IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

KIMBERLY INBODEN,		
Plaintiff,	)	
vs.	)	**Civil No. 14-cv-915-CJP**
NANCY A. BERRYHILL, Acting Commissioner of Social Security,	)	
Defendant.[1]	)	

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. 31).** Defendant filed a response in opposition at Doc. 33 and plaintiff filed a reply at Doc. 34.

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).

[1] 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).

This case was remanded to the Commissioner for further proceedings pursuant to sentence four of 42 U.S.C. §405(g). 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. ***Id.***

The evidence in the administrative record and the specifics of the ALJ's decision are discussed in detail in the Memorandum and Order remanding the case, Doc. 29.

Plaintiff argued that the ALJ erred in not giving appropriate weight to the physicians of record and the ALJ erred in assessing plaintiff's residual functional capacity (RFC). This Court found merit in plaintiff's first point and deferred ruling on the other point. This Court noted that the Commissioner violated the ***Chenery*** doctrine by defending the ALJ's decision on a ground that the agency had not relied on within its decision. Doc. 29, p. 21; **See, *SEC v. Chenery Corporation*, 318 U.S. 80 (1943)**. The Court concluded, and the Commissioner conceded, that the ALJ failed to properly analyze plaintiff's migraine condition. The Court determined that the ALJ's reasons for rejecting the treating physician's opinions were not supported by the record and were based on a highly selective review of the medical evidence.

The Commissioner characterizes the ALJ's errors with regard to the treating physician's opinions as "errors of articulation" and argues they do not necessitate a finding that the government's position was not substantially justified, Doc. 36, pp. 3-4. The Commissioner cites ***Stein v. Sullivan*, 966 F.2d 317, 319-320 (7th Cir. 1992)**, in support of this argument. However, ***Stein*** did not establish a *per se* rule that attorney's fees will not be awarded whenever the error was a failure to meet the articulation requirement. **See, *Conrad v. Barnhart*, 434 F.3d 987, 991 (7th Cir. 2006).**

The Commissioner also argues that this Court did not use "strong language" in its opinion and that the Court's analysis and language used suggests the case was remanded on relatively narrow grounds in relation to the agency's position as a whole. The Court agrees with plaintiff's rebuttal that the Court made it clear this was not a "close case." The ALJ's errors within his opinion and the Commissioner's errors within her arguments violated long-standing legal precedent and as a result the Commissioner's position cannot be substantially justified. ***Pierce v. Underwood*, 487 U.S. 552, 561 (1988); *Golembiewski*, 382 F.3d at 724; *Stewart v. Astrue*, 561 F.3d 679, 684 (7th Cir. 2009).**

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 nor does she substantiate her claims that a genuine dispute exited. 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 56.2 hours her attorney expended on this case were unreasonable. The Commissioner notably fails to state how many hours she feels would be considered reasonable for the petitioner to claim, just that the number of hours should be reduced.

Plaintiff contends the number of hours her counsel expended on the case 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 argues that the issues within the case were not complex or novel and did not require 38 hours of work in reviewing the record and drafting plaintiff's opening brief. The Commissioner is correct that plaintiff's counsel routinely raises the issues he raised in this case in other Social Security cases. However, this does not support the idea that plaintiff's counsel put little or no work effort into this case. Further, the Court agrees with plaintiff that classifying a case as "typical" does not mean plaintiff is not entitled to fair compensation for the time her attorney spent advocating on her behalf.

The Court notes that 56.2 hours is not completely outside the realm of reasonableness for a social security disability case, albeit on the high end. ***See, e.g., Porter v. Barnhart,* No. 04 C 6009, 2006 WL 1722377, at 4 (N.D. Ill. June 19, 2006) (awarding 88.2 hours of attorney's fees)**. ***Schulten v. Astrue,* 2010 WL 2135474, at *6 (N.D.Ill.2010)(finding the "permissible range" to be, "generally speaking" 40 to 60 hours)**. However, there are many

cases where comparable or greater hours have been awarded.[2] The evidentiary record in this case is over 1200 pages long. Plaintiff's attorney itemized each of the hours he spent reviewing the record and on each section of the brief, none of the time seems unreasonable.

Finally, the Court looks at plaintiff's request for an additional $678.62 for the time spent on her reply brief for the current matter. Plaintiff's attorney claims he spent an additional 3.3 hours and his legal assistant spent .5 hours on the response to the Commissioner's response to her petition for attorney's fees. The Court notes that replying to the Commissioner's response is

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[2] *Claiborne ex rel. L.D. v. Astrue*, 877 F. Supp. 2d 622, 624 (N.D. Ill. 2012), where the hourly time spent by the attorney was not contested (Plaintiff has submitted invoices showing that her attorneys worked a total of 73.1 hours, including time spent preparing the fee petition and reply brief. Specifically, Barry Schultz worked 24.6 hours; Lauren Rafferty worked 35.9 hours; and Julie Coen worked 12.6 hours. Two legal assistants worked an additional 1.3 hours.) (Doc. 45–3; Doc. 49, at 15 n. 10); *Bias v. Astrue*, 11 C2247, 2013 WL 615804, *1 (N.D. Ill. Feb. 15, 2013) (Plaintiff has submitted an "EAJA Itemization of Time" showing that his counsel worked a total of 64 hours. The legal assistants worked an additional 1.9 hours); *Spaulding vs. Astrue*, 08 C 2009, 2011 WL 1042580, *3 (N.D. Ill. Mar. 22, 2011) (55 hours of attorney time at a rate of $170 an hour ($9,350), and 2.7 hours of legal assistant time at a rate of $85 an hour ($229.50); *Scott v. Astrue*, 08 C 5882, 2012 WL 527523, *5 (N.D. Ill. Feb. 16, 2012)(59.6 hours in the district court for Ms. Scott's initial claim held to be proper); *Schulten v. Astrue*, 08 C 1181, 2010 WL 2135474, *6 (N.D. Ill. May 28, 2010) "The requested number of hours—48.75—is within the permissible range for cases like this, which is, generally speaking, 40 to 60 hours. *See Nickola v. Barnhart,* 2004 WL 2713075, *2 (W.D.Wis. Nov.24, 2004)(roughly 60 hours of combined law clerk and attorney time it took to produce plaintiff's briefs was not excessive); *Holland v. Barnhart,* 2004 WL 419871, *2 (N.D.Ill. Feb.3, 2004)(56.85 hours devoted to the preparation of "three briefs, totaling 48 pages" not unreasonable); *Anderson v. Barnhart,* 2006 WL 4673476, *5 (N.D.Ill. Feb.9, 2006)(38.9 hours spent on brief and reply "unextraordinary"); *Cuevas v. Barnhart,* 2004 WL 3037939, *2 (N.D.Ill.2004) (56.5 hours of attorney work found reasonable); *Taylor v. Barnhart,* 2004 WL 1114783, *3 (N.D.Ill. May 14, 2004) (51 hours of attorney work found reasonable).

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. 31)** is **GRANTED.**

The Court awards attorney's fees in the amount of $11,452.67 (eleven thousand four hundred and fifty-two dollars and sixty-seven 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 5, 2017

s/ Clifford J. Proud

CLIFFORD J. PROUD

UNITED STATES MAGISTRATE JUDGE