

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**WILLIAM PRICE,**

) )  
Plaintiff, ) )  
) )

**vs.**

) **Civil No. 13-cv-1160-CJP**  
) )

**NANCY A. BERRYHILL,**  
**Acting Commissioner of Social**  
**Security,**

) )  
) )  
) )  
Defendant.<sup>1</sup> ) )

**MEMORANDUM AND ORDER**

**PROUD, Magistrate Judge:**

This matter is before the Court on plaintiff's Motion for Attorney's Fees Under the Equal Access to Justice Act. (**Doc. 47**). Defendant filed a response in opposition at Doc. 50 and plaintiff filed a reply at Doc. 53.

Pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412(d)(1)(A), the Court shall award attorney's fees and expenses to a prevailing party in a civil action against the United States, including proceedings for judicial review of agency action, unless the government's position was substantially justified. The hourly rate for attorney's fees is not to exceed \$125.00 per hour "unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." §2412(d)(2)(A).

In July 2015 the Seventh Circuit reversed this Court's order affirming the

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<sup>1</sup> Nancy A. Berryhill is now the Acting Commissioner of Social Security. See, *Casey v. Berryhill*, \_\_\_ F3d. \_\_\_, 2017 WL 398309 (7th Cir. Jan. 30, 2017). She is automatically substituted as defendant in this case. See Fed. R. Civ. P. 25(d); 42 U.S.C. §405(g).

ALJ's decision and directed the Court to remand this case for further administrative proceedings. Doc. 45. Plaintiff is, therefore, the prevailing party. See, ***Shalala v. Schaefer*, 509 U.S. 292, 302 (1993)**.

In her response to the motion, the Commissioner argues the Court should not award fees because the government's position was substantially justified and plaintiff's fees sought are unreasonable.

1. Substantially Justified

The EAJA does not define the term "substantially justified," and the Seventh Circuit has recognized that its meaning in this context is not "self-evident." ***U.S. v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 381 (7th Cir. 2010)**. However, in view of the purpose of the Act, substantially justified means something more than "not frivolous;" the government's position "must have sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion." ***Id.*, at 381-382**.

The government's position is substantially justified where it had a "reasonable basis in law and fact, that is, if a reasonable person could believe the position was correct." ***Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004)(internal citations omitted)**. The Commissioner bears the burden of demonstrating that her position was substantially justified, and the Court must make a determination based on an assessment of both the government's pre-litigation and litigation conduct, including the decision of the ALJ. ***Ibid.***

Plaintiff's history and the specifics of the ALJ's decision are discussed in detail in the opinion written by the Seventh Circuit in ***Price v. Colvin*, 794 F.3d 836 (7th Cir. 2015)**. The Seventh Circuit found that plaintiff's history created a presumption he would have continued to receive benefits had he not been sent to prison. ***Id.* at 837**. They also noted that plaintiff's combined intellectual problems and psychiatric abnormalities were consistent with rendering a person so afflicted incapable of gainful employment. ***Id.* at 839**. Judge Posner made it clear that the reasons given for finding plaintiff to be capable of gainful employment were "unconvincing." ***Id.* at 839**.

The Commissioner argues that the fact that this Court found that the ALJ's decision was reasonable initially serves as *prima facie* evidence that a reasonable person would also find her position to be reasonable. Doc. 47, p. 3. However, Judge Posner notably disagreed with the idea that there was substantial justification in the ALJ's reasoning when he stated the "unavoidable conclusion" was "that the judgment of the district court must be . . . reversed." ***Price*, 794 at 841**. As plaintiff notes in his EAJA brief, the appellate court excoriated the ALJ's decision, noting that facts were cherry picked, the ALJ had several instances within his opinion that lacked evidentiary support, and that there was an absence of logical bases for several conclusions. This is not indicative of a substantially justified position.

Further, if the Commissioner's arguments were correct any party that advanced appeals to the Appeals Court and won at that level could not be granted fees. This is illogical. As the Seventh Circuit has stated, "if it is

apparent from our opinion that we think the government lacked a substantial justification for its position, though the judge had thought it not only substantially justified but correct, he must bow. *Golembiewski v. Barnhart*, 382 F.3d 721, 724–25 (7th Cir.2004); *Friends of Boundary Waters Wilderness v. Thomas, supra*, 53 F.3d at 885–86.” ***United States v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 384 (7th Cir. 2010).**

The Commissioner fails to advance arguments that show her position was substantially justified as a whole. ***Gatimi v. Holder*, 606 F.3d 344, 349-50 (7th Cir. 2010).** She does not indicate how she had a rational ground for her arguments outside of this Court’s initial review of the case. Therefore, the Court finds that plaintiff is entitled to an award of attorney’s fees under the EAJA.

## 2. Unreasonable Fees

The Commissioner argues that the number of hours plaintiff’s counsel claims are unreasonable.

Plaintiff contends the number of hours his counsel and his support staff expended on the case, approximately 108.77, is reasonable and the court has the discretion to award fees for those hours. There is no *per se* rule for capping hours, instead the Court must analyze if the hours are “reasonably expended.” It is an attorney’s responsibility to use “billing judgment” because “hours that are not properly billed to one’s client also are not properly billed to one’s adversary pursuant to statutory authority.” ***Hensley v. Eckerhart*, 461 U.S. 424, 433–434 (1983).** To determine if hours are reasonably expended, factors

like novelty and difficulty of the questions, the skill required to perform the legal service, and the customary fee are taken into consideration. *Id.* at 434.

The Commissioner takes issue with plaintiff's request to recoup 11.5 hours spent drafting his appellate brief and suggests 6 hours seems more reasonable because many of the issues were the same. She argues the 17.9 hours spent drafting the reply appellate brief were not justified and suggests 9 hours is more reasonable. She contends the 15 hours spent preparing for and attending the appellate oral argument is too high and suggests 11 hours is a better amount. She contends that 5 hours on the EAJA application is too many and instead 2 hours is more reasonable. Finally, she argues plaintiff's staff hours are not compensable.

The Commissioner does not provide a rationale for why she believes most of the suggested amounts of time are more reasonable than those claimed by plaintiff. As plaintiff notes, she fails to state which portions of his appellate brief were similar to those within his district court brief and leaves it to the Court to compare the 43 page appellate brief with the 30 page district court brief. She fails to provide any methodology on how she arrived at the amounts of time she suggests.

It is clear that plaintiff's attorney spent a considerable amount of time on the case at hand both initially and at the appellate level. This was not a "typical" social security case, as it was appealed and many of plaintiff's issues were particularly unique to his situation. As a result, this Court does not deem it appropriate to reduce the amount of hours for which plaintiff requests

compensation.

Plaintiff concedes that the 3.91 hours of staff time is not compensable in light of the Court's ruling in ***Donaldson v. Colvin*, 2013 WL 1156414, at \*3 (S.D. Ill. March 20, 2013)**.

Finally, the Court looks at plaintiff's request for an additional \$792.20 for the time spent on his reply brief for the current matter. Plaintiff's attorney claims he spent an additional 4.25 hours on the response to the Commissioner's response to his petition for attorney's fees. The Court notes that replying to the Commissioner's response is completely voluntary and not required for the merits of the motion to be reviewed. However, plaintiff had to do additional research on the issues presented by the Commissioner within her response to plaintiff's motion for fees. As a result the Court finds plaintiff's time spent preparing the reply justified.

For the reasons discussed above, plaintiff's Motion for Attorney's Fees Under the Equal Access to Justice Act (**Doc. 47**) is **GRANTED**.

The Court awards attorney's fees in the amount of \$20,338.10 (twenty thousand three hundred and thirty eight dollars and ten cents).

The amount awarded is payable to plaintiff and is subject to set-off for any debt owed by plaintiff to the United States, per ***Astrue v. Ratliff*, 130 S.Ct. 2521 (2010)**. However, any amount that is not used to satisfy an outstanding debt shall be made payable to plaintiff's attorney.

**IT IS SO ORDERED.**

**DATE: April 7, 2017**

**s/ Clifford J. Proud**  
**CLIFFORD J. PROUD**  
**UNITED STATES MAGISTRATE JUDGE**