

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>JOHN B. HOWARD,</b> <b>Plaintiff</b>	:	<b>CIVIL ACTION</b>
	:	
v.	:	<b>NO. 04-5286</b>
	:	
<b>COMMISSIONER of SOCIAL SECURITY,</b> <b>Defendant</b>	:	
	:	

**MEMORANDUM**

**STENGEL, J.**

**February 10, 2006**

Plaintiff John B. Howard (“Howard”) brings this motion for attorneys’ fees pursuant to the Equal Access to Justice Act (“EAJA”) after successfully challenging defendant Commissioner of Social Security Administration’s denial of his claim for supplemental security income. The Commissioner moves this Court to deny the motion arguing: (1) Howard’s motion is untimely; (2) the Commissioner was substantially justified in her position; and (3) that the hours Howard’s counsel claims to have spent should be reduced.

**I. BACKGROUND**

On November 17, 2005, Magistrate Judge Thomas Rueter filed a Report and Recommendation recommending that this Court grant Howard’s motion for summary judgment and remand the case to the Commissioner of Social Security Administration for further proceedings. On December 15, 2005, this Court adopted the Report and

Recommendation. On December 23, 2005, Howard filed the present petition for attorneys' fees.

According to the Commissioner, Howard's petition is untimely because the remand order does not become final and non-appealable until the commissioner's 60 day appeal period expires on February 13, 2006. While this is true in terms of when the 30 day statute of limitations begins to run against the petitioner,<sup>1</sup> a remand pursuant to sentence four of § 405(g), as in this case, is considered a final judgment for purposes of an EAJA petition for attorneys' fees. Sec. of Health and Human Serv. v. Schaefer, 509 U.S. 292, 300-01 (1993). In this case, given that the Commissioner failed to raise any objections to the Report and Recommendation and is therefore unlikely to appeal an order adopting that Report, I will treat this Court's December 15, 2005 Order as a final judgment and address the merits of Howard's petition for attorneys' fees.

## **II. STANDARD of REVIEW**

In an appeal from the denial of social security benefits, a prevailing plaintiff is entitled to attorneys' fees under the EAJA "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). The burden of proving substantial justification rests with the government. Washington v. Heckler, 756 F.2d 959, 960 (3d Cir. 1986). In order

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<sup>1</sup>"Final judgment' for purposes of 28 U.S.C. § 2412(d)(1)(B) means a judgment rendered by a court that terminates the civil action for which EAJA fees may be received. The 30-day EAJA clock begins to run after the time to appeal that 'final judgment' has expired." Melkonyan v. Sullivan, 501 U.S. 89, 96 (1991).

to meet its burden, “the government must show: (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory it propounds; and (3) a reasonable connection between the facts alleged and the legal theory advanced.” Morgan v. Perry, 142 F.3d 670, 684 (3d Cir. 1998) (citing Hanover Potato Products, Inc. v. Shalala, 989 F.2d 123, 128 (3d Cir. 1993)).

### **III. DISCUSSION**

In this case, Howard raised three arguments in support of his motion. First, Howard alleges that the ALJ erred by finding that he could perform a limited range of medium work. Second Howard contends the ALJ erred by finding that Howard could perform his past relevant work as a sign-maker; and third that Howard’s work as a sign-maker did not rise to the level of substantial gainful activity. By adopting Magistrate Judge Rueter’s Report and Recommendation, this Court ruled in favor of the Commissioner on the first and third arguments raised by Howard and remanded the case to clarify the record on the second issue. The issue raised by this motion is whether the Commissioner was substantially justified in defending her second argument.

#### **A. Was the Commissioner Substantially Justified In Defending the ALJ’s Finding that Howard Could Perform His Past Relevant Work as a Sign-Maker?**

In order to determine whether a claimant is disabled, an ALJ must follow a five-step sequential evaluation as set forth in 20 C.F.R. § 404.1520.

In step one, the Commissioner must determine whether the claimant is currently engaging in substantial gainful

activity. 20 C.F.R. § 1520(a). If a claimant is found to be engaged in substantial activity, the disability claim will be denied. Bowen v. Yuckert, 482 U.S. 137, 140, 107 S. Ct. 2287, 2290-91, 96 L. Ed. 2d 119 (1987). In step two, the Commissioner must determine whether the claimant is suffering from a severe impairment. 20 C.F.R. § 404.1520(c). If the claimant fails to show that her impairments are “severe,” she is ineligible for disability benefits.

In step three, the Commissioner compares the medical evidence of the claimant’s impairment to a list of impairments presumed severe enough to preclude any gainful work. 20 C.F.R. § 404.1520(d). If a claimant does not suffer from a listed impairment or its equivalent, the analysis proceeds to steps four and five. Step four requires the ALJ to consider whether the claimant retains the residual functional capacity to perform her past relevant work. 20 C.F.R. § 404.1520(d). The claimant bears the burden of demonstrating an inability to return to her past relevant work. Adorno v. Shalala, 40 F.3d 43, 46 (3d Cir. 1994).

If the claimant is unable to resume her former occupation, the evaluation moves to the final step. At this stage, the burden of production shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability. 20 C.F.R. § 404.1520(f). The ALJ must show there are other jobs existing in significant numbers in the national economy which the claimant can perform, consistent with her medical impairments, age, education, past work experience, and residual functional capacity. The ALJ must analyze the cumulative effect of all the claimant’s impairments in determining whether she is capable of performing work and is not disabled.

Burnett v. Comm’r of Soc. Sec. Admin., 220 F.3d 112, 118-19 (3d Cir. 2000)

(citing Plummer, 186 F.3d at 428).

The regulations governing the ALJ’s decision at step four provide that an ALJ may decide whether a claimant retains the ability to do past relevant work based on medical

facts, other relevant evidence and the physical and mental demands of the work a claimant has done in the past. 20 C.F.R. § 416.920(e).<sup>2</sup> If a claimant can still do the kind of work he did in the past, the ALJ will find the claimant not disabled. Id.

At the ALJ hearing, a vocational expert (“VE”) testified about Howard’s ability to return to his previous job as a sign-maker. Originally the VE stated that Howard could return to his job, but then after the ALJ posed a hypothetical question regarding whether Howard could return to his job according to how Howard himself described his duties, the VE recanted his previous testimony and stated that Howard would not be able to perform his job. (Tr. 114). The ALJ ruled that Howard could return to his previous job without mentioning the VE’s changed testimony. The case was remanded to clarify that inconsistency in the record.

Although it is well-settled that an ALJ should attempt to explain or resolve inconsistencies between a VE’s testimony and the Dictionary of Occupational Titles (“DOT”) before relying on the VE testimony, there is no set requirement for the ALJ to

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<sup>2</sup> In step four, the ALJ must determine whether a claimant’s residual functional capacity enables her to perform her past relevant work. This step involves three substeps: (1) the ALJ must make specific findings of fact as to the claimant’s residual functional capacity; (2) the ALJ must make findings of the physical and mental demands of the claimant’s past relevant work; and (3) the ALJ must compare the residual functional capacity to the past relevant work to determine whether claimant has the level of capability needed to perform the past relevant work. See 20 C.F.R. § 404.1561; S.S.R. 82-62; Winfrey v. Chater, 92 F.3d 1017, 1023 (10th Cir. 1996). Both residual functional capacity and past relevant work may be classified as either “sedentary,” “light,” “medium,” “heavy,” or “very heavy.” Burnett, 220 F.3d at 120 (citing Adorno v. Shalala, 40 F.3d 43, 47 (3d Cir.1994); 20 C.F.R. § 404.1567).

explain why every part of a VE's testimony is, or is not, compelling. See Burns v. Barnhart, 312 F.3d 113, 127 (3d Cir. 2002); Boone v. Barnhart, 353 F.3d 203, 208-09 (3d Cir. 2003). The facts in Howard's appeal posed a unique issue regarding what evidence the ALJ's opinion should have addressed. Although the Court has ruled that the apparent inconsistency in the VE's testimony and the ALJ's final opinion needed to be resolved, the distinct issue in this petition for attorneys' fees is whether the Commissioner was substantially justified in arguing that the ALJ's decision that Howard could return to his previous job should be upheld.

In this case, the Commissioner had a reasonable basis in fact in that the ALJ found Howard capable of performing a limited range of medium work, and that his work duties did not necessarily exceed that range. The Commissioner does not go against established legal precedent in arguing that the ALJ was justified in finding the plaintiff performed his previous sign-maker job at a limited range of the medium exertional level, and thus a vocational expert was unnecessary as testimony about the exertional level of a sign-maker's job generally was not at issue. Finally, the Commissioner had a reasonable connection between the facts alleged and the legal theory advanced to argue that the ALJ was justified in concluding Howard's past work as a sign-maker did not require him to perform activities inconsistent with his residual functional capacity. I therefore find that the Commissioner was substantially justified in arguing that the ALJ's determination that Howard could return to his previous job should be upheld.

#### **IV. CONCLUSION**

Based upon my finding that the Commissioner had a reasonable basis in truth for the facts she alleged, a reasonable basis in law for the theory she propounded, and a reasonable connection between the facts alleged and the legal theory advanced, I conclude that the Commissioner was substantially justified in arguing the ALJ's determination should be upheld. An appropriate order denying Howard's petition for attorneys' fees follows.

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<b>v.</b>	:	<b>NO. 04-5286</b>
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<b>COMMISSIONER of SOCIAL</b>	:	
<b>SECURITY,</b>	:	
<b>Defendant</b>	:	

**ORDER**

**AND NOW**, this 10th day of February, 2006, upon consideration of the plaintiff's Motion for Attorneys' Fees (Docket # 16), it is hereby **ORDERED** that the Motion is **DENIED**.

BY THE COURT:

s/ Lawrence F. Stengel  
LAWRENCE F. STENGEL, J.