

701 F.Supp.2d 410
(Cite as: 701 F.Supp.2d 410)

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United States District Court,
E.D. New York.
Harold HARRIS, Plaintiff,
v.

Michael J. ASTRUE, Commissioner of So-
cial Security, Defendant.

Civil Action No. 08-3356.
March 31, 2010.

Background: Claimant brought action challenging decision of Commissioner of Social Security to deny his applications for **disability** insurance benefits (DIB) and supplemental security income (SSI). Following remand for further administrative proceedings, 2009 WL 3838257, claimant moved for attorney fees under the Equal Access to Justice Act (EAJA).

Holding: The District Court, Hurley, Senior District Judge, held that claimant's refusal of government's remand offer did not disentitle him to award of attorney fees.

Motion granted.

West Headnotes

[1] United States 393 ¶147(6)

393 United States
393IX Actions
393k147 Costs
393k147(6) k. Application; form, requisites, and time. Most Cited Cases

United States 393 ¶147(8.1)

393 United States
393IX Actions
393k147 Costs
393k147(8) Grounds

393k147(8.1) k. In general.
Most Cited Cases

To be entitled to statutory fees under the Equal Access to Justice Act (EAJA), a claimant must satisfy four criteria: (1) the claimant must be a prevailing party; (2) the Government's position cannot be substantially justified; (3) no special circumstances exist that make an award unjust; and (4) the fee application is timely submitted and supported by an itemized statement. 28 U.S.C.A. § 2412(d).

[2] United States 393 ¶147(4)

393 United States
393IX Actions
393k147 Costs
393k147(3) Items and Amount
393k147(4) k. Attorney fees.
Most Cited Cases

The reasonableness of attorney fees sought under the Equal Access to Justice Act (EAJA) is a factual inquiry left to the discretion of the district court. 28 U.S.C.A. § 2412(d).

[3] United States 393 ¶147(18)

393 United States
393IX Actions
393k147 Costs
393k147(11) Nature of Action or Proceeding
393k147(18) k. Social security. Most Cited Cases

Disability benefits claimant's rejection of the government's offer to remand to the Commissioner of Social Security for further administrative proceedings, rather than remand for calculation of benefits, did not disentitle him to award of attorney fees un-

701 F.Supp.2d 410
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der the Equal Access to Justice Act (EAJA) following the district court's remand for further administrative proceedings; although ultimately unsuccessful, claimant's argument for remand to calculate benefits was not without merit, government's offer of remand came after the action was commenced, months after Commissioner's answer was filed, after claimant's summary judgment papers had been prepared and sent to government counsel on an informal basis, and after claimant's counsel had expended more than 25 hours prosecuting the action, and hours spent by claimant's counsel after offer was made were not, for the most part, expended in opposing the government's motion for remand. 28 U.S.C.A. § 2412(d).

[4] United States 393 ↪147(18)

393 United States
393IX Actions
393k147 Costs
393k147(11) Nature of Action or Proceeding
393k147(18) k. Social security. Most Cited Cases

In addressing whether **disability** benefits claimant's refusal to accept government's offer of remand to Commissioner of Social Security constitutes a special circumstance that would make an award of attorney fees under the Equal Access to Justice Act (EAJA) unjust, the question is whether the claimant's refusal of the offer of remand was unreasonable. 28 U.S.C.A. § 2412(d).

[5] United States 393 ↪147(4)

393 United States
393IX Actions
393k147 Costs
393k147(3) Items and Amount

393k147(4) k. Attorney fees.
Most Cited Cases

Appropriate hourly rate for calculating attorney fees awarded under the Equal Access to Justice Act (EAJA) is \$125 as adjusted by the consumer price index (CPI-U) for the district in which the Court sits. 28 U.S.C.A. § 2412.

***411** Jeffrey **Delott**, Esq., Jericho, NY, for the Plaintiff.

Benton J. Campbell, United States Attorney, by Diane Leonardo Beckmann, Central Islip, NY, for the Defendant.

MEMORANDUM & ORDER

HURLEY, Senior District Judge:

Plaintiff, Harold Harris, ("Plaintiff") commenced this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of a final decision by the Commissioner of Social Security (the "Commissioner" or "Defendant") which denied his claim for **disability** benefits. Presently before the Court is Plaintiff's motions for attorneys fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. For the reasons discussed below, the motion is granted.

***412 Background**

Plaintiff applied for Social Security **Disability** and Supplemental Security Income benefits on February 1, 2006, which claim was denied on March 10, 2006. Plaintiff filed a timely request for a hearing by an administrative law judge ("ALJ") and an administrative hearing was held, after which the ALJ denied Plaintiff's claim. The ALJ found that Plaintiff was unable to perform his "past relevant work" but was not disabled because he had the residual functioning capacity ("RFC") to per-

701 F.Supp.2d 410
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form light work. Plaintiff's request to the Appeals Council to review the decision was denied, rendering the ALJ's decision the "final decision" of Defendant.

Plaintiff then commenced the instant action on August 18, 2008 seeking reversal and/or remand. On November 12, 2008, Defendant filed an answer asserting, inter alia, that the decision of the Commissioner was supported by substantial evidence in the record. By letter dated January 16, 2009, Defendant requested additional time to file motions while the parties discussed Defendant's offer to remand the matter. (Docket No. 5.) Thereafter, an agreement regarding remand of the matter not having been reached, Defendant filed its motion seeking reversal of the decision of the ALJ and a remand of the matter for further proceedings pursuant to the fourth sentence of 42 U.S.C. § 405(g). Plaintiff opposed the motion to the extent of contending that the matter should be remanded solely for the calculation of Plaintiff's benefits. By Memorandum & Order dated November 16, 2009, the Court granted the relief sought by Plaintiff to the extent it reversed the decision of the ALJ. The remand, however, was not solely for the purpose of determining benefits but rather pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings.

Plaintiff now seeks attorney's fees in the amount of \$6,836.27, calculated at the rate of \$178.96 for 38.2 hours, and costs in the amount of \$621.73, consisting of \$350.00 for filing fees, \$130.00 service costs and \$141.73 for electronic research fees. Defendant opposes the motion to the extent that Plaintiff seeks attorney's fees in excess of \$4,850.91, maintaining that no fees should be awarded after January 16, 2009 when Defendant's offer of remand

was refused and that the rates of compensation for work should be \$177.01 for 2008 and \$177.53 for 2009.^{FN1}

FN1. The Commissioner does not oppose Plaintiffs claim to \$621.73 in costs. (Def's Mem. in Opp. at 2 n. 1.)

Discussion

[1][2] The Equal Access to Justice Acts provides in pertinent part:

[A] court shall award to a prevailing party other than the United States fees and other expenses ... incurred by that party in any civil action ... including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust."

28 U.S.C. § 2412(d)(1)(A). To be entitled to statutory fees under § 2412(d) a claimant must satisfy four criteria: (1) the claimant must be a "prevailing party"; (2) the Government's position cannot be "substantially justified"; (3) no "special circumstances" exists that make an award "unjust"; and (4) the fee application is timely submitted and "supported by an itemized statement." *Kerin v. U.S. Postal Service*, 218 F.3d 185, 189 (2d Cir.2000). The reasonableness*413 of attorney's fees sought is a factual inquiry left to the discretion of the district court. *Ferguson v. Apfel*, 2000 WL 709018, at *2 (E.D.N.Y. Apr. 17, 2000) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

[3] Defendant does not dispute that Plaintiff has satisfied the first, second, and

701 F.Supp.2d 410
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fourth criteria. Rather, he argues that special circumstance warrant a reduction in the fees sought. According to Defendant, “Plaintiff refused to accept a remand unless EAJA fees were agreed upon prior to the entry of a judgment from the Court. Conditioning a remand upon the payment of fees was not reasonable. Ultimately, the Court granted the Commissioner's motion for remand, with no more favorable directives attached to the order than Plaintiff would have received had he accepted the Commissioner's offer.” (Def.'s Mem in Opp. at 4.)

[4] Defendant is correct that courts have in some circumstance refused to grant fees for time expended after refusing to accept an offer of remand. *See, e.g., McLaurin v. Apfel*, 95 F.Supp.2d 111, 116 (E.D.N.Y.2000); *Quinn v. Astrue*, 2008 WL 5234300, 2008 U.S. Dist. Lexis 101108 (N.D.N.Y. Dec. 15, 2008); *Beiro v. Astrue*, Civil Action No. 08-0304, slip op. at 5-10 (E.D.N.Y. Nov. 23 2009). In addressing this issue, the question is whether the litigant's refusal of the offer of remand was unreasonable. *See, e.g., McLaurin*, 95 F.Supp.2d at 115-17. The circumstance of this case do not warrant such a conclusion.

Here, the offer of remand came after the action was commenced, months after Defendant's answer was filed, after Plaintiff's summary judgment papers had been prepared and sent to defense counsel on an informal basis, and after counsel had expended more than 25 hours prosecuting this action. Under these circumstances, it was not, as Defendant claims without citation to authority, unreasonable for Plaintiff to condition a remand upon the payment of fees. Moreover, although ultimately unsuccessful, Plaintiff's argument for remand to calculate benefits was not without merit.

Finally, the Court notes that the hours spent after January 16, 2009 were not, for the most part, expended in opposing Defendant's motion for remand. In sum, the Court finds that Plaintiff's rejection of the offer to remand does not disentitle him to counsel fees after January 16, 2009.

Two other matters raised by Defendant need to be addressed albeit briefly, to wit the hourly rate for counsel fees and to whom the award should be paid.

[5] Defendant acknowledges that attorney's fees under 28 U.S.C. § 2412 are to be awarded at the rate of \$125 as adjusted by the consumer price index for the relevant community, i.e. the district in which the Court sits. (Def.'s Mem. at 6) Curiously, it opposes the rate sought by Plaintiff which is based on the consumer price index for all urban consumers (“CPI-U”) “N.Y.-Northern N.J.-Long Island, NY-MJ-CT”. Rather Defendant contends that the CPI-U “U.S.City Average” should be used resulting in rate of \$177.01 and \$177.53 for 2008 and 2009, respectively, as opposed to the \$178.96 sought by Plaintiff. The Court finds that the \$178.96 rate sought by Plaintiff is appropriate as it is based on the CPI-U for the district in which the Court sits.

Finally, Defendant contends that the award should be to Plaintiff, rather than counsel because Plaintiff has not assigned his fee award to counsel. (Def.'s Mem. at 9.) However, included in Plaintiff's reply papers is a copy of such an assignment. Accordingly, reimbursement should be made to Plaintiff's counsel.

***414 Conclusion**

Plaintiff's motion for attorney's fees and costs is granted for a total of \$7,458.00, with reimbursement to be paid to counsel

701 F.Supp.2d 410
(Cite as: 701 F.Supp.2d 410)

for Plaintiff.

SO ORDERED.

E.D.N.Y.,2010.
Harris v. Astrue
701 F.Supp.2d 410

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