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

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| LUIGI PERRINI | : | CIVIL ACTION |
| | : | |
| v. | : | NO. 04-3893 |
| | : | |
| JO ANNE B. BARNHART, | : | |
| Commissioner of Social Security | : | |

**MEMORANDUM**

LOWELL A. REED, Jr, Sr. J. MARCH 2, 2005

Presently before this court is the motion for attorney fees filed by the plaintiff, Luigi Perrini ("Perrini") pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA") (Doc. No. 13) and defendant's response thereto and request to stay the motion due to prematurity (Doc. No. 14).

## I. History

After unsuccessfully applying for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433, Perrini filed a complaint in this court on August 17, 2004, pursuant to 42 U.S.C. § 405(g). On January 18, 2006, I ruled on the parties' cross-motions for summary judgment and remanded the case to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) (Doc. No. 12). In my remand order, I found that the ALJ failed to adequately explain his evaluation of Perrini's subjective complaints and his reasoning for his RFC determination in violation of Social Security Regulations 96-7p and 96-8p. As a result of my remand order, Perrini is a prevailing party. Shalala v. Schaefer, 509 U.S. 292, 300-302 (1993). On January 23, 2006, Perrini filed the present motion for attorney fees. Defendant, in her response, contends that Perrini's motion is premature and requests that I stay consideration of the motion and allow her until March 24, 2006, to more formally respond to Perinni's motion if the case is not appealed.

## II. Discussion

The relevant issue concerns the earliest time that a prevailing party may submit a motion for attorney fees under 28 U.S.C. § 2412(d)(1)(B), the fee provision of the EAJA. 28 U.S.C. § 2412(d)(1)(B) provides that:

> A party seeking an award of fees and other expenses shall, *within thirty days of final judgment in the action*, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection and the amount sought . . . . The party shall also allege that the position of the United States was not substantially justified.

28 U.S.C. § 2412(d)(1)(B) (emphasis added).[1] Specifically, the question raised by the parties is whether this section of the EAJA sets a 30 day window in which a motion for attorney fees must be filed or whether it merely delineates an end point after which such a motion would be unacceptable.

Defendant contends that Perrini's motion is premature because: (1) the 30 day time period to apply for attorney fees does not begin to run until my remand order has become a final judgment and Perrini may not file his motion prior to this 30 day time period; and (2) my remand order will not become a final, not appealable, judgment until the government's 60 day appeal period has expired on March 19, 2006. See 28 U.S.C. §§ 2412(d)(1)(A)-(B); (d)(2)(G); F.R.A.P. Rule 4(a)(1)(B). Therefore, defendant argues that the earliest Perrini may file a motion for attorney fees is March 20, 2006. I disagree with first part of this analysis.

Defendant cites Melkonyan v. Sullivan, 501 U.S. 89, 96 (1991) to support her proposition that the 30 day EAJA filing period begins only after the time for taking an appeal from the district court judgment expires and that a claimant may not file his or her fee motion prior to this 30 day period. This is a misinterpretation of Melkonyan. Melkonyan does not concern the issue of

[1] Under the EAJA, a "'final judgment' means a judgment that is final and not appealable." 28 U.S.C.A. § 2412(d)(2)(G).

the earliest time at which a prevailing party may file for attorney fees under the EAJA but instead establishes, *inter alia*, that an administrative decision may not be considered a final judgment under the EAJA. 501 U.S. at 91. Therefore, Melkonyan is of limited use to us in this case. Nevertheless, in defining "final judgment", the court in Melkonyan held that:

> a "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.

Id. at 96. The Melkonyan court did not determine that a prevailing party could not petition for attorney fees before the court's order became final and not appealable, because this was not at issue in the case, but merely that the prevailing party could not file for attorney fees more than 30 days after the final judgment was entered. Id. In fact, the court specifically refused to rule on the issue of whether the claimant could "apply for fees at any time up to 30 days after entry of judgment, and even before judgment is entered, as long as [the claimant had] achieved prevailing party status." Id. at 103.

In further support of this interpretation, I note that in Melkonyan, the court discussed that in 1985 the EAJA was amended by adding the term "final judgment" in order to conform with the holding of McDonald v. Schweiker, 726 F.2d 311, 314 (7th Cir. 1983). Id. at 95-96 (citing S. Rep. No. 98-586, p. 16 (1984)("the Committee believes that the interpretation of the court in [McDonald] is the correct one."). In McDonald, the court specifically held that "The legislative history [of the EAJA] indicates and the government concedes that the 30-day provision in the Act was meant to establish a deadline, not a starting point. The claimant can apply for fees as soon as he has prevailed, i.e., as soon as the district court has entered its final judgment." 726 F.2d at 314 (internal citations omitted).

In addition to the above, after conducting independent research, I am further

persuaded that section 2412(d)(1)(B) of the EAJA prescribes only a final deadline for the filing of an EAJA attorney fee motion and not a window within which such a motion must be filed. See e.g. Gonzalez v. U.S., 44 Fed. Cl. 764 (1999), 767-768 (Fed. Cl. 1999) (finding that based on the legislative history of the statute and relevant precedent, the 30-day provision regarding fee petitions did not establish a starting point for the filing of EAJA petitions, and, thus, an EAJA petition may be timely filed once the party seeking attorney fees has prevailed in the underlying litigation); Cervantez v. Sullivan, 739 F. Supp. 517, 519-520 (E.D. Cal. 1990) (finding that "Examination of the legislative history to the 1985 amendments to EAJA reveals strong evidence that Congress intended the 30-day period to represent a final deadline for the filing of fee petitions rather than a fixed window within which such petitions must be filed" and concluding that "in clear and unequivocal language, Congress endorsed Judge Posner's view [in McDonald] that EAJA fee petitions could be filed and considered any time after final judgment is entered by the district court, but no later than 30 days following the entry of a final, non-appealable judgment from the appellate court"); *American Jurisprudence 2nd*, Federal Courts § 302 (concluding that "a claimant is permitted to file the petition for fees before a final judgment (as that term is used in the EAJA) has been entered."); see also Miller v. U.S., 753 F.2d 270, 273 (3d Cir. 1985) (citing Taylor v. U.S., 749 F.2d 171, 174 (3d Cir. 1984)) (stating that "fee petitions under the EAJA must be filed *no later than thirty days* after the expiration of the time to appeal") (emphasis added)).

## III. Conclusion

In light of the foregoing, a prevailing party may file a motion for attorney fees under the EAJA anytime after a remand order under sentence four of 42 U.S.C. § 405(g) is entered up until 30 days after the government's 60 day appeal period has expired. Therefore, Perrini's motion is timely.

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**ORDER**

AND NOW, this 2nd day of March, 2006, upon consideration of the motion for attorney fees by Luigi Perrini ("Perrini") (Doc. No. 13), the defendant's initial response to the motion and request to stay the motion (Doc. 14), and Perrini's response thereto (Doc. No. 15), and for the reasons set forth in the memorandum above, it is hereby **ORDERED** that:

1. Defendant's request to stay the consideration of Perrini's motion until March 24, 2006, is denied; and

2. Defendant shall file a substantive response to Perrini's motion by Friday, March 10, 2006.

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LOWELL A. REED, JR., S.J.