IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

LANE D. SIMION,		
Plaintiff,	)	
vs.	)	**Civil No. 14-cv-1129-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. 35.

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).

This case was remanded to the Commissioner for further proceedings

[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).

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 that both the hourly rate and the number of hours plaintiff's counsel claims are unreasonable.

As to the hourly rate, counsel asks the Court to award him $191.63 per hour for attorney time and $95.00 per hour for legal assistant time. The Commissioner states that attorneys representing claimants in social security cases are allowed a maximum of $125 per hour per the EAJA but she acknowledges that the courts may award enhanced fees due to an increased cost of living. ***Sprinkle v.Colvin*, 777 F.3d 421, 423 (7th Cir. 2015).**

In ***Sprinkle***, the Court clarified that EAJA claimants that seek inflation-based rate adjustments do not need to prove the "effects of inflation on the particular attorney's practice" and do not need to prove "that no competent attorney could be found for less than the requested rate." ***Id.* at 423.** Instead, a claimant can rely upon a "general and readily available measure of inflation such as the Consumer Price Index [CPI]." ***Id***. "An affidavit from a single attorney testifying to the prevailing market rate in the community may suffice to meet that burden." ***Id***.

This does not make a fee increase automatic because the government can still raise evidence that the CPI does not provide an accurate measure of the cost of living in a certain market. ***Id.*** The claimant must also supply "satisfactory evidence" that the "rate they request is in line with those

prevailing in the community for similar services by lawyers of comparable skill and experience." ***Id***. A district court may, "in its discretion" find one sworn statement from the claimant's attorney as sufficient for this purpose. ***Id.*** **at 429.**

The Court notes that the Commissioner is correct in noting that the CPI for "all urban consumers" on a national level is not the same as the CPI applicable to the Midwest area where plaintiff's attorney practices law. Plaintiff concedes that it is within the Court's discretion to determine whether the regional CPI is more appropriate. The Midwest area CPI for July 2015, when the majority of plaintiff's work was performed, was $186.10. Therefore, the Court will use this figure in determining plaintiff's ultimate reward. This rate is similar to what other judges in this Circuit have approved since ***Sprinkle***. ***See, eg, Trump v. Colvin,*** **2015 WL 970111 at *3, 4 (N.D.Ill.2015);** ***Smith–Harvey v. Colvin,*** **2015 WL 1548955 at *2 (S.D.Ind.2015);** ***Embry v. Colvin*****, No. 12 C 3685, 2015 WL 4720106, at *4 (N.D. Ill. Aug. 4, 2015).**

Plaintiff contends the number of hours her counsel and his support staff expended on the case, approximately 54, 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 35.6 hours plaintiff spent drafting the opening and the additional 14.5 hours on the reply brief was excessive. She also argues that plaintiff's case was routine and the issues raised in plaintiff's brief on the merits were neither new nor novel. The Commissioner contends that with plaintiff's counsel's experience spending 10 hours reading and taking notes on a record that had a total of 349 pages was unjustified. The Commissioner takes issue with the 35 hours spent preparing the opening brief, 14.5 hours spent preparing the reply brief, 1.5 hours spent re-reading the plaintiff's own opening brief, and 4.2 hours editing and cutting the draft reply brief. Doc. 31, pp 12-13.

The Commissioner contends that a portion (.4 hours) of the assistant hours plaintiff requests to be compensated for are not allowed under the EAJA. She cites cases that indicate legal assistant hours are not properly included in a fee request unless the legal assistant performs work traditionally performed by an attorney. ***Donaldson v. Colvin,* No. 11–cv–00554–JPG, 2013 WL 1156414, *2 (S.D. Ill. Mar. 20, 2013) (citing *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 697 (5th Cir.1982)).** The Commissioner suggests the Court deduct 10 hours of attorney time and .4 hours of legal assistant time as a result of these arguments.

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 54 hours is not completely outside the realm of reasonableness for a social security disability case. ***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)**.

The Court also notes that 54 hours is considered to be on the "high end of the range of hours that courts within this circuit have considered reasonable for social security appeals." ***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, as plaintiff's counsel notes, there are many cases where comparable or greater hours have been awarded.[2]

[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).

Here, the record was considerably shorter (349 pages of total record with 146 pages of medical records of which several are duplicates) than many records this Court sees on a regular basis. Spending 10 hours reading and reviewing this record does seem excessive, as does spending 1.5 hours re-reading plaintiff's own brief. While the Court acknowledges that plaintiff's attorney had to be diligent and conduct a detailed review of the record in order to find the errors committed by the ALJ, spending over 35 hours preparing the opening brief for this case was unnecessary. As a result, the Court will reduce the attorney hours spent reviewing the record to 5. This makes the total billable time spent by the attorneys in this case 48 hours. The Court finds the time spent by the attorneys' assistants to be reasonably expended according to the time sheet and assistant time will remain at 1 hour.

Finally, the Court looks at plaintiff's request for an additional $287.44 for the time spent on her reply brief for the current matter. Plaintiff's attorney claims he spent an additional 1.5 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 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, but at the rate of $186.10 an hour, making the addition total $279.15

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 $9,450.95 (nine thousand four hundred and fifty dollars and ninety-five 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