

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

MALISSA ANN TEW,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 1:09cv799-CSC
)	
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	

MEMORANDUM OPINION and ORDER

On May 11, 2011, the plaintiff filed a motion for attorney’s fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). (Doc. # 20). The Commissioner objects to an award of fees because his “position – although ultimately unsuccessful – was substantially justified, that is reasonable in law and fact.” (Def’s Res., doc. # 24 at 1).

Tew applied for and was denied disability insurance and supplemental security income benefits by the Commissioner. After her application was denied, she sought judicial review in this court. On February 25, 2011, the court concluded that the ALJ erred and remanded the case for further proceedings.

A Social Security disability claimant is a prevailing party entitled to seek EAJA fees when the claimant obtains a remand for reconsideration of her case by the Commissioner. *See Shalala v. Schaefer*, 509 U.S. 292, 300-01 (1993). Thus, the plaintiff is a prevailing party.

Under the EAJA, the court “shall award” attorney’s fees “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). *See also Gisbrecht v. Barnhart*, 535 U.S. 789, 796

(2002). “The government’s position is substantially justified under the EAJA when it is justified to a degree that would satisfy a reasonable person - i.e. when it has a reasonable basis in both law and fact. The government bears the burden of showing that its position was substantially justified.” *United States v. Douglas*, 55 F.3d 584, 588 (11th Cir. 1995) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

The responsibility for assessing a claimant’s residual functional capacity (“RFC”) belongs to the ALJ at the administrative law judge hearing level. 20 C.F.R. § 404.1546(c). The Commissioner’s own regulations require that the ALJ determine a person’s RFC “based on *all* the relevant evidence in . . . [the] case record” including the medical evidence. *See* 20 C.F.R. § 404.1545(a) and (c) (emphasis added). The court concluded that the ALJ, in making the residual functional capacity determination, did not properly consider *all* of the medical evidence before him because he did not consider Tew’s mental impairments. The court further found that the ALJ also failed to consider the mental limitations identified for two physicians. The limitations identified by Dr. Jacob and Dr. Hinton were not included in the ALJ’s determination of Tew’s residual functional capacity. (Doc. # 18 at 7). Because the ALJ failed to comply with the legal requirement that he properly consider all evidence in the record when determining the plaintiff’s RFC, he committed legal error requiring a remand for further proceedings. Thus, the Commissioner’s position in this litigation did not have a reasonable basis in law. *Pierce* requires that the government’s position be reasonable *both* in fact and law to be substantially justified.

The Commissioner argues that the plaintiff is not entitled to fees because his position was “reasonable in both law and fact.” (Def’s Res., doc. # 24, at 3). The defendant’s arguments however merely rehash his positions in support of the ALJ’s determination and completely miss

