

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

JAMES SORRELLS

PLAINTIFF

vs.

Civil No. 4:10-cv-04016

MICHAEL J. ASTRUE
Commissioner, Social Security Administration

DEFENDANT

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

Pending now before this Court is Plaintiff's Application for Attorney Fees Under the Equal Access to Justice Act ("EAJA"). ECF No. 16.¹ In this Application, Plaintiff's counsel requests that the attorney's fee award be made payable directly to him. *See id.* Defendant has responded to this Motion and objects to Plaintiff's counsel's request that the fee be made directly payable to him. ECF No. 18. Pursuant to the provisions of 28 U.S.C. § 636(b)(1) and (3) (2005), the Honorable Harry F. Barnes referred this Application to this Court for the purpose of making a report and recommendation. In accordance with that referral, this Court enters the following report and recommendation.

1. Background:

James Sorrells ("Plaintiff") appealed to this Court from the Secretary of the Social Security Administration's ("SSA") denial of his request for disability benefits. ECF No. 1. On August 26, 2010, Plaintiff's case was reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g). ECF No. 15.

On October 28, 2010, Plaintiff filed the present Application requesting an award of attorney's fees under the EAJA. ECF No. 16. With this Application, Plaintiff requests an award of attorney's fees of \$5,994.38, representing 34.50 attorney hours at an hourly rate of \$173.75 per hour. *See id.*

¹ The docket numbers for this case are referenced by the designation "ECF. No."

Plaintiff's counsel also requests that this fee award be made directly to him and not to Plaintiff himself. *See id.* Defendant responded to this Motion on November 9, 2010 and objects to Plaintiff's counsel's request that this award be made directly to him. ECF No. 18. Instead, Defendant claims this award must be made payable directly to Plaintiff. *See Astrue v. Ratliff*, ___ U.S. ___, 130 S. Ct. 2521 (2010).

2. Applicable Law:

Pursuant to the EAJA, 28 U.S.C. § 2412(d)(1)(A), a court must award attorney's fees to a prevailing social security claimant unless the Secretary's position in denying benefits was substantially justified. The Secretary has the burden of proving that the denial of benefits was substantially justified. *See Jackson v. Bowen*, 807 F.2d 127, 128 (8th Cir.1986) ("The Secretary bears the burden of proving that its position in the administrative and judicial proceedings below was substantially justified"). An EAJA application also must be made within thirty days of a final judgment in an action, *See* 28 U.S.C. § 2412(d)(1)(B), or within thirty days after the sixty day time for appeal has expired. *See Shalala v. Schaefer*, 509 U.S. 292, 298 (1993).

An award of attorney's fees under the EAJA is appropriate even though, at the conclusion of the case, the plaintiff's attorney may be authorized to charge and to collect a fee pursuant to 42 U.S.C. § 406(b)(1). Recovery of attorney's fees under both the EAJA and 42 U.S.C. § 406(b)(1) was specifically allowed when Congress amended the EAJA in 1985. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002) (citing Pub. L. No. 99-80, 99 Stat. 186 (1985)). The United States Supreme Court stated that Congress harmonized an award of attorney's fees under the EAJA and under 42 U.S.C. § 406(b)(1) as follows:

Fee awards may be made under both prescriptions [EAJA and 42 U.S.C. § 406(b)(1)], but the claimant's attorney must "refun[d] to the claimant the amount of the smaller fee." . . . "Thus, an EAJA award offsets an award under Section 406(b), so that the [amount of total past-due benefits the claimant actually receives] will be increased by

the . . . EAJA award up to the point the claimant receives 100 percent of the past-due benefits.”

Id. Furthermore, awarding fees under both acts facilitates the purposes of the EAJA, which is to shift to the United States the prevailing party’s litigation expenses incurred while contesting unreasonable government action. *See id.*; *Cornella v. Schweiker*, 728 F.2d 978, 986 (8th Cir. 1984).

The statutory ceiling for an EAJA fee award is \$125.00 per hour. *See* 28 U.S.C. § 2412(d)(2)(A). A court is only authorized to exceed this statutory rate if “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.” *Id.* A court may determine that there has been an increase in the cost of living, and may thereby increase the attorney’s rate per hour, based upon the United States Department of Labor’s Consumer Price Index (“CPI”). *See Johnson v. Sullivan*, 919 F.2d 503, 504 (8th Cir. 1990).

3. Discussion:

In the present action, Plaintiff’s case was remanded to the SSA. ECF No. 15. Defendant does not contest Plaintiff’s claim that he is the prevailing party, does not oppose his application for fees under the EAJA, and does not object to the hourly rate he requested. ECF No. 18. The Court construes this lack of opposition to this application as an admission that the government’s decision to deny benefits was not “substantially justified” and that Plaintiff is the prevailing party.

Plaintiff requests a total award of \$5,994.38 under the EAJA. ECF No. 16. Plaintiff requests these fees at a rate of \$173.75. *See id.* An enhanced hourly rate is authorized when a CPI demonstrating a cost of living increase is submitted. *See* 28 U.S.C. § 2412(d)(2)(A); *Johnson*, 919 F.2d at 504. In the present action, Plaintiff submitted a CPI. ECF No.16-3. Based upon this CPI, this Court recommends Plaintiff be awarded an enhanced hourly rate of \$173.50.

Further, this Court has reviewed Plaintiff's request for 34.50 hours of attorney work. Plaintiff has submitted an itemized bill in support of that request, and this Court notes that Defendant has not objected to Plaintiff's request as being excessive. ECF No. 16-2. Thus, this Court finds the hours requested are reasonable and should be awarded and recommends Plaintiff be entitled to 34.50 hours at an hourly rate of \$173.50 or a total award of \$5,985.75.

Defendant claims the fees awarded should be paid directly to Plaintiff pursuant to *Ratliff*. ECF No. 18. In Plaintiff's Application, Plaintiff's counsel requested that these attorney's fees be awarded to him. ECF No. 16. *Ratliff* requires that attorney's fees be awarded to the "prevailing party" or the litigant. *See Ratliff*, 130 S. Ct. at 2529. Thus, these fees must be awarded to Plaintiff, not to Plaintiff's attorney.

4. Conclusion:

Based upon the foregoing, the Court recommends Plaintiff be awarded **\$5,985.75** in attorney's fees and costs pursuant to the EAJA, 28 U.S.C. § 2412.

The parties have fourteen (14) days from receipt of this Report and Recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. The parties are reminded that objections must be both timely and specific to trigger *de novo* review by the district court. *See Thompson v. Nix*, 897 F.2d 356, 357 (8th Cir. 1990).

ENTERED this 10th day of November, 2010.

/s/ Barry A. Bryant
HON. BARRY A. BRYANT
U.S. MAGISTRATE JUDGE