

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HARRY WEATHERBY,

Plaintiff,

-against-

1:05-CV-1531 (LEK/RFT)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

DECISION AND ORDER

Presently before the Court is Plaintiff's Motion for attorneys fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, filed on September 30, 2008. Motion (Dkt. No. 17.) On September 3, 2008, the Court issued an Order and Judgment remanding the case to the Commissioner in accordance with sentence four of 42 U.S.C. § 405(g). Order (Dkt. No. 15); Judgment (Dkt. No. 16). A party who obtains a sentence four remand is a "prevailing party" for purposes of the EAJA and is, therefore, entitled to pursue attorney fees under the EAJA. Shalala v. Schaefer, 509 U.S. 292, 301-302 (1993). Defendant Commissioner of Social Security does not oppose the Motion. It is the duty of the Court to review the Motion for fees in accordance with the EAJA statutory framework and related case law. See 28 U.S.C. § 2412; Schaefer, 509 U.S. at 297-298, 300-301.

I. Discussion

The EAJA provides for an award of attorney fees and costs to the prevailing party in social security litigation against the United States when the government fails to demonstrate that its

position was “substantially justified,” and absent “special circumstances” making an award unjust. See 28 U.S.C. § 2412(d)(1)(A); Wells v. Bowen, 855 F.2d 37, 41 (2d Cir. 1988) (citations omitted). In social security litigation, a plaintiff who succeeds in obtaining a remand under sentence four of § 405(g) is a “prevailing party,” and may pursue fees under the EAJA. Schaefer, 509 U.S. at 297-298, 300-301. On September 3, 2008, this Court entered a Judgment remanding the case to the Commissioner. Judgment (Dkt. No. 16). The burden of proving substantial justification is on the government. Rosado v. Bowen, 823 F.2d 40, 42 (2d Cir. 1987). In this case, Defendant does not oppose the present Motion or argue that its opposition to Plaintiff’s appeal was “substantially justified” or that “special circumstances” suggest a reduced award. Accordingly, the government has failed to show that the agency’s position was substantially justified. After reviewing the record and the papers submitted by the parties in regard to the present Motion, the Court finds that Defendant’s position was not substantially justified and that no circumstance suggests justice would be achieved by withholding the reimbursement of fees for a reasonable number of hours expended.

Plaintiff requests fees in the amount of \$1,738.95, and has provided time records in support of this demand. Dkt. No. 17, Ex. A. This represents reimbursement for 11.5 hours at a rate of \$150 per hour¹ and \$13.95 to cover costs. Id. The government has not objected to the reasonableness of this amount. Upon review of the itemized time sheet submitted by Plaintiff’s attorney, the Court finds the number of hours and the total amount reasonable. Therefore, the Court finds that the

¹ The EAJA requires reimbursement at a rate of \$125 per hour, subject to an upward cost of living adjustment or a special factor justifying a higher fee. See 28 U.S.C. § 2412(d)(2)(A). The rate of \$150 per hour is within the cost of living increase adjustment to the EAJA base rate. The Consumer Price Index is available from the U.S. Department of Labor, Bureau of Labor Statistics. See U.S. Dep’t of Labor, Consumer Price Index, All Urban Consumers, available at <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>.

amount requested is reasonable.

II. CONCLUSION

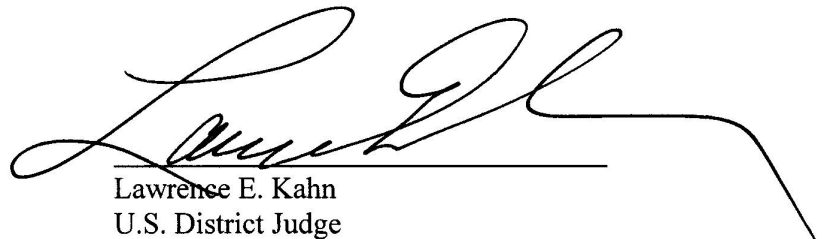
Accordingly, it is hereby

ORDERED, that Plaintiff's Motion for attorney fees (Dkt. No. 17) is **GRANTED**, and the Commissioner of Social Security is directed to pay \$1,738.95 to Plaintiff's attorney of record, Thomas C. Erwin; and it is further

ORDERED, that the Clerk serve a copy of this Order on all parties.

IT IS SO ORDERED.

DATED: June 03, 2009
Albany, New York



Lawrence E. Kahn
U.S. District Judge