White's inexperience in Social Security cases. *See* Opposition at 3-4. As the plaintiff points out, *see* Reply at 2-4, the commissioner's position is without merit. The same issue, involving the same associate (White), was resolved unfavorably to the commissioner in *Curtis v. Barnhart*, 89 Soc. Sec. Rep. Serv. 649 (D. Me. 2003) (rec. dec., *aff'd* Sept. 11, 2003).

3. That the number of White's hours for which the plaintiff seeks compensation (45.0, voluntarily reduced from 49.7 in an exercise of "billing judgment," *see* Application at 2) is excessive given the straightforward nature of the two issues on which the decision turned (application of *res judicata* and the merits of an alternative Step 2 holding) and the fact that counsel devoted time to an argument the court

¹ The commissioner alternatively (albeit weakly) argues that Jackson's hourly fee should be fixed at the statutory cap of \$125 without any adjustment for inflation. *See* Opposition at 3. I decline this invitation. The plaintiff submits adequate evidence to establish that (i) prevailing market rates for services such as Jackson rendered in this case exceed \$125 per hour, and (ii) CPI data justify adjustment of the statutory cap to account for inflation. *See* Exhs. B-C to Application.

ultimately found to be without merit (involving application of Social Security Ruling 83-20 (“SSR 83-20”)).
See Opposition at 4.

I am unpersuaded that the number of White’s hours for which compensation is sought should be further reduced. While the Step 2 issue was straightforward, the *res judicata* issue – which the court necessarily had to decide – was not. The plaintiff’s underlying statement of errors raised a novel issue (the effect on *res judicata* analysis of the absence of any record of a purported prior application) and appropriately took the precaution of exploring whether there were (i) constitutional concerns and (ii) a question of *de facto* reopening, given that the administrative law judge had proceeded to decide the case on an alternative Step 2 ground. *See* Plaintiff’s Itemized Statement of Specific Errors (Docket No. 6) at 7-19. Further, while the court ultimately found the SSR 83-20 argument unpersuasive, the point was colorable and its inclusion reasonable.

For the foregoing reasons, I recommend that the plaintiff be awarded a total of \$9,870, representing payment of \$3,120 for 20.0 hours expended by Jackson (at a rate of \$156 per hour) and \$6,750 for 45.0 hours expended by White (at a rate of \$150 per hour).

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

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