

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

CAROL J BARNETT,

Plaintiff,

vs.

**NANCY A. BERRYHILL,
Acting Commissioner of Social
Security,**

Defendant.¹

)
)
)
)
)
)
)
)
)
)
)
)

Civil No. 15-cv-1018-CJP

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. 37)**. Defendant filed a response in opposition at Doc. 40 and plaintiff filed a reply at Doc. 41.

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 pursuant

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).

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 the number of hours plaintiff's counsel claims are unreasonable. Plaintiff contends the number of hours her counsel and his support staff expended on the case, approximately 88.3, 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 32.75 hours to review and take notes on the administrative record was excessive. She contends that the Court should reject the 10.25 hours plaintiff's spent advancing arguments regarding credibility and requesting the Court to grant benefits because they were ultimately rejected by the Court. The Commissioner also argues that plaintiff's case was routine and the issues raised in plaintiff's brief on the merits were neither new nor novel. Generally, she states that the 86.7 hours of attorney time is illogical but notably fails to state how many hours she feels would be considered reasonable for the petitioner to claim.

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 86.7 hours of attorney work is considered to be higher than the range "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)**. The Court also notes that 86.7 hours of attorney work 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)**.

Plaintiff seeks \$17,056.11 in his initial petition. Plaintiff cites several cases for attorney fees that have been granted within the Seventh Circuit, but as the Commissioner notes, only two of the seventeen cases cited sought more than \$12,500. The Commissioner also points to a previous case that plaintiff's attorney litigated where the record was longer, contained a previous ALJ decision similar to the one at hand, and plaintiff's attorney only spent 41.7 attorney hours on litigation. The Commissioner also cites cases plaintiff's attorney litigated with records that are 500-600 pages shorter where he spent anywhere from 33-58.5 hours on litigation.

Plaintiff's attorney addresses the Commissioner's arguments for each case and explains that in some cases with large records the entire record may not have needed to be reviewed in its entirety, some of the evidence may have been duplicative, or perhaps he was extremely efficient with other cases. For example, he notes that one of the cases cited by the Commissioner was about 56% shorter than the record in the current case, and he spent 49.6 hours briefing that case. If he multiplied those hours by the difference it would amount to 77.37 hours. Plaintiff's attorney addressed a similar case where, if the amount of billable time was directly reflective of the record length, he would have billed 86.7 hours if it were the same length as the case at hand.

Plaintiff's counsel contends that if he spent one minute on each page of the record he would have spent 28.5 hours on review, 4.25 hours less than the amount he requests for his review of plaintiff's case. Further, as plaintiff notes, the Commissioner did not suggest the arguments plaintiff failed on were unreasonable or frivolously made. She cites a Seventh Circuit case that stated fees should not be reduced because a party did not prevail on arguments reasonably made. *Jaffee v. Redmond*, 143 F.3d 409, 416-17 (7th Cir. 1998).

While this Court believes plaintiff should be awarded fees for the time spent on her case, including time spent on arguments that did not prevail, the total amount of hours requested is excessive. Since the Commissioner failed to recommend an amount of time she considers to be reasonable, the Court will use the amount of hours proportional to the case cited by the Commissioner as discussed above, 77.37 hours.

Finally, the Court looks at plaintiff's request for an additional \$513.97 for the time spent on her reply brief for the current matter. Plaintiff's attorney claims he spent an additional 2.7 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.

For the reasons discussed above, plaintiff's Motion for Attorney's Fees Under the Equal Access to Justice Act (**Doc. 37**) is **GRANTED**.

The Court awards attorney's fees in the amount of \$15,794.12 (fifteen thousand seven hundred and ninety-four dollars and twelve cents)(77.37 hours * \$190.36 + \$152 assistant time + 400 filing fee + \$513.97 additional EAJA response)

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