

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

EDWARD S. GOLAS

CIVIL ACTION

v.

JO ANNE B. BARNHART,<sup>1</sup>  
COMMISSIONER OF SOCIAL SECURITY :

NO. 01-3561

MEMORANDUM AND ORDER

McLaughlin, J.

April   /  , 2003

Before the Court is a Petition for Attorney's Fees Pursuant to Equal Access to Justice Act and Costs of Litigation, filed by counsel for the plaintiff in this appeal of the decision of the Commissioner of Social Security denying the plaintiff's claim for disability insurance benefits. On November 12, 2002, the Court denied the Commissioner's motion for summary judgment and granted, in part, the plaintiff's motion for summary judgment.

The defendant opposes the plaintiff's petition on the grounds that the Commissioner was substantially justified in her position and, alternatively, that the number of hours requested

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<sup>1</sup> Jo Anne B. Barnhart became Commissioner of Social Security, effective November 14, 2001, succeeding Larry G. Massanari. She is automatically substituted as the defendant pursuant to Fed. R. Civ. P. 25(d) (1) and 42 U.S.C. § 405(g).

by counsel is excessive and should be reduced. A party is entitled to attorney's fees "unless the Court finds that the position of the United States is substantially justified." 28 U.S.C. § 2412(d) (1)(A) (1982); see also Pierce v. Underwood et al., 487 U.S. 553, 565 (1988). The burden of proving substantial justification is on the government. Dougherty v. Lehman, 711 F.2d 555, 561 (3d Cir. 1983).

The government's only argument for substantial justification is that the Magistrate Judge recommended that the defendant's motion for summary judgment **be** granted. **If** that were sufficient to establish substantial justification, attorney's fees would never be awarded when the district court overrules the report and recommendation of a Magistrate Judge. See Weakley v. Bowen, 803 F.2d 575, 578-79 (10<sup>th</sup> Cir. 1986). **In** addition, the government routinely agrees to the award of attorney's fees when the Court remands a case to the Commissioner, whether the Court is approving or disapproving a report and recommendation.

In the absence of any argument as to why the Commissioner's position was substantially justified, the Court is reluctant to make arguments for the Commissioner. For example, the Court did find that the decision **of** the Administrative Law Judge was supported by substantial evidence for a portion of the time period considered by the ALJ. The Court remanded so that a

medical adviser could determine the date of onset of disability. The Commissioner, however, has not raised this issue. The Court finds, therefore, that the Commissioner has not carried its burden of showing substantial justification.

The Court also rejects the government's argument that the fees are excessive. The thrust of the government's argument is that counsel for the plaintiff has litigated many social security cases and it should not have taken him as long as it did to prepare the initial brief in support of the plaintiff's motion for summary judgment. In support of this argument, the government attaches a list of prior cases litigated by the petitioner and the cases cited therein. In all of those cases, the petitioner was awarded the requested attorney's fees. I am not persuaded that the number of hours is excessive.

The government also argues that the expenditure of 6.25 hours in research and preparation of a reply brief, and 14 hours for research and preparation of the objection to the report and recommendation, are unreasonable. Although these hours do seem to be on the high side, the Court cannot find that they are excessive. The Court will also grant the additional fees expended in replying to the government's objection to the petition for attorney's fees.

An appropriate order follows.

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COMMISSIONER OF SOCIAL SECURITY :

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O R D E R

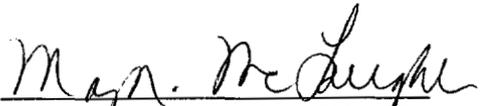
AND NOW, this 1<sup>st</sup> day of April, 2003, upon consideration of the Petition for Attorney's Fees Pursuant to the Equal Access Act of Costs of Litigation of Stephen H. Skale, Esquire, and the Memorandum in support thereof (Docket #14), the Defendant's Brief in Opposition to Plaintiff's Petition for Attorney Fees Under the Equal Access to Justice Act, (Docket #15), and the Petitioner's Brief in Reply to Defendant's Brief in Opposition to Plaintiff's Petition for Attorney's Fees Pursuant to Equal Access to Justice Act and Costs of Litigation, (Docket #16), it is hereby ORDERED, ADJUDGED and DECREED, and that the Social Security Administration shall pay to Stephen H. Skale,

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Esquire, attorney fees in the amount of Seven Thousand, One Hundred and Eighty-five (\$7,185.39) Dollars and Thirty-nine Cents, and additional attorney fees for the cost of attorney fee litigation, in the amount of One Thousand, Two Hundred and Sixty-three Dollars and Seventy-six (\$1,263.76)Cents, for a total of Eight Thousand Four Hundred and Forty-nine Dollars and Fifteen (\$8,449.15)Cents, pursuant to the Equal Access to Justice Act, 28 U.S.C. §2412, and reimbursement of litigation costs in the amount of One Hundred and Fifty Dollars (\$150.00), pursuant to 28 U.S.C. §1920, within thirty (30) days of the date of this Order.

BY THE COURT:

  
MARY A. MCLAUGHLIN, J.

FAXED FROM CHAMBERS? 4/2/03  
Stephen H. Skale, Esq.  
Nicholas Cerulli, Esq.