

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

MICHELLE WILEY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>No. 1:10-cv-103-JAW</i>
)	
CAROLYN W. COLVIN, Acting)	
Commissioner of Social Security,)	
)	
<i>Defendant</i>)	

RECOMMENDED DECISION ON MOTION FOR ATTORNEY FEES

The plaintiff seeks \$14,608.28 in attorney fees under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), as the prevailing party in this Social Security disability benefits action. The defendant objects, contending that her position in the litigation was substantially justified. I recommend that the court grant the motion.

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 EAJA allows fee reimbursement to a prevailing party only for “reasonable fees and expenses of attorneys[.]” *Id.* § 2412(b). “[A] prevailing party that satisfies EAJA’s other requirements may recover its paralegal fees from the Government at prevailing market rates.” *Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571, 590 (2008). “The plaintiffs bear

the burden of establishing the reasonableness of the rates and hours submitted in their application for fees.” *Mason v. Maine Dep’t of Corr.*, 387 F. Supp.2d 57, 60 (D. Me. 2005).

I. Procedural History

On March 11, 2010, the plaintiff filed a complaint seeking review of the defendant’s final decision denying her application for disability benefits and supplemental security income. Defendant’s Opposition to Plaintiff’s Motion for Attorney’s Fees Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (“Opposition”) (ECF No. 45) at 1. On September 14, 2010, this court granted the defendant’s unopposed motion to remand the case pursuant to the sixth sentence of 42 U.S.C. § 405(g). *Id.*

On January 24, 2013, after the plaintiff’s applications were again denied by the defendant, the case in this court was reopened on the joint motion of the parties. *Id.* at 1-2. On September 30, 2013, I filed a recommended decision in favor of the commissioner. ECF No. 33. Judge Woodcock adopted the recommended decision over the plaintiff’s objection. ECF Nos. 34, 36. The plaintiff appealed to the First Circuit, which ruled in favor of the plaintiff, in part, on February 11, 2015. ECF No. 42.

II. Discussion

The plaintiff’s petition for fees recites the procedural history set forth above and asserts that “[t]he Commissioner’s position in the underlying agency action was not substantially justified because she failed to apply proper legal standards in evaluating this case and her decision was not based on substantial evidence.” Plaintiff’s Petition for Attorney Fees (“Petition”) (ECF No. 43) ¶ 6. Attached to the petition is an itemization of 17.7 hours of paralegal time and 67.05 hours claimed by three attorneys. Exhibit A (ECF No. 43-2). The plaintiff also seeks an additional \$942.20 incurred in preparing a reply memorandum. Plaintiff’s Reply to Defendant’s Opposition

Filed in Response to Plaintiff's Motion for Attorney Fees Pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 ("Reply") (ECF No. 49) at 7.

There can be no dispute that the plaintiff is now the prevailing party in this action, and the defendant does not suggest otherwise. The defendant contends only that her position throughout the proceedings "was largely justified." Opposition at 3. She does not challenge any of the entries on the attorneys' itemization of the fees sought or the hourly rates applied in that document. The defendant bears the burden to demonstrate that her position was substantially justified. *McDonald v. Secretary of Health & Human Servs.*, 884 F.2d 1468, 1475 (1st Cir. 1989).

The defendant's position was substantially justified if it had a reasonable basis in law and fact and was justified to a degree that could satisfy a reasonable person. *Id.* In this case, the plaintiff presented three claims of error to the First Circuit: That the hypothetical question posed to the vocational expert was defective, that the vocational expert's testimony regarding jobs available in the national economy was inadequate, and that the residual functional capacity ("RFC") finding below was not supported by substantial evidence. Memorandum of Law in Support of Plaintiff's Petition for Attorney Fees ("Memorandum") (ECF No. 43-5) at 2. The First Circuit reversed on the first issue, took no position on the second, and affirmed on the third. Judgment, *Michelle Wiley v. Carolyn W. Colvin, Acting Commissioner, Social Security Administration*, No. 13-2473 (1st Cir. Feb. 11, 2015) ("Decision") (ECF No. 42) (slip op.) at 1.

Neither the fact that the plaintiff prevailed on appeal nor that the government succeeded at earlier stages of the litigation is dispositive. *Schock v. United States*, 254 F.3d 1, 5 (1st Cir. 2001). The issue of the sufficiency of a vocational expert's testimony when he or she relies on the Occupational Employment Quarterly as a source for the number of a particular job available in the national economy, coupled with the expert's testimony that he or she cannot determine that number

because that source is organized by census codes that include more than one job as coded in the Dictionary of Occupational Titles and does not offer any other basis for assigning a specific number to the job, had not previously been addressed in reported case law. The appeal turned on the testimony of the vocational expert that she could not provide a specific number of linen grader jobs.

The defendant's success before the administrative law judge and this court is a factor to be considered in the substantial justification analysis. *See, e.g., Garnica v. Astrue*, 378 Fed. App'x 680, 682 (9th Cir. 2010); *Burgos v. Astrue*, Civil Action No. 3:09-cv-1216 (VLB), 2011 WL 1085623, at *3 (D. Conn. Mar. 18, 2011). In addition, the First Circuit upheld the defendant's position on the question of whether the administrative law judge's RFC was supported by substantial evidence. Decision at 3. Past rulings of this court on the pivotal issue had accepted similar vocational testimony, so long as the vocational expert testified to some basis for choosing a specific number for a specific DOT-coded job out of the Occupational Employment Quarterly grouping. *E.g., Clark v. Astrue*, No. 2:11-cv-373-DBH, 2012 WL 2913700, at *3-*4 (D. Me. June 28, 2012); *Decker v. Astrue*, No. 09-641-P-S, 2010 WL 4412142, at *2 (D. Me. Oct. 31, 2010).

The plaintiff cites *Tobeler v. Colvin*, 749 F.3d 830 (9th Cir. 2014), for the proposition that "even where the Commissioner has reasonably argued in the district court that the A[dm]i[n]i[st]rative L[aw] J[udge]'s error was harmless the denial of attorney fees amounts to an abuse of discretion, as the issue is not merely whether the government's litigation position was substantially justified." Reply at 3 (internal punctuation omitted). Read in context, that portion of the Ninth Circuit's opinion merely restates the widely-accepted standard that the government's position must be substantially justified at all stages of the litigation, not merely before the district court.

The First Circuit's opinion included the following passage about the defective hypothetical question to the vocational expert:

The hypothetical question upon which the ALJ relied to find Wiley not disabled contained a limitation of no more than occasional interaction with the general public. The ALJ's RFC assessment, however, limited her to no contact with the public. The Commissioner essentially concedes error in this regard but suggests that the error was harmless because the VE identified at least one job existing in the national economy that does not involve public contact – linen grader.

As discussed below, however, eliminating two of three jobs identified by the VE reduced the number of jobs purportedly existing in the national economy and the VE presented only indefinite job numbers as to the linen grader job; so it is unclear whether just one such job or over a hundred thousand such jobs exist in the national economy.

The equivocal job numbers were sparked by the ALJ's flawed hypothetical, so we cannot agree this was harmless error.

Decision at 2.

Here, although the administrative law judge's hypothetical question was flawed, the pivotal question was whether the linen grader job rendered the error harmless by providing sufficient jobs nationally. In finding the vocational expert's testimony in that regard to be too indefinite, the First Circuit specifically discussed *Clark* and *Decker*:

The district court rejected Wiley's argument faulting the VE's testimony as too indefinite, relying on two prior cases in which a similar argument was found to be infirm. See *Clark v. Astrue*, No. 2:11-cv-373-DBH, 2012 WL 2913700 (D. Me. June 28, 2012); *Decker v. Astrue*, No. 09-641-P-S, 2010 WL 4412142 (D. Me. Oct. 31, 2010). In those cases, however, it appears the VEs extracted job numbers out of the census-coded groupings for the particular jobs they identified. Here, by contrast, the VE testified there was no way to do that.

Id.

The question is a close one, but the material difference found by the First Circuit between the vocational expert's testimony in this case and that in *Clark* and *Decker*, upon which the

defendant relies, Opposition at 7-8, persuades me on balance that the defendant has not established that her position on this issue was substantially justified.

III. Conclusion

For the foregoing reasons, I recommend that the petition for attorney fees 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 31st day of July, 2015.

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

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