

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3
4 August Term 2010

5 (Argued: May 3, 2011 Decided: July 8, 2011)

6 Docket No. 10-2437-cv

7 -----x
8 LORETTA VINCENT,

9
10 Plaintiff - Appellant,

11
12 -- v. --

13
14 COMMISSIONER OF SOCIAL SECURITY,

15
16 Defendant - Appellee.

17
18 -----x
19
20 B e f o r e : WALKER, CALABRESI, and WESLEY, Circuit Judges.

21 Appeal from an order of the United States District Court for
22 the Northern District of New York (Victor E. Bianchini,
23 Magistrate Judge) reducing by two-thirds the attorney's fees
24 awarded following a successful appeal from the administrative
25 denial of an application for Social Security disability benefits.
26 We hold that the failure of claimant's counsel to develop the
27 administrative record as to issues collateral to the disability
28 determination does not constitute a "special circumstance"

1 warranting a fee reduction under the Equal Access to Justice Act.
2 We also hold that the district court abused its discretion in
3 reducing the fee award based on its sua sponte critique of
4 counsel's billing records and its assessment that the time billed
5 was excessive.

6 REVERSED and REMANDED.

7 MARK CURLEY, New York, NY, for
8 Plaintiff-Appellant.
9

10 VERNON NORWOOD, Special Assistant
11 U.S. Attorney, Social Security
12 Administration (Richard S.
13 Hartunian, United States Attorney,
14 Northern District of New York,
15 Stephen P. Conte, Regional Chief
16 Counsel, Social Security
17 Administration, on the brief), New
18 York, NY for Defendant-Appellee.
19

20 Catherine M. Callery, Louise M.
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22 Rochester, NY, for Amicus Curiae
23 Empire Justice Center.
24

25 JOHN M. WALKER, JR., Circuit Judge:

26 Plaintiff-Appellant Loretta Vincent appeals from an order of
27 the United States District Court for the Northern District of New
28 York (Victor E. Bianchini, Magistrate Judge) that reduced by two-
29 thirds the attorney's fee award she requested for successfully
30 appealing from the administrative denial of her application for
31 disability benefits. The district court, attributing gaps in the
32 administrative record to Vincent's counsel, concluded that this
33 alleged deficiency constituted "special circumstances" justifying

1 a reduction in the attorney's fees awarded under the Equal Access
2 to Justice Act. We hold that the failure of a claimant's
3 attorney to develop the administrative record on issues
4 collateral to the disability determination does not constitute a
5 "special circumstance" warranting a reduction in attorney's fees.
6 We also hold that the district court abused its discretion in
7 reducing the fee award based on its sua sponte critique of
8 counsel's billing records and its conclusion that the time billed
9 was excessive because no novel issues were raised.

10 **BACKGROUND**

11 Attorney Mark Schneider represented Vincent in her
12 successful appeal from the administrative denial of her claim for
13 disability benefits. His efforts at getting paid for those
14 services have been less successful. After ruling in Vincent's
15 favor on the merits, the district court chided Schneider for
16 apparent deficiencies in his representation and awarded only one-
17 third of the amount requested in Vincent's motion for attorney's
18 fees. Vincent now appeals from that order.

19 Vincent applied to the Social Security Administration for
20 disability insurance benefits on November 23, 2005. After an
21 initial denial, Vincent requested a hearing and appeared before
22 Administrative Law Judge ("ALJ") J. Lawson Brown, who rejected
23 the application on December 20, 2007. On August 21, 2008, the
24 Social Security Appeals Council ("Appeals Council") denied

1 Vincent's request for review, making the ALJ's decision a final
2 order of the Commissioner of Social Security ("Commissioner").
3 On September 9, 2008, Vincent filed a complaint in the district
4 court challenging the Commissioner's final order. Schneider
5 represented Vincent at every step of this process.

6 Vincent based her benefits application on a claim that a
7 work-related back injury had rendered her unable to work as of
8 August 2, 2004. To determine whether or not Vincent was disabled
9 as defined by the Social Security Act, the ALJ engaged in the
10 five-step sequential analysis prescribed by regulations. See 20
11 C.F.R. §§ 404.1520, 416.920. In finding her not to be disabled,
12 the ALJ put significant weight on his negative assessment of
13 Vincent's credibility. While acknowledging that Vincent's
14 "medically determinable impairment could reasonably be expected
15 to produce the alleged symptoms," the ALJ found that her
16 "statements concerning the intensity, persistence and limiting
17 effects of these symptoms are not entirely credible." Vincent's
18 disability report listed ten years of full-time factory
19 employment from 1994 to 2004, but her earnings records reflected
20 less than three years of work in that period. Vincent's
21 statements to the Social Security Administration therefore
22 suggested, according to the ALJ, "that she tends to exaggerate."
23 The ALJ's review of Vincent's medical records, including a
24 doctor's recommendation, unheeded by Vincent, that she attend

1 physical therapy or a "back school" program, further "call[ed]
2 into question [Vincent's] credibility." The ALJ also observed
3 that Vincent's assertion of having been enrolled in special
4 education through tenth grade was not "corroborated by the
5 records" of the school district, which was unable to locate any
6 special education records in Vincent's name. Having discounted
7 Vincent's own account of her impairment based on these
8 credibility concerns, the ALJ concluded that she had the residual
9 functional capacity to perform light work and was not disabled.
10 The Appeals Council denied review.

11 On March 30, 2010, the district court reversed and remanded
12 because the ALJ failed to develop the record as to several
13 issues. First, the ALJ could not rely on Vincent's alleged
14 noncompliance with prescribed treatment as a basis for denying
15 benefits, or even for an adverse credibility finding, without
16 allowing her to explain why she did not follow any such
17 treatment. The ALJ also erred by relying, without further
18 inquiry, on the apparent exaggeration in Vincent's work history
19 (which could have resulted from a data entry error) and on the
20 absence of corroboration for Vincent's special education history
21 (which may have been attributable to the use of Vincent's married
22 name in the records request). Finally, the district court found
23 that the ALJ should have considered the effect of Vincent's
24 obesity in assessing whether she was disabled. In light of these

1 gaps in the record, the district court remanded for further
2 administrative proceedings.

3 The district court did not limit its criticisms to the ALJ,
4 however. It also blamed Schneider, who represented Vincent at
5 the administrative hearing: "the underdeveloped issues clearly
6 could have, and should have, been addressed by [Vincent's]
7 counsel at the administrative stage" as part of his "ethical
8 obligation to act with reasonable diligence." Once the ALJ had
9 denied Vincent's applications, Schneider again faltered - in the
10 district court's view - by waiving the filing of a brief when he
11 requested Appeals Council review. Questioning whether
12 Schneider's alleged lapses constituted "a strategic and
13 deliberate choice," the district court anticipated examining his
14 conduct further when Schneider applied for attorney's fees.

15 On April 27, 2010, Vincent moved the district court for an
16 award of \$8,272.00 in attorney's fees. Vincent sought fees for
17 47 hours of Schneider's time: 24.1 hours spent working on the
18 appeal to the district court; 13.9 hours on the fee petition and
19 brief; and 9.0 hours on the reply brief and affidavit for the fee
20 petition. In a May 24, 2010 order, the district court granted
21 the motion in part and denied it in part, reducing the requested
22 fee award by two-thirds based on a number of purported
23 deficiencies. The district court held that Schneider's failure
24 to develop the record constituted "special circumstances" that,

1 under the Equal Access to Justice Act, would render a full award
2 "unjust." See 28 U.S.C. § 2412(d). In addition, the district
3 court viewed the length of time Schneider billed for preparing
4 the fee application as "clearly excessive and unreasonable." The
5 district court also expressed concern that Schneider's billing
6 records provided only "conclusory explanations" for "several
7 lengthy increments of time" and improperly intermingled legal and
8 clerical tasks. To account for these flaws, the district court
9 awarded only \$2,757.33 in attorney's fees, one-third of the
10 amount requested. Vincent now appeals from this order.

11 **DISCUSSION**

12 The Equal Access to Justice Act ("EAJA") provides that "a
13 court shall award to a prevailing party . . . fees and other
14 expenses . . . incurred by that party in any civil action (other
15 than cases sounding in tort), including proceedings for judicial
16 review of agency action, brought by or against the United States
17 . . . unless the court finds that the position of the United
18 States was substantially justified or that special circumstances
19 make an award unjust." 28 U.S.C. § 2412(d)(1)(A). It is
20 undisputed that Vincent prevailed before the district court and
21 that the position of the United States was not substantially
22 justified. In assessing Vincent's entitlement to fees, however,
23 the district court concluded that the deficiencies referred to
24 above were "special circumstances" justifying a substantial

1 reduction in the fees awarded. Our review of that decision "is
2 narrow; we will only reverse if we find the court abused its
3 discretion." United States v. 27.09 Acres of Land, 43 F.3d 769,
4 772 (2d Cir. 1994). A district court abuses its discretion "when
5 (1) its decision rests on an error of law (such as application of
6 the wrong legal principle) or a clearly erroneous factual
7 finding, or (2) its decision - though not necessarily the product
8 of a legal error or a clearly erroneous factual finding - cannot
9 be located within the range of permissible decisions." In re
10 Holocaust Victim Assets Litig., 424 F.3d 158, 165 (2d Cir. 2005)
11 (quoting Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 169 (2d Cir.
12 2001)).

13 Vincent argues that the district court abused its discretion
14 in denying the full amount of fees requested in her motion. She
15 contends that Schneider's representation was not deficient and
16 therefore cannot constitute "special circumstances" rendering a
17 full award unjust. She further argues that the time billed on
18 the fee application was appropriate because a novel issue was
19 raised, and that the district court, by evaluating the billing
20 entries sua sponte, improperly denied Schneider the opportunity
21 to respond to its concerns. The Commissioner responds that the
22 district court acted within its discretion and asks us to affirm.

23 I.

24 The EAJA's "special circumstances" exception is a "safety
25 valve" that gives "the court discretion to deny awards where

1 equitable considerations dictate an award should not be made."
2 Scarborough v. Principi, 541 U.S. 401, 422-23 (2004) (quoting
3 H.R. Rep. No. 96-1418, at 11 (1980)). The contours of that
4 safety valve are indistinct. The Second Circuit has spoken only
5 twice in published opinions to the question of what constitutes
6 "special circumstances [that] make an award unjust," and in
7 neither case did it address whether - or to what extent -
8 deficiencies in counsel's performance may justify a denial or
9 reduction in EAJA fees. See Oguachuba v. INS, 706 F.2d 93 (2d
10 Cir. 1983); United States v. 27.09 Acres of Land, 43 F.3d 769 (2d
11 Cir. 1994). With those decisions as our baseline, we must decide
12 whether the district court abused its discretion in applying the
13 "special circumstances" exception in this case.

14 In Oguachuba, we affirmed the district court's denial of
15 attorney's fees under the EAJA where the petitioner's own
16 conceded history of repeated and flagrant misconduct caused the
17 improper incarceration that he successfully challenged. John
18 Oguachuba, a Nigerian citizen, was granted a writ of habeas
19 corpus based on a violation by the Immigration and Naturalization
20 Service ("INS") of a statutory six-month limit on the detention
21 of any alien under final order of deportation. Oguachuba, 706
22 F.2d at 96. Oguachuba then sought attorney's fees under the EAJA
23 as the prevailing party in that action. Id. at 96-97.
24 Oguachuba's history of misconduct was little short of
25 extraordinary: after overstaying a student visa, Oguachuba

1 repeatedly flouted a deportation order by lying to INS officials,
2 fleeing INS custody, delaying the procurement of travel documents
3 from the Nigerian consulate, and flying back to New York
4 immediately after having been deported to Nigeria. Id. at 94-96.
5 Oguachuba's incarceration exceeded the six-month limit only
6 because the "recalcitrance of Nigerian officials" prevented INS
7 officials from obtaining the travel documents necessary to re-
8 deport him. Id. at 96. We held that "Oguachuba's extraordinary
9 persistence in evading the lawful efforts of the INS to deport
10 him to Nigeria, his flagrant contempt for United States law and
11 the fact that his own decision not to acquiesce in deportation
12 caused his incarceration constitute the 'special circumstances'
13 which make it inequitable to award him attorneys' fees under the
14 EAJA." Id. at 94.

15 We have also affirmed the denial of attorney's fees under
16 the EAJA for a party who played an only marginal role in the
17 litigation. The attorney's fees requested in 27.09 Acres of Land
18 related to "a discrete early phase of the litigation" in which
19 the claimant "achieved nothing but its own intervention." 43
20 F.3d at 771. The claimant's "efforts in the later, productive
21 phase of the litigation were marginal, duplicative and
22 unnecessary because of the laboring oar taken by parties whose
23 fees are not recoverable under EAJA." Id. Because "the claim of
24 the prevailing parties rest[ed] largely on a result to which the
25 claimant made no contribution," we held that "[g]eneral equitable

1 principles support the district court's finding that an award of
2 fees would have been unjust." Id. at 773-75.

3 A prevailing party can therefore be denied attorney's fees
4 under the EAJA for "special circumstances" when his own
5 misconduct created the circumstances that led to the litigation,
6 see Oquachaba, 706 F.2d at 94, and when that party's
7 contributions to the litigation's success were "marginal,
8 duplicative and unnecessary," see 27.09 Acres, 43 F.3d at 771.
9 These two examples of "special circumstances," while
10 illustrative, do not define the exception. Indeed, if the
11 "special circumstances" exception is to function as an equitable
12 "safety valve," its contours can emerge only on a case-by-case
13 basis.

14 When the exception is invoked in the context of the adequacy
15 of counsel's representation, however, we think greater clarity is
16 needed if only because counsel must know the parameters of their
17 responsibilities. The EAJA's fee-shifting provision is meant to
18 reduce the "economic deterrents to contesting governmental
19 action" and "the disparity between the resources and expertise of
20 . . . individuals and their government." H.R. Rep. No. 96-1418,
21 at 5-6 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4984. The
22 EAJA provides access to justice by encouraging access to counsel,
23 which not only ensures "the thoughtful presentation and
24 consideration of opposing views," but also assists the government
25 in "refining and formulating public policy." Id. at 10,

1 reprinted in 1980 U.S.C.C.A.N. at 4988. That goal is not
2 advanced if an indeterminate standard is applied to reduce or
3 deny a fee award based on alleged deficiencies in representation.
4 “[I]t is common sense that increasing the risk that an attorney
5 will not receive a fee award will inevitably decrease the
6 willingness of attorneys to undertake representation in these
7 kinds of cases.” Astrue v. Ratliff, 130 S. Ct. 2521, 2531 (2010)
8 (Sotomayor, J., concurring).

9 Clarity is of heightened importance in the context of Social
10 Security appeals, which predominate among the cases in which EAJA
11 awards are made. Social Security adjudications represent a
12 unique variant from the traditional model of adversarial
13 litigation. “Social Security disability determinations are
14 investigatory, or inquisitorial, rather than adversarial.” Moran
15 v. Astrue, 569 F.3d 108, 112 (2d Cir. 2009) (internal quotation
16 marks omitted). The duty of the ALJ, unlike that of a judge at
17 trial, is to “investigate and develop the facts and develop the
18 arguments both for and against the granting of benefits.” Butts
19 v. Barnhart, 388 F.3d 377, 386 (2d Cir. 2004) (quoting Seavey v.
20 Barnhart, 276 F.3d 1, 8 (1st Cir. 2001)), reh’g granted in part
21 and denied in part, 416 F.3d 101 (2d Cir. 2005). Still, counsel
22 is not relieved of the duty to provide competent representation,
23 including the obligation “to assist the claimant in bringing to
24 [the ALJ’s] attention everything that shows that the claimant is
25 disabled.” See 20 C.F.R. § 404.1740(b)(1). Because of the ALJ’s

1 duty to investigate, if counsel's entitlement to fees is
2 questioned due to an undeveloped record, it must be clear that
3 counsel bore primary responsibility for those deficiencies before
4 the fee recovery is reduced. That was the case in Bryant v.
5 Apfel, 37 F. Supp. 2d 210, 213 (E.D.N.Y. 1999), in which EAJA
6 fees were denied to a prevailing plaintiff whose attorney's
7 failure to "seek or produce critical medical records from the
8 period of plaintiff's claimed disability . . . made it impossible
9 to determine whether plaintiff was, in fact, entitled to
10 disability benefits."

11 Those are not, however, the facts in this case. The
12 district court purports to follow Bryant, but in reality goes
13 beyond it. Unlike counsel in Bryant, Schneider fulfilled his
14 obligation to present evidence establishing Vincent's disability.
15 The denial of benefits at the administrative level was based not
16 on the absence of such evidence, but upon the ALJ's refusal to
17 credit it. The deficiencies in the record that the district
18 court cited all relate to the ALJ's negative assessment of
19 Vincent's credibility. In the circumstances of this case, in
20 which the ALJ gave Vincent no notice of his credibility concerns,
21 it was the ALJ's responsibility to develop the facts related to
22 this collateral issue. For example, the ALJ cited Vincent's
23 noncompliance with treatment recommendations without having
24 raised the issue at the hearing or otherwise allowing Vincent to
25 address it. The ALJ also relied on the discrepancy between

1 Vincent's earnings record - which showed less than three years of
2 employment - and a form she submitted listing ten years' full-
3 time factory employment as evidence of her tendency to
4 exaggerate. Again, however, the ALJ never questioned Vincent
5 about the inconsistency or flagged it as a potential credibility
6 concern.

7 The district court erred in concluding that Schneider shared
8 responsibility with the ALJ for these omissions. In the district
9 court's view, Schneider should have identified the discrepancy in
10 Vincent's work history and preemptively addressed it, and also
11 should have developed the record to explain Vincent's
12 noncompliance with treatment recommendations. The district court
13 demanded too much of counsel. If we endorsed the district
14 court's position, counsel would have to anticipate and refute all
15 conceivable credibility issues to be assured recovery of
16 attorney's fees after prevailing on appeal. This is not, nor
17 should it be, the bar against which representation in Social
18 Security matters is assessed for purposes of awarding EAJA fees.
19 Although refuting potential credibility questions before they
20 arise and without notice as to their potential significance may
21 be an effective strategy, it could also generate unnecessary
22 costs in a context where efficiency and economy are at a premium.
23 Counsel's failure to anticipate collateral issues thus cannot
24 constitute "special circumstances" justifying a denial or
25 reduction in attorney's fees on appeal. The equitable "special

1 circumstances" exception, which applies only when an attorney's
2 fee award would be "unjust," is not so broad. Where a plaintiff
3 prevails in a Social Security appeal by winning remand to fill
4 gaps in the record, "special circumstances" do not justify a
5 reduction in or denial of attorney's fees if plaintiff's counsel
6 does not reasonably bear responsibility for the evidentiary
7 deficit.

8 The district court's approach does not accord with the
9 realities of representation in the Social Security disability
10 context. The limited resources of clients and legal service
11 providers demand that counsel act with expediency. It would be
12 unreasonable to insist that counsel pursue issues collateral to
13 the medical disability determination without any notice from the
14 ALJ that such issues are likely material to the outcome. This is
15 particularly true in light of the ALJ's independent duty to
16 develop the record.

17 The deficits in the record caused by the ALJ's failure to
18 investigate and to notify counsel of his concerns are
19 illustrative. Schneider explained in an affidavit that the
20 report that erroneously listed Vincent's ten-year work history
21 was prepared by a Social Security Administration employee, not
22 Vincent, and therefore could not have been probative of her
23 credibility. Schneider therefore had no reason, absent notice
24 from the ALJ, to devote any resources to addressing what appeared
25 to be a nonexistent credibility issue.

1 The district court further faulted Schneider for declining
2 to submit a brief to the Appeals Council. Granting an unreduced
3 attorney's fee award would, in the district court's view,
4 effectively reward Schneider for "saving" his arguments for the
5 district court. However, the decision not to file a brief before
6 the Appeals Council fell well within Schneider's tactical
7 discretion. The regulations "permit - but do not require - the
8 filing of a brief with the Council (even when the Council grants
9 review)." Sims v. Apfel, 530 U.S. 103, 111 (2000); see also 20
10 C.F.R. § 404.975 ("Upon request, the Appeals Council shall give
11 you and all other parties a reasonable opportunity to file briefs
12 or other written statements about the facts and law relevant to
13 the case."). The Supreme Court held in Sims that Social Security
14 claimants "who exhaust administrative remedies need not also
15 exhaust issues in a request for review by the Appeals Council in
16 order to preserve judicial review of those issues." 530 U.S. at
17 112. The Supreme Court declined to impose an exhaustion
18 requirement due to the non-adversarial nature of Social Security
19 proceedings and appeals, in which "[t]he Council, not the
20 claimant, has primary responsibility for identifying and
21 developing the issues." Id. Given that neither the regulations
22 nor the exhaustion rules require the filing of a brief before the
23 Appeals Council, the decision not to do so is not a "special
24 circumstance" making a full award of attorney's fees unjust.

1 Counsel representing Social Security claimants cannot be
2 penalized with a reduction in attorney's fees for failing to
3 address issues collateral to the disability determination as to
4 which counsel had no notice. Thus, responsibility for the gaps
5 in Vincent's administrative record fell exclusively on the ALJ.
6 Schneider's representation was in no way deficient; to the
7 contrary, it appears to have been more than adequate. The
8 district court therefore abused its discretion in concluding that
9 "special circumstances" warranted a reduction in the EAJA award
10 in this case.

11 II.

12 The district court cited two other reasons to justify its
13 sharp reduction in the attorney's fee award: the length of time
14 Schneider billed for the application for attorney's fees, and the
15 quality of Schneider's billing records. Nearly half of the 47
16 hours that Schneider billed were for his work on the EAJA fee
17 motion and reply, a figure the district court concluded was
18 "clearly excessive and unreasonable." The district court also
19 criticized Schneider's billing entries, which it felt were
20 insufficiently detailed and appeared to merge clerical tasks with
21 legal ones.

22 The district court enjoys broad discretion in determining
23 the amount of a fee award. See Hensley v. Eckerhart, 461 U.S.
24 424, 437 (1983). Such discretion "is appropriate in view of the
25 district court's superior understanding of the litigation and the

1 desirability of avoiding frequent appellate review of what
2 essentially are factual matters." Id.; see also Comm'r, INS v.
3 Jean, 496 U.S. 154, 161 (1990) (applying Hensley standard to EAJA
4 fee determination once party has met EAJA's eligibility
5 requirements). When "the documentation of hours is inadequate,"
6 the district court "may reduce the award accordingly" but must
7 "provide a concise but clear explanation of its reasons for the
8 fee award." Hensley, 461 U.S. at 433, 437.

9 Although we respect the district court's ample discretion to
10 reduce a fee award, deference is not warranted when the reduction
11 rests on an erroneous premise. Vincent justified the 22.9 hours
12 Schneider billed for the EAJA application and reply as
13 necessitated by the novelty of the district court's construction
14 of the "special circumstances" exception. The district court, by
15 contrast, found that Vincent's case "did not involve issues of a
16 particularly novel or complex nature." Vincent is correct that
17 this case presented a novel question; indeed, we have not
18 identified any precedents in which EAJA fees were reduced under
19 comparable reasoning. It is therefore unsurprising that the EAJA
20 briefing here would demand more attention and time than a
21 standard fee application. Furthermore, by rebuking Schneider in
22 the remand order, which preceded Vincent's fee motion, the
23 district court alerted Schneider that it viewed his entitlement
24 to fees with skepticism. That alone made this an atypical EAJA
25 application, one that required Schneider to concentrate more

1 effort than usual in convincing the district court that he had
2 earned the fees requested. The district court therefore appears
3 to have underappreciated the degree of effort warranted by the
4 EAJA motion.

5 We also question the district court's sua sponte decision to
6 address the quality of Schneider's billing records without
7 allowing him to respond to its concerns. The district court
8 noted with disapproval that Schneider accounted for lengthy
9 increments of time with cursory explanations such as "Research,
10 draft brief," making it difficult to assess the appropriateness
11 of the time spent. According to the district court, Schneider
12 also improperly billed for clerical tasks like "index record,"
13 and combined clerical and legal tasks in single entries without
14 differentiating the two. The Commissioner never raised the issue
15 of inadequate records; his opposition to Vincent's EAJA motion
16 was based only on "special circumstances" and the allegedly
17 excessive hours billed on the EAJA application. Schneider first
18 learned of the district court's record-keeping concerns only when
19 he was penalized for them in the EAJA fee order. Had Schneider
20 been given the opportunity to address these concerns, he likely
21 could have answered them, at least in part. For example, he has
22 now explained that "index record" is not a clerical task, but
23 refers to his review of the record for facts supporting his
24 client's claim.

1 Although we do not agree with Vincent's contention that an
2 evidentiary hearing was required here, the district court erred
3 in depriving Schneider of the opportunity to respond to its
4 criticisms. An evidentiary hearing may be necessary "if it is
5 evident that the material facts necessary [to determine the fee
6 award] are genuinely in dispute and cannot be resolved from the
7 record." Farbotko v. Clinton Cnty., 433 F.3d 204, 209 (2d Cir.
8 2005) (quoting Crescent Publ'g Group, Inc. v. Playboy Enters.,
9 Inc., 246 F.3d 142, 147 (2d Cir. 2001)). The evidentiary hearing
10 in Farbotko was necessary to determine that district's
11 "prevailing market rate," a factual question that required "an
12 evaluation of evidence proffered by the parties." Id. Because
13 the only factual questions here relate to the interpretation of
14 Schneider's billing records, the need for an evidentiary hearing
15 is unlikely. Before relying on the perceived billing flaws as a
16 basis for reducing the attorney's fee award, however, the
17 district court should have given Schneider notice of its concerns
18 and allowed the attorney to address them.¹ That way, the
19 district court would have been the first to assess Schneider's
20 explanation of his billing practices, which is appropriate given

1 ¹ We decline Vincent's invitation to adopt the Third Circuit's
2 rule that "a court may not reduce counsel fees sua sponte as
3 'excessive, redundant, or otherwise unnecessary' in the absence
4 of a sufficiently specific objection to the amount of fees
5 requested." United States v. Eleven Vehicles, 200 F.3d 203, 211
6 (3d Cir. 2000). The problem here was not that the district court
7 raised the issue sua sponte, but that it did so without giving
8 counsel prior notice of its concerns.

1 its greater familiarity with the context in which the legal work
2 was performed.

3 III.

4 For the foregoing reasons, we cannot affirm the district
5 court's fee reduction; neither can we conclude, however, that
6 Schneider is due the full award requested. After giving
7 Schneider an opportunity to address the billing record issues,
8 the district court may award the fees in full, or it may still
9 conclude that excessive or inadequate billing warrants some
10 reduction. While there are no "special circumstances" that would
11 render a full fee award unjust, the district court continues to
12 have the discretion to adjust the fee award if there are valid
13 reasons for doing so. We therefore remand for further
14 proceedings consistent with this opinion.

15 We note that this is the second time in as many years we
16 have reversed an EAJA fee order by this magistrate judge reducing
17 or denying fees requested for Schneider's work. See Burger v.
18 Astrue, 363 F. App'x 73 (2d Cir. 2010). In Burger, as in the
19 present case, we rejected the district court's assessment that
20 Schneider bore responsibility for failing to develop the record.
21 When circumstances "might reasonably cause an objective observer
22 to question [the judge's] impartiality," we have the power to
23 remand a case to a different judge. Pescatore v. Pan Am. World
24 Airways, Inc., 97 F.3d 1, 21 (2d Cir. 1996) (quoting United
25 States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995)

1 (per curiam)) (alteration in original). We believe it would be
2 prudent to do so here. We therefore order that on remand this
3 matter be transferred to a different judge.

4 **CONCLUSION**

5 For the foregoing reasons, the judgment of the district
6 court is REVERSED and REMANDED for proceedings consistent with
7 this opinion, with instructions to assign the case to a different
8 judge.