

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RAYMOND L. BEGGS, )  
Plaintiff, )  
 )  
v. ) Civil Action No. 89-1604  
 )  
LOUIS W. SULLIVAN, M.D., )  
SECRETARY OF HEALTH AND )  
HUMAN SERVICES, )  
Defendant. )

**MEMORANDUM AND ORDER**

Plaintiff, Raymond Beggs, previously was before this court on appeal from the decision of the Secretary of Health and Human Services ("Secretary") denying his request for disability benefits under Title II of the Social Security Act. 42 U.S.C. § 405(g). Prior to filing a motion for summary judgment, the Secretary moved to remand the case for a medical advisor to assess plaintiff's psychological functional limitations. Sometime thereafter, the Secretary awarded plaintiff benefits. Before the court is David Harr's ("fee applicant") (plaintiff's counsel) petition for attorney's fees.

A.

The Social Security Act provides for the recovery of attorney's fees for services performed in connection with Title II claims. 42 U.S.C. § 406. Section 406(b) provides that, where a

federal district court renders a judgment favorable to a claimant who is represented by an attorney, the court may authorize a reasonable fee, not to exceed twenty-five per cent "of the total of the past-due benefits to which the claimant is entitled by reason of such judgment." Id. § 406(b)(1).<sup>1</sup> This section further provides that the Secretary may withhold "the amount of such fee for payment [directly] to such attorney out of, and not in addition to, the amount of such past-due benefits." Id. § 406(b)(1). See generally Guadamuz v. Heckler, 662 F. Supp. 1060 (N.D. Cal. 1986). That is, the fee is taken directly from the plaintiff's award.

Section 406 was enacted with a dual purpose. One purpose is to protect claimants from exorbitant attorney's fees, especially those resulting from contingent fee arrangements. Detson v. Schweiker, 788 F.2d 372, 376 (6th Cir. 1986). This goal is accomplished under section 406 primarily by having the Secretary or court determine and authorize a "reasonable" fee, and by prohibiting attorneys from charging any more than the authorized fee. See Reid v. Heckler, 735 F.2d 757, 760-61 (3d Cir. 1984). The other goal of section 406 is to encourage effective legal representation of

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1. Section 406(b) has also been applied to requests for attorney's fees where the court did not itself reverse the Secretary's denial of benefits but where, after filing in this court, the Secretary initiated or consented to a remand prior to determination of the merits by the court. See generally Jack v. Bowen, 671 F. Supp. 1211 (S.D. Ind. 1987); Petrella v. Secretary of Health and Human Services, 654 F. Supp. 174 (W.D. Pa. 1987).

claimants by assuring lawyers they will receive reasonable fees directly through certification by the Secretary." Dawson v. Finch, 425 F.2d 1192, 1195 (5th Cir. 1970), cert. denied, 400 U.S. 830 (1970). Accord Wheeler v. Heckler, 787 F.2d 101, 107 (3d Cir. 1986).

The court scrutinizes applications such as these with particular care because the interests of the attorney and his or her client "are inherently in conflict" in social security fee petition cases. See Lewis v. Secretary of Health & Human Services, 707 F.2d 246, 251 (3d Cir. 1983). As stated in Taylor v. Heckler, 608 F. Supp. 1255 (D. N.J. 1985), "such conflict peaks at the point at which the attorney requests a fee to be deducted, dollar-for-dollar, from the award of back benefits to which the claimant is entitled. Id. at 1258. This is the reason this court requires a fee plaintiff notify the claimant of the petition for fees. See also Bailey v. Heckler, 621 F. Supp. 521, 523 (W.D. Pa. 1985). In most instances the plaintiff and claimant have entered a contingent fee agreement, or contract, but this is a situation where the court has a statutory obligation to exercise its discretion despite the terms of the agreement.

B.

In certain situations, an attorney for a prevailing social security plaintiff may seek fees pursuant to the Equal Access to Justice Act. 28 U.S.C. § 2412 (1991 West Supp.) ("EAJA"). The EAJA provides that a court shall award to a prevailing party fees and other expenses incurred by that party in a proceeding against the United States "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." Id. § 2412(d)(1)(A).

In Pierce v. Underwood, 487 U.S. 552 (1988), the Supreme Court stated that "substantially justified" means

"justified in substance or in the main"--that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the [Third] Circuit and the vast majority of other Courts of Appeals that have addressed this issue. See . . . Citizens Council of Delaware County v. Brinegar, 741 F.2d 584, 593 (3d Cir. 1984)[.] To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness.

Id. at 565-66 (citations omitted). See also Commissioner, I.N.S. v. Jean, 110 S.Ct. 2316, 2319 n. 6 (1990). Any fee application must be submitted to the court within thirty days of final judgment in the action and be supported by an itemized statement. 42 U.S.C. § 2412(d)(1)(B). Fees under the EAJA are not taken as a portion of the plaintiff's award, as with section 406 fees, but are paid directly by the government. 28 U.S.C. § 2412(c).

It is settled law that the EAJA applies to judicial review of actions brought under the Social Security Act, 42 U.S.C. § 405(g). See Tressler v. Heckler, 748 F.2d 146, 148 (3d Cir. 1984) (citing authorities). The EAJA pays attorney's fees for time spent recovering attorneys fees, see Commissioner, I.N.S. v. Jean, 110 S. Ct. 2316, and work done at the administrative level after the cause of action was remanded to the Secretary. See Sullivan v. Hudson, 490 U.S. 877 (1989).<sup>2</sup>

Although an attorney has no statutory obligation to pursue fees first from the Secretary under the EAJA rather than from the claimant under section 406, in Taylor v. Heckler, the district court strongly recommended that that course be followed whenever appropriate. 608 F. Supp. at 1260. Because the EAJA allows counsel to be paid, without depriving claimant of monies owing them, EAJA applications mitigate the direct conflict over fees that is otherwise inherent in section 406 fee petitions. See also Brinker v. Heckler, slip op. (E.D. Pa. 1985) (held: counsel should seek fees first under EAJA).

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2. Merely obtaining a remand is not sufficient to make plaintiff a prevailing party under the EAJA. E.g., Brown v. Secretary, 74 F.2d 878 (3d Cir. 1984). Plaintiff must ultimately secure an award of benefits and as one court has put it, to be a prevailing party the claimant "must obtain those benefits which he sought on the original appeal to the district court." Swedberg v. Bowen, 804 F.2d 432, 434 (8th Cir. 1986). See also, Sherman v. Bowen, 647 F. Supp. 700 (D. Me. 1986).

In Petrella v. Secretary of Health & Human Services, 654 F. Supp. 174 (M.D. Pa. 1987), the court noted Taylor with approval. In that case, however, the fee applicant had petitioned for fees under both statutory provisions. Because there is a statutory limitation on the hourly rate which may be recovered under the EAJA, the Petrella court granted attorney's fees under both statutory provisions so as to reimburse the plaintiff for his full normal fee. In Wells v. Bowen, 855 F.2d 37, 42 (2d Cir. 1988), the Court of Appeals for the Second Circuit also approved of the dual application procedure.

As a general matter, the decision to proceed under section 406, rather than the EAJA, does not justify a decision refusing to award fee at all, as there is no requirement that attorneys seek EAJA fees first. However, in our discretionary review of the fee petition, we will consider the fact that counsel has chosen to diminish a claimant's past-due benefits by up to twenty-five per cent where much of that amount could have been recovered from the government directly.

This has been an issue of concern to this court for some time. This case is an appropriate one in which to raise this concern for several reasons. Initially, we note that the Secretary's own request for a remand for its further review is tantamount to an admission that its previous decision was not substantially justified.

This presumption is especially true where, as here, the Secretary's request for a remand was not made in light of recent new pronouncement of the law by the courts on newly promulgated regulations. The Secretary requested the remand so as to allow a medical advisor to assess plaintiff's psychological functional limitations, an assessment which clearly could have been made during the initial administrative proceedings. Thus, it appears, without our finding, that the Secretary's position was not substantially justified, making this case one in which plaintiff had a great likelihood of succeeding in attaining fees under the EAJA.

Further, the plaintiff here has handled approximately 165 social security disability cases since 1979, including six appeals to the Court of Appeals for the Third Circuit. Plaintiff is well aware that fees are recoverable under the EAJA as well as section 406. See Coup v. Heckler, 834 F.2d 313 (3d Cir. 1987) (E. David Harr, as attorney for plaintiff recovered award for attorney's fees under EAJA).

Thus, in exercise of our discretion in reviewing this petition, we will follow the lead of the courts in Losco v. Bowen, 638 F. Supp. (S.D. N.Y. 1986) and Garber v. Heckler, 607 F. Supp. 574, 576 (E.D. N.Y. 1985), and limit plaintiff's recovery to that which could have been recovered under the EAJA. We do this to

encourage the Social Security bar to more actively seek fees under the EAJA.

C.

Petitioner affidavit shows that he expended 21 hours in litigation before this court which involved preparation of the complaint, contacts with the plaintiff, writing and filing a motion for summary judgment, research and writing the plaintiff's brief in support of motion for summary judgment, and research and writing attorney's fee petition and brief. The one hour spent compiling time records and drafting a petition for payment of fees is not recoverable under section 406. See Bailey v. Heckler, 621 F. Supp. 521 (W.D. Pa. 1985).

Petitioner also avers that his customary contingent hourly rate is \$250.00 for handling social security disability cases.<sup>3</sup> In Matthews v. Secretary of Health & Human Services, Civ. No. 88-1738 (W.D. Pa. 1991), Judge Cohill, who is also assigned to this case, determined that \$98.12 per hour is recoverable under the EAJA.

Thus, we conclude that petitioner spent twenty hours, compensable at \$98.12 per hour, for a fee award of \$1,962.40.

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3. This court generally has found a reasonable rate not to exceed \$125.00 per hour.

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ORDER

AND NOW, this day of , 1991, upon  
consideration of petitioner's request for attorney fees pursuant to  
42 U.S.C. § 406, it is hereby approved in the amount of \$1,962.40.  
The Secretary of Health and Human Services is hereby ordered to  
release that amount to him in a timely fashion.

\_\_\_\_\_  
United States Magistrate

DATED: May 8, 1991

cc: Albert W. Schollaert, Esquire  
Assistant United States Attorney

E. David Harr, Esquire  
203 S. Main Street  
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