

Slip Copy, 2012 WL 4479006 (S.D.N.Y.)
(Cite as: 2012 WL 4479006 (S.D.N.Y.))

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United States District Court,
S.D. New York.

David **BORUS**, Plaintiff,

v.

Michael **ASTRUE**, Commissioner of Social
Security, Defendant.

No. 09–CV–4723(PAC)(RLE).
Sept. 28, 2012.

ORDER

Honorable PAUL A. CROTTY, District
Judge.

*1 Jeffrey **Delott** (“**Delott**”), counsel for Plaintiff David **Borus** (“**Plaintiff**”), moves for attorney's fees pursuant to (1) the Equal Access to Justice Act (the “**EAJA**”), 28 U.S.C. § 2412 (“**Section 2412**”) and (2) the Social Security Act (the “**SSA**”), 42 U.S.C. § 406(b) (“**Section 406(b)**”). After this Court remanded the case for a calculation of benefits, Defendant Commissioner of Social Security (the “**Commissioner**”) issued an award of benefits to Plaintiff. Plaintiff now requests an award of \$30,875 in attorney's fees under the SSA (25% of past due benefits) and \$10,000 in fees under the EAJA for services rendered by counsel in successfully representing Plaintiff before this Court. For the reasons set forth below, the motions are GRANTED as modified.

BACKGROUND

On April 13, 2005, Plaintiff filed an application for disability insurance benefits with the Social Security Administration. **Borus v. Astrue**, No. 09 Civ. 4723(PAC)(RLE),

2011 WL 2574395, at *1 (S.D.N.Y. June 24, 2011). After the Commissioner denied Plaintiff's application, Plaintiff requested a hearing before an administrative law judge (“**ALJ**”). *Id.* The hearing was held on December 11, 2006. On January 1, 2007, the ALJ issued an opinion, finding that Plaintiff was not entitled to disability benefits under the Act. *Id.* The ALJ's decision became final when the Appeals Council denied Plaintiff's request for review on March 16, 2009. *Id.*

On March 23, 2009, Plaintiff's attorney, Amit D. Vagal, Esq., notified Plaintiff that he “would no longer represent him, and urged him to find new counsel.” Pl.'s Mem. of Law in Supp. of Att'y Fees Pursuant to 28 U.S.C. § 2412 & 42 U.S.C. § 406(b) at 2, Dkt. No. 33 (“**Pl.'s Mem.**”). Plaintiff, acting *pro se*, commenced this action on May 20, 2009, seeking judicial review of the Commissioner's decision denying his claim for disability benefits. Compl., Dkt. No. 2. Plaintiff proceeded without an attorney for roughly eight months, (Pl.'s Mem. at 2), until December 29, 2009, when Jeffrey **Delott** filed his notice of appearance. *See* Not. Appear., Dkt. No. 10. On June 24, 2011, this Court adopted the Magistrate Judge's Report and Recommendation granting Plaintiff's motion for judgment on the pleadings and remanding the case to the Social Security Administration solely for the calculation of benefits. **Borus**, 2011 WL 2574395, at *1. On July 13, 2011, Plaintiff moved for attorney fees under the EAJA and the SSA. *See* Mot. for Att'y Fees, Dkt. No. 23. On March 6, 2012, the Court terminated the motion as premature pending the Commissioner issuing a Notice of Award (“**NOA**”). Order, Dkt.

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No. 28. The Commissioner later issued the NOA, stating “that out of the past due benefits of \$123,500, it was withholding 25%,” which totaled \$30,875. Pl.’s Mem. at 3. On April 5, 2012, Plaintiff resubmitted his motion for attorney fees, pursuant to the EAJA and Section 406(b). *See* Mot. for Att’y Fees, Dkt. No. 32.

DISCUSSION

*2 Fees may be awarded under both Section 2412 of the EAJA and Section 406(b) of the SSA, but the attorney must give the smaller fee to the client. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002). Here, Plaintiff claims \$10,000 in attorney’s fees under Section 2412 of the EAJA. Pl.’s Reply Mem. of Law in Further Supp. of Mot. for Att’y Fees Pursuant to 28 U.S.C. § 2412 & 42 U.S.C. § 406(b) at 5, Dkt. No. 35 (“Pl.’s Reply”). **Delott** also seeks \$30,875 in fees under Section 406(b) of the SSA, representing twenty-five percent of the past-due benefits awarded to Plaintiff. Pl.’s Mem. at 4.

A. Attorney’s Fees Under Section 2412

The EAJA provides in pertinent part that “a court shall award to a prevailing party ... fees and other expenses ... 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). Section 2412(d) requires a party seeking an award under the EAJA to file an application for fees within thirty days after a final judgment is issued, (1) showing that the plaintiff is a prevailing party, (2) including an itemized statement of fees and expenses setting forth the amount sought, time spent, and payment rate, and (3) alleging that the position of the Commissioner was not substantially justified. *See* 28 U.S.C. § 2412(d)(1)(B); *Comm’r, I.N.S. v.*

Jean, 496 U.S. 154, 158 (1990). Furthermore, “[o]nce a party has demonstrated that it is a prevailing party under the EAJA, the burden shifts to the government to demonstrate that its litigation position was substantially justified.” *Commodity Futures Trading Comm’n v. Dunn*, 169 F.3d 785, 786 (2d Cir.1999) (internal quotation marks omitted).

Plaintiff’s application satisfies all of these requirements. It is uncontested that Plaintiff filed his fee application within thirty days of final judgment. Additionally, the Commissioner concedes that Plaintiff was the prevailing party, Def.’s Opp’n to Pl.’s Mot. for Att’y Fees Under 28 U.S.C. § 2412(d) & 42 U.S.C. § 406(b) at 2, Dkt. No. 36 (“Def.’s Opp’n”), because he received a remand for the calculation of benefits. *See McKay v. Barnhart*, 327 F.Supp.2d 263, 266–67 (S.D.N.Y.2004) (“a remand under sentence four of 42 U.S.C. § 405(g)^{FN1} is a final judgment that qualifies a plaintiff for prevailing party status”) (citing *Schalala v. Schaefer*, 509 U.S. 292, 302 (1993)). Further, **Delott** has submitted an affirmation setting forth the amount sought, time spent, and payment rate, *see Delott Affirm.* at ¶¶ 10–11, Dkt. No. 31, as well as itemized records for his fees, *see Exhibits A, C, and D.*^{FN2} Finally, the Commissioner concedes that the initial agency determination was not substantially justified, Def.’s Opp’n at 2, and there exist no special circumstances that would render an award of attorney’s fees unjust.

FN1. The relevant sentence provides that “[t]he court shall have power to enter ... a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security,

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with or without remanding the cause for a rehearing.” Here, this Court remanded the case to the Social Security Administration solely for the calculation of benefits. *See supra* p. 2.

FN2. Plaintiff's affirmation includes an unlabeled and unpaginated appendix. This Court will refer to the attachments therein as “Exhibit A,” “Exhibit B,” “Exhibit C,” and “Exhibit D,” in the order in which they appear.

The Commissioner argues that the time billed by **Delott** is unreasonably excessive and that any fee award should be reduced accordingly. Def.'s Opp'n at 2. Plaintiff originally requested EAJA fees in the amount of \$14,657.08. **Delott** Affirm. at ¶ 11. He reached that number by multiplying the 78.7 hours that he claims to have worked on the case by the rate of \$186.24.^{FN3} *Id.* However, in his reply memorandum, Plaintiff states the base amount sought (before the concessionary reductions specified therein) as \$11,416.51. Pl.'s Reply at 5. The latter figure will be viewed by this Court as a concession, superseding the original claim.^{FN4}

FN3. Plaintiff and Defendant disagree as to the proper cost of living adjustment to be applied to Delott's billing rate. *Compare Id.* at ¶ 8 with Def.'s Opp'n at 7–8. Because the Court declines to deviate from the statutory billing rate, *see infra*, it is not necessary to adjudicate this conflict.

FN4. Plaintiff, in his affirmation, additionally requested \$286.89 for

electronic research fees incurred as well as \$19.92 for postage costs. **Delott** Affirm. at ¶¶ 16–17. However, in his reply memorandum, Plaintiff omits these amounts from the calculation toward the total amount sought. *See* Pl.'s Reply at 5. This amounts to a concession, and these amounts are therefore not included in the final award.

*3 Plaintiff agreed to further reduce the amount of hours for which he seeks compensation, in response to the Commissioner's allegations that: (1) Plaintiff's use of 12-minute-interval billing, as well as his tendency to lump together time spent on disparate tasks, resulted in minor inaccuracies in certain instances; (2) Plaintiff's calculation of his hourly rate was slightly imprecise; and (3) Plaintiff cannot seek compensation under the EAJA for time spent petitioning for fees under Section 406(b). *Id.* Plaintiff's final request, after all the concessionary reductions, is for \$10,000 in EAJA fees. *Id.* We conclude that to the extent that there is merit to the Commissioner's aforementioned allegations, Plaintiff's concessions adequately correct those inaccuracies.

Attorneys are not entitled to fees under the EAJA for work that is unreasonable, redundant, excessive, or unnecessary. *See Torres v. Barnhart*, No. 02 Civ. 9209(AJP), 2007 WL 1810238, at *14 (S.D.N.Y. June 25, 2007) (noting that hours that were not “‘reasonably expended’ “ or were “ ‘excessive, redundant, or otherwise unnecessary’ “ should be excluded (quoting *Hensley v. Eckhardt*, 461 U.S. 424, 433–34 (1983))). District courts enjoy broad discretion in ruling on fee awards under the EAJA, and need not scrutinize the time spent on each itemized

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task for which fees are requested. *See Aston v. Sec'y of Health & Human Servs.*, 808 F.2d 9, 11 (2d Cir.1986). Nevertheless, “the Court has a duty to discount any [e]xorbitant, unfounded, or procedurally defective fee applications’ and ensure the final award is reasonable.” *Torres*, 2007 WL 1810238, at *14 (quoting *Jean*, 496 U.S. at 163).

In the present case, after dividing the total amount of fees for which Plaintiff seeks compensation, which is \$10,000, by the stated hourly rate of \$186.24, we conclude that Plaintiff seeks compensation for approximately 54 hours. We find that the number of billed hours is reasonable and consistent with analogous Second Circuit cases. Although some courts in this circuit find that twenty to forty hours is a reasonable amount of time to spend on routine Social Security cases, fees have regularly been awarded far in excess of this amount. *See id.* at *15 (“The courts in this district have not hesitated to award attorney’s fees well in excess of the routine twenty to forty hours where the facts of the specific case warrant such an award.” (alterations omitted) (quoting *Hinton v. Sullivan*, No. 84 Civ. 9276(CES), 1991 WL 123960, at *5 (S.D.N.Y. July 2, 1991))); *see also Aston*, 808 F.2d at 11–12 (affirming award of attorney’s fees for 200 hours of work without specific justification and noting that district courts have “broad discretion in this area”). “There are ... special factors ... which justify granting an award for a greater than average number of hours.” *DiGennaro v. Bowen*, 666 F.Supp. 426, 433 (E.D.N.Y.1987). In *DiGennaro*, as in the present case, counsel was brought in at the district court litigation stage, whereupon there were numerous documents and transcripts to be reviewed. *Id.* The court consid-

ered this to be a “special factor” justifying an award of attorney’s fees for a greater than average number of hours. *Id.*; *see also Jackson v. Heckler*, 629 F.Supp. 398, 406 (S.D.N.Y.1986) (awarding EAJA fees based on more than 65 hours of work for a Social Security disability claim, where counsel did not represent the plaintiff at the administrative level and was unfamiliar with the case until the plaintiff sought review by a federal district court). Moreover, Plaintiff was forced to review an extremely voluminous administrative record, totaling nearly 700 pages. *See Delott Affirm.* at ¶ 4; *Colegrove v. Barnhart*, 435 F.Supp.2d 218, 220 (W.D.N.Y.2006) (citing the fact that counsel in a social security disability case had to review an 1,100–page administrative record in justifying over 90 hours billed for EAJA fees).

*4 Additionally, the fact that **Delott**, an expert in Social Security disability litigation, agreed to represent Plaintiff after the latter could not find anyone to take the case for almost nine months justifies an award in the amount that Plaintiff seeks. *See Isaacs v. Astrue*, No. 07 Civ. 257A, 2009 WL 1748706, at *3 (W.D.N.Y. June 19, 2009) (noting the specialized expertise of Plaintiff’s counsel in a social security disability case and the fact that counsel regularly takes such cases while many attorneys decline to do so as justification for an award of \$12,676.60 in EAJA fees).

Moreover, “[t]he extent of an attorney’s success for a client is ‘a crucial factor in determining the proper amount of an award of attorney’s fees.’” *Rivera ex rel. DeJesus v. Comm’r of Soc. Sec.*, No. 05 Civ. 4465(NG), 2009 WL 1924772, at *2 (E.D.N.Y. July 2, 2009) (quoting *Hensley*,

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461 U.S. at 439). In the present case, as in Rivera, the Plaintiff's success at securing a reversal of the ALJ's decision is a factor to consider in determining appropriate attorney's fees.

Considering all of these factors, Plaintiff's request for a slight departure from the average of twenty to forty billed hours is warranted. Indeed, the Commissioner contends that "fair compensation in EAJA fees for this case would be approximately forty-five hours," implicitly conceding that in the present circumstances, Plaintiff was justified in billing for more than the typical 20–40 hours. *See* Def. Opp'n at 11.

The Court finds, however, that the requested hourly rate of \$186.24 is excessive. Section 2412(d)(2)(A) limits attorney's fees to \$125 per hour unless a court determines that increases to the cost of living or special circumstances justify a higher fee. *See* 28 USC § 2412(d)(2)(A). Such special circumstances are absent here. The Court therefore awards Plaintiff \$6,750 in attorney's fees pursuant to the EAJA, calculated by multiplying the 54 hours for which Dellott requests compensation by the statutory rate of \$125 per hour.

B. Attorneys' Fees Under Section 406(b)

Separate from the claim for fees under § 2412 of the EAJA, **Delott** seeks fees under § 406(b) of the SSA, in the amount of \$30,875, representing 25% of the past-due benefits that Plaintiff received. **Delott** Affirm. ¶ 18. In order to obtain attorney's fees under Section 406(b), three elements must be satisfied: (1) there must be a judgment that is favorable to the claimant; (2) the fee must be awarded as part of the court's judgment; and (3) the fee must not exceed twenty-five percent of the total amount of past-

due benefits rewarded to the claimant. *See* 42 U.S.C. § 406(b)(1)(A).^{FN5} This fee is payable out of the plaintiff's past-due benefits that have been awarded by the court. *See Gisbrecht*, 535 U.S. at 795.

FN5. Section 406(b) provides: "Whenever a court renders a judgment favorable to a claimant ... who was represented before the court by an attorney, the court may ... allow ... a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment " 42 U.S.C. § 406(b)(1)(A).

Here, Plaintiff received a fully favorable decision on remand. Nothing in the record suggests any fraud or overreaching in the execution of the retainer agreement, and there is no evidence that counsel caused any unreasonable delay in the proceedings in order to drive up the fee amount. Furthermore, the Court finds that **Delott's** motion for an attorney's fee of 25% of the past-due benefits awarded to Plaintiff, consistent with his contingency fee arrangement with Plaintiff, *see* Exhibit B, is a reasonable award. This case, as discussed above, required **Delott** to spend a significant amount of time reviewing a lengthy administrative record. Additionally, counsel has significant experience in the area of Social Security law. *See Delott* Affirm. ¶ 5. Finally, litigation of such cases entails a high level of risk, as evidenced by Plaintiff's difficulty in securing a suitable attorney. *See supra* p. 2. Based on these factors, the amount sought is not unreasonable. *See Wells v. Sullivan*, 907 F.2d 367, 372 (2d Cir.1990); *McGuire v. Sulli-*

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van, 873 F.2d 974, 981 (7th Cir.1989); *Rodriguez v. Bowen*, 865 F.2d 739, 746 (6th Cir.1989).

CONCLUSION

*5 For the reasons discussed above, Plaintiff's motion for attorney's fees is GRANTED as modified. The Clerk of Court is directed to enter a supplemental judgment in favor of Plaintiff and attorney's fees are awarded in the amounts of \$6,750, pursuant to Section 2412 of the EAJA, and \$30,875, pursuant to Section 406(b) of the SSA, with the smaller of the two awards to be paid to Plaintiff.

SO ORDERED.

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