

litigation position was not substantially justified. *Dionne v. Barnhart*, 230 F.Supp.2d 84, 86 (D. Me. 2002). The point at which the case reached this court is the point at which to determine whether the commissioner's position was substantially justified. *Freeman v. Barnhart*, No. 00-120-B, 2003 WL 21210329, at *2 (D. Me. May 21, 2003).

The defendant does not challenge the amount sought by the plaintiff, \$4,979.55. Exhibit A to EAJA Application for Fees and Expenses (ECF No. 26), at [2]. Rather, she contends that the agency's position was substantially justified. Defendant's Opposition to Plaintiff's Motion for Attorney's Fees ("Opposition") (ECF No. 28) at 1. She offers the following as evidence of substantial justification:

- My recommended decision stated that the question posed by the case was "nuanced."
- I requested post-hearing briefing on the issue.
- The plaintiff supported his appeal by citing "only one case."
- Only one of the plaintiff's arguments was successful.

Id. at 3-5.

The defendant's first proffered item of support, my use of the word "nuanced," takes the word out of context. In my recommended decision, I said the following: "It is true that the existence of medical records which state-agency reviewers did not see may provide grounds for remand, but the question here is more nuanced." Report and Recommended Decision (ECF No. 23) at 4 (citation omitted). Then, I discussed the reasons why the records that the state-agency reviewers did not review in this case would not have required the state-agency reviewers to alter their findings. *Id.* at 4-6. This narrowly focused discussion cannot be interpreted to suggest that the defendant's overall position in this case was substantially justified. On the contrary, the point on which I decided the case in the plaintiff's favor was a different one: that the

administrative law judge wrongly equated the lack of a concrete diagnosis with the lack of a medically determinable impairment.

Similarly, the fact that I requested post-hearing briefing from the parties on an issue not directly addressed by the plaintiff's itemized statement, the second item proffered by the defendant, cannot serve as evidence that the commissioner's position in the case was substantially justified. The fact that the court asks for briefing on a particular issue does not indicate that the position of either party on that issue, or in the case as a whole, is substantially justified.² In addition, if the court could never ask for post-hearing briefing without barring a claimant from obtaining an award of attorney's fees, the court's ability to seek assistance from counsel with issues that are framed for the first time at oral argument would be chilled.

The plaintiff disagrees with the defendant's third assertion, that he cited "only one case." EAJA Reply Memorandum re Fees and Expenses ("Reply") (ECF No. 29) at 4. He contends that he cited six cases, not one. *Id.* The plaintiff is correct. Plaintiff's Supplemental Memorandum of Law (ECF No. 22), *passim*. If the defendant meant to suggest that only one of the cases cited by the plaintiff was exactly on point with the facts in this case, that fact does not prevent the plaintiff from citing cases not on all fours with the instant case as persuasive authority. In any event, the defendant has not shown that the issue addressed by the post-hearing briefs was a novel one, which is the point of the First Circuit opinion she cites on this point. Opposition at 3.

Finally, a party's entitlement to EAJA attorney fees is not determined by the percentage of issues that party raised upon which he or she was ultimately successful. In many cases, a court will decide a case on the basis of a particular issue and decline to reach other issues presented by the successful party. While a fee-shifting award under the EAJA may appropriately

² Nor does it "suggest[] that the legal posture was not clear[,]'" as the defendant asserts. Opposition at 3. At best, it suggests that the question may be new to the judge.

be reduced to account for the prevailing party's relative degree of success, *e.g.*, *Guimond v. Social Sec. Admin. Com'r*, No. 1:10-CV-00037-JAW, 2011 WL 3100537, at *2 (D. Me. July 25, 2011), the defendant here does not seek a reduction in the claim for attorney fees but rather seeks to bar the entire requested award.

For the foregoing reasons, I recommend that the plaintiff's application for attorney fees under the EAJA 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 fourteen (14) days after being served with a copy thereof. A responsive memorandum shall be filed within fourteen (14) 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 29th day of June, 2013.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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