



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).

The defendant contends, *inter alia*, that her position with respect to the plaintiff’s SSI claim was substantially justified inasmuch as (i) it was “felicitous” that the plaintiff happened to turn 50 just eight days prior to issuance of the administrative law judge’s decision; (ii) the plaintiff won based solely on a Grid classification, “not on any proven disability”; and (iii) there was substantial justification for defending against the award of any benefits for the period of time prior to the plaintiff’s 50th birthday, including a valid argument against mechanical application of the Grid. Opposition at 4-5. All of these points miss the mark. Once the plaintiff turned 50, application of the Grid directed a finding of disability; the commissioner had no discretion to find otherwise. *See* Report and Recommended Decision (“Recommended Decision”) (Docket No. 6) at 46; Order Affirming the Recommended Decision of the Magistrate Judge (Docket No. 9). *Ipsa facto*, the plaintiff had “proven disability.” Finally, to the extent invocation of the claimant-friendly concept of avoidance of mechanical application of the Grid could have benefited anyone, it would have been the plaintiff, not the commissioner. *See, e.g.*, 20 C.F.R. §§ 404.1563(b), 416.963(b) (“We will not apply

the age categories mechanically in a borderline situation. If you are within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or decision that you are disabled, we will consider whether to use the older age category after evaluating the overall impact of all the factors of your case.”).<sup>1</sup>

The defendant makes a stronger argument with respect to SSD, *see* Opposition at 3-4; however, even assuming *arguendo* that her position on that issue was substantially justified, that would not impact the fees claimed in this case. I recommended that the SSD portion of this case be remanded for further proceedings inasmuch as the administrative law judge had essentially collapsed the SSI and SSD analyses, developing no separate factual or legal findings with respect to SSD. *See* Recommended Decision at 6. Not surprisingly, because there were no distinct SSD findings to challenge, the plaintiff pressed no separate SSD argument, focusing both her statement of errors and her oral argument on the commissioner’s unified SSI/SSD findings. *See generally, e.g.*, Plaintiff’s Itemized Statement of Specific Errors (Docket No. 3). Therefore, even had there been no SSD component, the fee charged by plaintiff’s counsel would have been approximately the same as that charged for the combined SSI/SSD case.

I turn next to the defendant’s argument that, in any event, the plaintiff has failed to justify a fee higher than the \$125 EAJA statutory cap. Opposition at 5-9. The EAJA provides, in section 2412(d)(2)(A)(ii), that “attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee.” This subsection of the statute was amended in 1996 to increase the indicated dollar limit from \$75 to \$125. Pub.L. 104-121, § 232(b)(1); 28 U.S.C. § 2412, Historical and Statutory Notes. It also provides that

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<sup>1</sup> Moreover, the commissioner’s position on the “borderline age” question in the underlying proceedings was indefensible; the administrative law judge utterly failed even to consider whether the plaintiff, whose hearing was held approximately two months prior to her 50th birthday, qualified for benefits on the basis of her borderline age status. *See* Record at 16-24.

the amount of fees awarded “shall be based upon prevailing market rates for the kind and quality of the services furnished.” The plaintiff has submitted satisfactory evidence that the prevailing market rates for services like those provided in this case exceed \$125 per hour. Affidavit of Leslie S. Silverstein (“Silverstein Aff.”) (Docket No. 12) ¶¶ 4-7. The plaintiff has also submitted consumer price index information for the period since the \$125 statutory maximum rate was enacted indicating that the percentage increase since then translates to a fee of \$144.38 per hour, which she rounds up to \$145. Affidavit [of Francis Jackson] in Support of Application for Attorneys Fees (Docket No. 13) ¶ 8 & Exh. B thereto. Most significantly, the attorney for the plaintiff in this case was awarded fees in the hourly amount of \$145 in January of this year by Judge Hornby of this court in a social security case that, from all that appears in the record of both cases, was no more complex or challenging than the instant case. Endorsement dated January 15, 2002 on Motion for EAJA Fees and Expenses (Docket No. 8), *Johnson v. Barnhart*, Docket No. 01-98-P-H. Accordingly, while no special factor in the case justifies an award at an hourly rate in excess of the statutory cap, an increase in the cost of living does provide such justification. I conclude that an hourly rate of \$145 is reasonable.<sup>2</sup>

I turn finally to the defendant’s arguments against allowance of certain components of the fees and costs sought, which I address *seriatim*:

1. That a charge of 1.5 hours of attorney time on September 17, 2001, for preparation of a complaint, letter to the clerk, civil cover sheet and summons is excessive inasmuch as the complaint and letter to the clerk are “boilerplate” documents and preparation of the civil cover sheet and summons is a clerical duty for which attorney time should not be charged. Opposition at 5-6; *see also*

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<sup>2</sup> The defendant further observes that, although the plaintiff’s attorney’s affidavit requests a rate of \$145 an hour, the plaintiff’s attorney in fact charged varying rates for this case – \$135, \$144.50, \$143.09 and \$145 per hour. Opposition at 1 n.1. Although, as the defendant notes, the plaintiff’s counsel does not explain the reason for the varying hourly rates, *see id.* at 5 n.3, he need not do so. The question before the court is whether the charges actually submitted by counsel, including the varying hourly rates reflected in his billing statement, are reasonable. In this case they clearly are; none of the hourly rates charged exceeds the cap that I have found to be (continued on next page)

invoice to Rosemary A. Levesque dated May 30, 2002 (“Invoice”), attached to EAJA Application for Fees and Expenses (Docket No. 11), at [1]. I agree, and accordingly recommend reduction in this charge from 1.5 hours (totaling \$217.50) to 1 hour (totaling \$145.00).

2. That, although the listing for services rendered on January 24 and 25, 2002, identifies “LLS” and “LSS” performing 7.10 hours of work, there is no proof that “LLS” or “LSS” is an attorney for whose work attorney’s fees may be charged. Opposition at 6; *see also* Invoice at [1]. As an initial matter, the defendant errs in asserting that the entry for 5.10 hours of work performed on January 25, 2002, pertains to the work of “LLS” or “LSS”; in fact, this entry clearly pertains to attorney Jackson’s own work. *See* Invoice at [1]. Secondly, it is reasonably clear from the Silverstein affidavit that she is the individual referred to in the billing entry of January 24, 2002. *See* Silverstein Aff. ¶ 3. Thus, the defendant’s challenge to fees charged for this 7.10 hours of work fails.

3. That postage and copying charges (totaling \$43.95) are not recoverable pursuant to the EAJA. Opposition at 10. This court has held that photocopying charges, but not postage, may be taxed as costs in an EAJA case. *See, e.g., Sierra Club v. Marsh*, 639 F. Supp. 1216, 1225-26 (D. Me. 1986), *aff’d*, 820 F.2d 513 (1st Cir. 1987).<sup>3</sup> However, because the plaintiff fails to segregate postage from copying charges, *see* Invoice at [2], I recommend that the entire claimed amount of \$43.95 be disallowed.

4. That “any attorney time expended in this matter should be weighed under the concepts of reasonableness and an economy of effort.” Opposition at 9. Apart from attorney time expended on

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reasonable, \$145 per hour. Of course, to the extent the hourly rate sought in the plaintiff’s attorney’s affidavit is higher than certain rates at which she actually was invoiced, the plaintiff can only recover at the lower, actually invoiced rates.

<sup>3</sup> There has been no post-*Marsh* amendment to the language of the EAJA or 28 U.S.C. § 1920, which is incorporated by reference in the EAJA, that would call into question the court’s rulings concerning recovery of either postage or photocopying charges. *Compare Marsh*, 639 F. Supp. at 1225-26 with 28 U.S.C. §§ 1920, 2412.

September 17, 2001, the defendant identifies no other time as wasteful or otherwise excessive. Nor does any other time itemized for this case strike me, on its face, as unreasonable.

For the foregoing reasons, I recommend that the plaintiff be awarded a total of \$4,484.95, representing (i) 30.3 hours of attorney time for which a total of \$4,334.95 was charged and (ii) \$150.00 in costs.

**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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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 17th day of July, 2002.

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David M. Cohen  
United States Magistrate Judge

ADMIN

U.S. District Court  
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-189

LEVESQUE v. SOCIAL SECURITY, COM  
Assigned to: Judge GEORGE Z. SINGAL  
Demand: \$0,000  
Lead Docket: None  
Dkt# in other court: None

Filed: 09/17/01

Nature of Suit: 863  
Jurisdiction: US Defendant

Cause: 42:405 Review of HHS Decision (DIWC)

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