

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SABINA A. WALSH,)	
)	
Plaintiff)	
)	
v.)	Civil No. 93-79-P-H
)	
DONNA E. SHALALA, Secretary)	
of Department of Health and Human)	
Services,)	
)	
Defendant)	

**RECOMMENDED DECISION ON PLAINTIFF-S APPLICATION FOR
FEES AND EXPENSES**

On November 1, 1993 I filed a Report and Recommendation in this Social Security Supplemental and Disability appeal recommending that the Secretary-s decision be vacated and the cause remanded. Appended thereto was the very same notice that appears at the end of this recommended decision. The time within which to file objections having expired and no objections having been filed, the court (Hornby, J.) on December 1, 1993 adopted my recommended decision. Judgment was entered on December 2, 1993.

Before the court now is the plaintiff-s application for an award of fees and expenses filed pursuant to the Equal Access to Justice Act (AAct®), 28 U.S.C. ' 2412, on February 28, 1994. The Secretary opposes the application on the ground that it is untimely. Regrettably, I must agree.

The Act provides for the award to a prevailing party of fees and expenses incurred in a civil

action brought by or against the United States in any court having jurisdiction, except in certain circumstances not present here. A party seeking such an award must submit an application to the court within thirty days of final judgment in the action. 28 U.S.C. § 2412(d)(1)(B). Final judgment is defined to mean a judgment that is final and unappealable. 28 U.S.C. § 2412(d)(2)(G).

The court's sentence-four remand order issued on December 1, 1993, accompanied by a separate document of judgment docketed the following day, is a final judgment for purposes of the Act. *Shalala v. Schaefer*, 125 L.Ed.2d 239, 247-49, 251 & n.6 (1993).¹ What is left to decide is when that judgment became unappealable. The answer, unavoidably, is that it became unappealable when it was originally entered due to the fact no objection had been taken by either party to my recommended decision. The First Circuit rule is that section 636(b)(1) of the Federal Magistrate Act, 28 U.S.C. § 631 *et seq.*, bars appellate review when a party fails to raise objections to a magistrate judge's recommended decision within the statutorily prescribed ten-day limit. *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980). Such a rule has been sanctioned by the Supreme Court. *Thomas v. Arn*, 474 U.S. 140 (1985).

Since the judgment became final and unappealable on December 1, 1993, the plaintiff's fee

¹ I note that *Schaefer* effectively overruled the approach adopted by the First Circuit in *Labrie v. Secretary of Health & Human Servs.*, 976 F.2d 779 (1st Cir. 1992), which had ruled that a sentence-four remand order was not necessarily a final judgment for the purposes of the Act. *See Rivera Baez v. Secretary of Health & Human Servs.*, 832 F.Supp. 28, 29 (D.P.R. 1993).

application, filed on February 28, 1994, is late. The Act's thirty-day time limit is jurisdictional and cannot be waived. *Howitt v. United States Dept of Commerce*, 897 F.2d 583, 584 (1st Cir. 1990).

For the foregoing reasons, I recommend that the plaintiff's application be denied. *Accord Lankton v. Bowen*, 133 F.R.D. 81 (D. Conn. 1990).

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 at Portland, Maine this 11th day of April, 1994.

David M. Cohen
United States Magistrate Judge