

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**PETER KELLY,**

*Plaintiff*

v.

**MICHAEL J. ASTRUE,**  
*Commissioner of Social Security*<sup>1</sup>

*Defendant*

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*Docket No. 06-168-P-S*

**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, with respect to his Social Security Disability (“SSD”) appeal, he obtained a remand for further proceedings before the Social Security Administration. *See* EAJA Application for Fees and Expenses (“Fee Application”) (Docket No. 28). The commissioner rejoins that the plaintiff is entitled to zero inasmuch as the government’s position was substantially justified; alternatively, he argues that if any award is to be made, the court should weed out unreasonable and/or unsupported charges amounting to nearly \$400. *See generally* Defendant’s Opposition to Plaintiff’s Motion for Attorney’s Fees Under the Equal Access to Justice Act (“Fee Opposition”) (Docket No. 29). I agree that the defendant’s position was substantially justified and, hence, recommend that no EAJA award be made.

The EAJA provides, in relevant part:

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d)(1), I have substituted currently serving Commissioner of Social Security Michael J. Astrue as the defendant in this matter.

[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). As the First Circuit, in construing this language, has explained:

The burden is on the government to demonstrate that its position was “substantially justified.” Although the language of the statute refers to a “prevailing party,” the statute makes clear that courts are to examine both the prelitigation actions or inaction of the agency on which the litigation is based and the litigation position of the United States. . . .

The government need not show that its position was “justified to a high degree”; rather, it must show that its position was “justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person.” The Supreme Court has said this is equivalent to the “reasonable basis both in law and fact” formulation we have used.

*Schock v. United States*, 254 F.3d 1, 5 (1st Cir. 2001) (citations omitted).

In pressing his appeal to this court from the commissioner’s adverse SSD ruling, the plaintiff confronted what amounted to a difficult timing problem. Entitlement to SSD benefits hinges in part on acquisition of insured status. *See, e.g., Splude v. Apfel*, 165 F.3d 85, 87 (1st Cir. 1999). The plaintiff’s SSD insurance had expired on March 31, 2001; hence, to prove entitlement to SSD benefits, he had to demonstrate that he was disabled on or before that date. *See* Report and Recommended Decision (“Recommended Decision”) (Docket No. 23) at 1, 5 n.4; Order Affirming the Recommended Decision of the Magistrate Judge (Docket No. 26). Yet, while he adduced considerable evidence as of the date of his hearing tending to show he was disabled subsequent to his SSD date last insured, he was able to scrape up virtually none tending to show he was disabled prior thereto. *See* Recommended Decision at 5-6, 9. At hearing, the administrative law judge urged the plaintiff’s counsel to submit an application on his behalf for Supplemental Security Income (“SSI”), *see id.* at 5, entitlement to which does not hinge on acquisition of insured status, *see, e.g.,*

*Splude*, 165 F.3d at 87. The plaintiff did file an SSI application as suggested; however, it was rejected based on excess income (not failure to demonstrate disability) and not further pursued. *See* Recommended Decision at 5. The administrative law judge ruled against the plaintiff on his SSD claim in large part because of the absence of contemporaneous medical evidence documenting symptoms so severe as to be disabling prior to the plaintiff's date last insured. *See id.* at 12.

On appeal to this court, the plaintiff enumerated three bases for reversal of that adverse ruling, among them that the administrative law judge had erred in denying his claim in the absence of medical records without following the requirement of Social Security Ruling 83-20 ("SSR 83-20") that he infer an onset date of disability. *See id.* at 3. At oral argument before me, counsel for the commissioner rejoined that SSR 83-20 was inapposite, the plaintiff having never officially been determined (via his SSI application) to be disabled. *See id.* at 5. Nonetheless, I deemed SSR 83-20 applicable in the unusual circumstances presented, given that (i) the plaintiff had applied for SSI at the urging of the administrative law judge, who commented at hearing that his current disability seemed fairly clear, (ii) his SSI application had been turned down on the basis of excess income (not on the ground of failure to prove current disability), (iii) in the body of his decision, the administrative law judge had described the plaintiff as "almost certainly . . . unable to work since March 2004," and (iv) the Record evidence amply supported a finding of disability since at least that date. *See id.* at 5-7. I reasoned: "[T]his was as close as it was possible for the plaintiff to get to an official finding of current disability. It thus in my view is tantamount to a finding of current disability for purposes of application of SSR 83-20." *Id.* at 7 (footnote omitted). From there, it was but a short step to the ultimate finding that remand was warranted, the dictates of SSR 83-20 not having been heeded. *See id.* at 12-14.

As the commissioner now persuasively contends, the position he took in opposition to the plaintiff's winning SSR 83-20 argument had a reasonable basis in both law and in fact. *See* Fee Opposition at 3-6. By its terms, SSR 83-20 applies only when a claimant has been determined to be disabled. *See, e.g.*, SSR 83-20, reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 49 ("In addition to determining that an individual is disabled, the decisionmaker must also establish the onset date of disability. In many claims, the onset date is critical; it may affect the period for which the individual can be paid and may even be determinative of whether the individual is entitled to or eligible for any benefits."). The plaintiff never had officially been determined to be disabled – at least not by virtue of a grant of SSI benefits. *Compare, e.g., Beasich v. Commissioner of Soc. Sec.*, 66 Fed. Appx. 419, 432 (3d Cir. 2003) ("Here there was no dispute that, in the context of a separate application for SSI [Supplemental Security Income] benefits, Beasich was determined to have been 'disabled' as of August 1, 1996, by his psychiatric condition that was the result of his head injury in 1981. In view of that earlier SSI disability finding, the task of the ALJ in the context here was to determine onset – *i.e.*, when Beasich's impairments first became disabling. An earlier onset date assessment is mandated when a claimant already has been found disabled and alleges an earlier disability onset date.") (footnote omitted). SSR 83-20 itself is unhelpfully silent as to whether a grant of SSI benefits is or is not the only vehicle by which a "decisionmaker" might determine that an SSD claimant "is disabled[,]" thus triggering application of the ruling. SSR 83-20 at 49.

Against this backdrop, the plaintiff was able to cite no caselaw standing for the proposition that, in circumstances such as those presented, SSR 83-20 applied; indeed, my research revealed that this was a question of first impression. *See* Recommended Decision at 6. To make matters murkier, this court previously had ruled that a comment in the body of an administrative law judge's decision

did not amount to a finding of disability for purposes of SSR 83-20. *See id.* at 6-7 (discussing and distinguishing *Garland v. Barnhart*, 94 Soc. Sec. Rep. Serv. 305, 308 (D. Me. 2004) (rec. dec., *aff'd* Mar. 25, 2004)).<sup>2</sup> In these circumstances, the commissioner could not have foreseen that the court would rule that there existed a set of circumstances short of an official, favorable SSI ruling that would trigger application of SSR 83-20. His position in this litigation was “justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal quotation marks omitted); *see also, e.g., De Allende v. Baker*, 891 F.2d 7, 12-13 (1st Cir. 1989) (district court abused discretion in awarding fees pursuant to EAJA when, *inter alia*, case raised issues of first impression and government’s position was never without substantial justification given decisions in parallel cases); *Kali v. Bowen*, 854 F.2d 329, 332 n.2 (9th Cir. 1988) (fact that “the Ninth Circuit had not yet addressed the issue was an appropriate component of the inquiry into substantial justification”).<sup>3</sup> Accordingly, I recommend that the Fee Application be denied.

### 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***

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<sup>2</sup> The plaintiff suggests that this court dealt with a similar situation and arrived at a similar result in at least one earlier case, *Freese v. Barnhart*, No. 03-286-P-S, 2004 WL 1920702 (D. Me. Aug. 26, 2004) (rec. dec., *aff'd* Sept. 24, 2004), as did the United States Court of Appeals for the Seventh Circuit in *Wilder v. Chater*, 64 F.3d 335, 336 (7th Cir. 1995). *See* Plaintiff’s Reply Memorandum Regarding EAJA Fees and Expenses (“Fee Reply”) (Docket No. 30) at 3-4. He is mistaken. In *Freese*, I merely noted that the commissioner had conceded at oral argument that the plaintiff was currently disabled (and thus application of SSR 83-20 on remand was appropriate). *See Freese*, 2004 WL 1920702, at \*6 & n.9. I made no independent ruling whether, in the absence of the concession, the plaintiff would have been found “disabled” for purposes of application of SSR 83-20. *See id.* Likewise, in *Wilder*, the court noted that “[t]he parties seem to be agreed that at the time of the hearing in 1992, and presumably today, [the claimant] suffers from depression so severe as to be totally and permanently disabling[.]” *Wilder*, 64 F.3d at 336.

<sup>3</sup> The plaintiff adds that the commissioner’s litigation position was not substantially justified with respect to the two points of error this court did not reach. *See* Fee Reply at 4-5; Recommended Decision at 3. Those points are irrelevant. Their merits have never been vetted, they played no role in the plaintiff’s victory, and the commissioner makes no argument regarding their defensibility. *See* Fee Opposition at 3-6.

*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 28th day of November, 2007.

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

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