

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MIGUEL SERRANO,

Plaintiff,

vs.

Case No. 8:08-cv-1171-T-MCR

MICHAEL J. ASTRUE, Commissioner of the
Social Security Administration,

Defendant.

ORDER

THIS CAUSE is before the Court on Plaintiff's Petition for Attorney Fees (Doc. 29) filed October 8, 2009. Plaintiff's counsel certifies the Commissioner's "agreement is contingent on Plaintiff satisfying all jurisdictional requirements." (Doc. 29, p.3). The Commissioner has filed no response in opposition to the Petition, and the time for doing so has passed. This Petition follows the entry of a Judgment reversing and remanding the decision of the ALJ in Plaintiff's favor with respect to Plaintiff's claim for benefits. (Doc. 28).

A. Eligibility for Award of Fees

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412, a party may recover an award of attorney's fees against the government provided the party meets five requirements: (1) the party seeking the award is the prevailing party; (2) the application for such fees, including an itemized justification for the amount sought, is timely filed; (3) the claimant has a net worth of less than \$2 million at the time the

Complaint was filed; (4) the position of the government was not substantially justified; and (5) there are no special circumstances which would make an award unjust. See 28 U.S.C. § 2412(d)(1) and (2).

1. Prevailing Party

The Judgment in this case (Doc. 28), filed on July 14, 2009, reversed the final decision of the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) and remanded the case for further consideration. The Supreme Court has made clear that a plaintiff obtaining a sentence-four remand is a prevailing party. Shalala v. Schaefer, 509 U.S. 292, 300-02, 113 S.Ct. 2625, 2631-32 (1993). Accordingly, Plaintiff is the prevailing party in this case.

2. Timely Application

A plaintiff must file an application for fees and other expenses within thirty days of the “final judgment in the action.” 28 U.S.C. § 2412(d)(1)(B). “Final Judgment” is defined as a judgment that “is final and not appealable.” 28 U.S.C. § 2412(d)(2)(G). Because the Commissioner normally has sixty days in which to appeal, a judgment typically becomes final after sixty days. Fed. R. App. P. 4(a)(1)(B). The plaintiff then has thirty days in which to file his or her application so that an application is timely filed if done so prior to ninety days after the judgment is entered. See Shalala, 509 U.S. at 297-98, 113 S.Ct. at 2629; Jackson v. Chater, 99 F.3d 1086, 1095 n. 4 (11th Cir. 1996). Here, the Judgment was entered on July 14, 2009, and the Petition was filed on October 8, 2009, eighty-six days later. Accordingly, the Petition was timely filed.

3. Claimant's Net Worth

Plaintiff asserts that his net worth was less than \$2 million at the time this proceeding was filed and the Commissioner does not contest. Accordingly, the Court finds this requirement satisfied.

4. Government's Position Not Substantially Justified

The burden of proving substantial justification is on the Commissioner, who must demonstrate the substantial justification of his position as a whole. See United States v. Jones, 125 F.3d 1418, 1420, 1427-31 (11th Cir. 1997). Therefore, unless the Commissioner comes forth and satisfies his burden, the government's position will be deemed not substantially justified. In this case, the Commissioner does not dispute the issue of substantial justification, and accordingly, the Court finds his position was not substantially justified.

5. No Special Circumstances

The Court finds no special circumstances indicating an award of fees would be unjust.

B. Amount of Fees

Having determined Plaintiff is eligible for an award of fees under EAJA, the Court now turns to the reasonableness of the amount of fees sought. Plaintiff requests an award of \$4,037.08 in attorney's fees, representing 3.15 hours of work performed in 2008 at an hourly rate of \$165.00 and 20.75 hours of work performed in 2009 at an hourly rate of \$169.51. (Doc. 29).

The amount of attorney's fees to be awarded "shall be based upon the prevailing market rates for the kind and quality of the service furnished," except that attorney's fees shall not exceed \$125 per hour unless the Court determines an increase in the cost of living or a "special factor" justifies a higher fee award. 28 U.S.C. §2412(d)(2)(A). The Court accepts Plaintiff's contention that a statutory cost of living adjustment is appropriate in the hourly rate. Plaintiff proposes an hourly rate of \$165.00 for work performed in 2008 and \$169.51 for work performed in 2009. The Commissioner does not oppose Plaintiff's proposed hourly rates and accordingly, the Court will adopt those rates. The awarded fee may not exceed twenty-five percent of the claimant's past due benefits. 42 U.S.C. §406(b)(1). There is no contention here that the claimed fee would exceed that amount.

The Plaintiff seeks an award based on a total of 23.9 hours of attorney time (3.15 hours in 2008 and 2.25 hours by one attorney and 18.5 hours by another attorney in 2009). The Court believes 23.9 hours of attorney time is reasonable in this case. Therefore, the Court finds \$4,037.08 ($\165.00×3.15 hours plus $\$169.51 \times 20.75$ hours) is a reasonable fee in this case.

C. Payment of Fees Directly to Counsel

The Plaintiff requests that the attorney's fees be paid directly to Plaintiff's counsel. In Reeves v. Astrue, the Eleventh Circuit instructed that the unambiguous text of the EAJA requires that "attorney's fees are awarded to the prevailing party, not the prevailing party's attorney." 526 F.3d 732, 738 (11th Cir. 2008). In Reeves, the question before the Court was whether an award of attorney's fees belongs to the party or the

party's counsel. Here, Plaintiff has executed an Assignment of EAJA Fees assigning any fees awarded Plaintiff pursuant to EAJA to his attorney. Because this Court does not interpret Reeves as preventing an assignment of the fees, the Court finds the fees in this case may be made payable directly to Plaintiff's counsel.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED:

1. Plaintiff's Consent Petition for Attorney Fees (Doc. 29) is **GRANTED**.
2. The Clerk shall enter judgment in favor of Plaintiff and against Defendant in the amount of \$4,037.08 in attorney's fees.
3. The request that these fees be paid directly to Plaintiff's counsel is **GRANTED**.

DONE AND ORDERED in Chambers in Jacksonville, Florida this 28th day of October, 2009.

Monte C. Richardson

MONTE C. RICHARDSON
UNITED STATES MAGISTRATE JUDGE

Copies to:

Counsel of Record