

Administrative Law Judge (“ALJ”) denied Plaintiff’s claim.² The Appeal’s Council denied Plaintiff’s request for review.

Plaintiff then commenced this action against Jo Anne Barnhart, Commissioner of Social Security (“Commissioner”).³ The parties filed cross motions for summary judgment. On July 5, 2005, the Magistrate Judge filed a Report and Recommendation granting Plaintiff’s motion for summary judgment and denying the Commissioner’s motion for summary judgment. (Report & Recommendation at 1.) The Magistrate Judge also recommended that the final decision of the Commissioner be vacated and that the case be remanded. *Id.* Specifically, the Magistrate Judge disagreed with the ALJ’s finding that “Plaintiff did not present sufficient evidence to support a finding of severity at step two.” *Id.* at 9. The Magistrate Judge concluded that there was “ample evidence of severe pain for purposes of step two, and that the ALJ should have given Plaintiff the benefit of the doubt at this early step in the sequential evaluation.” *Id.* at 10. The Commissioner did not file any Objections to the Report and Recommendation.

On July 27, 2005, this Court entered an Order approving and adopting the Magistrate Judge’s Report and Recommendation. (Docket No. 10.) The case was remanded to the Commissioner for further proceedings. Plaintiff then filed this Petition on October 24, 2005 for attorneys’ fees pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d).

² The ALJ initially denied Plaintiff’s claim on January 13, 2000. Plaintiff appealed her claim to the Appeals Council. The Appeals Council remanded Plaintiff’s claim to the ALJ because of a lost hearing tape. A subsequent hearing took on May 13, 2003 and the ALJ again denied Plaintiff’s claim.

³ This Court referred the present case to Magistrate Judge Scuderi on May 6, 2005. (Docket No. 8.)

Specifically, Plaintiff asks this Court to award her \$3,341.53 in attorneys' fees and \$150.00 as reimbursement of the court filing fee.⁴

II. STANDARD OF REVIEW

Under the EAJA, a party is entitled to attorneys' fees "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A).⁵ The Supreme Court opined that a position can be "substantially (i.e. for the most part) justified if a reasonable person could think it correct, that is, it is has a reasonable basis in law and fact." Pierce v. Underwood, 487 U.S. 552, 564, 566 n. 2 (1988); see also Washington v. Heckler, 756 F.2d 959, 960 (3d Cir. 1985) (stating that for the Commissioner to meet her burden of substantial justification under the EAJA, the Commissioner must show (1) a reasonable basis in truth for the facts alleged; (2) a reasonable basis in law for the theory she propounds; and (3) a reasonable connection between the facts alleged and the legal theory advanced). In a case involving the denial of SSI disability benefits, the Commissioner has the burden of showing that her position

⁴ In Plaintiff's Response to the Commissioner's Brief in Opposition to Plaintiff's Petition for Attorneys' Fees Under the EAJA, Plaintiff requests leave to amend the Petition to include fees for the additional time it took to file a reply brief. (Pl.'s Resp. at 9.) Because the Court denies Plaintiff's request for attorneys' fees, this issue is moot. The Court notes, however, that the filing of a reply brief "is not a matter of right." Brown v. Shalala, No. 88-5381, 1994 U.S. Dist. LEXIS 2641, at *10 (E.D. Pa. Mar. 2, 1994). Particularly in the absence of permission to file a reply brief, the additional time will not be added into the computation of fees. Id.

⁵ In order to qualify for an attorneys' fee award pursuant to EAJA § 2412, an applicant must also satisfy three additional requirements. First, the applicant must be a "prevailing party" other than the United States. 28 U.S.C. § 2412(d)(1)(A). Second, the applicant's petition must be timely. That is, a petition for attorneys' fees must be filed within 30 days of the date when a final judgment is no longer appealable. Id. § 2412(d)(1)(B), § 2412(d)(2)(G). Finally, the court is empowered to grant "reasonable fees and expenses of attorneys" under the EAJA. Id. § 2412(b). The Commissioner fails to provide any argument to counter Plaintiff's averments on these additional requirements.

was substantially justified. Washington, 756 F.2d at 961-62. Importantly, “a position can be justified even though it is not correct.” Pierce, 487 U.S. at 566 n.2.

The determination of whether the Commissioner was substantially justified under the EAJA is juxtaposed against the standard used at step two of the five-step sequential evaluation for SSI disability benefits, the point at which Plaintiff’s application was terminated.⁶ In step two, the Commissioner considers the medical severity of Plaintiff’s impairment, 20 C.F.R. § 416.920 (4)(ii) (2004), including “all [of Plaintiff’s] symptoms, including pain, and the extent to which [Plaintiff’s] symptoms are consistent with the objective medical evidence,⁷ and other evidence.”⁸ Id. § 416.929(a). “Statements about [the Plaintiff’s] pain or other symptoms will not alone establish that [Plaintiff] is disabled; there must be medical signs and laboratory findings which show that [the Plaintiff has] a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged” Id. § 416.929(a).

⁶ In evaluating SSI disability benefit claims, the Commissioner applies a five-step sequential evaluation. The Commissioner must determine whether a claimant: (1) engaged in a substantial gainful activity, (2) had a severe impairment, (3) had an impairment that meets or equals the requirements of a listed impairment, (4) could return to her past relevant work, and (5) if not, whether she could perform other work in the national economy. 20 C.F.R. § 416.920(a)(4)(i), (iii-v) (2004).

⁷ Objective medical evidence includes medical signs and laboratory findings. 20 C.F.R. § 416.929(a) (2004). **Medical** signs are defined as “anatomical, physiological, or psychological abnormalities which can be observed, apart from [Plaintiff’s] statements (symptoms)” and “must be shown by medically acceptable clinical diagnostic techniques.” Id. § 416.928(b). Laboratory findings are defined as “anatomical, physiological, or psychological phenomena which can be shown by the use of a medically acceptable laboratory diagnostic techniques” including “chemical tests, electrophysiological studies (electrocardiogram, electroencephalogram, etc.), roentgenological studies (X-rays)” Id. § 416.928(c).

⁸ Other evidence includes “statements or reports by [Plaintiff], [Plaintiff’s] treating or non-treating source, and others about [Plaintiff’s] medical history, diagnosis, prescribed treatment, daily activities, efforts to work, and any other evidence showing how [the Plaintiff’s] impairments and any related symptoms affect [her] ability to work.” 20 C.F.R. § 416.929(a) (2004).

Notably, the “step two inquiry is a *de minimus* screening device to dispose of groundless claims,” Newell v. Comm’r of Soc. Sec., 347 F.3d 541, 546-547 (3d Cir. 2003), and “is to be rarely utilized as basis for the denial of benefits,” McCrea v. Comm’r of Soc. Sec., 370 F.3d 357, 361 (3d Cir. 2004). A claimant “need only demonstrate something beyond ‘a slight abnormality’ . . . which would have a minimal effect on an individual’s ability to work.” Id. at 360. “Any doubt as to whether [a] showing [of severity] has been made is to be resolved in favor of the applicant.” Id. (citing Newell, 347 F.3d at 546-47). However, if Plaintiff cannot demonstrate that she has “any impairment or combination of impairments which significantly limits [Plaintiff’s] physical or mental ability to do basic work activities,” further evaluation is unnecessary. 20 C.F.R. § 416.920(4)(ii) (2004).

III. DISCUSSION

The Commissioner’s position is that “Plaintiff’s symptoms of debilitating pain were not accompanied by the requisite clinical signs and laboratory findings as required by the Act. Therefore, Plaintiff’s mere diagnosis, without more, did not necessarily justify a favorable step two finding.” (Def.’s Br. at 6 (emphasis in original).) Further, the Commissioner argues that “a position can be justified even though it is not correct.” Id. (citing Pierce v. Underwood, 487 U.S. 552, 564, 566 n.2 (1988)). The Commissioner adds that “the mere fact that this case was remanded on substantial evidence review does not mean that [her] position in pursuing the case was not substantially justified.” (Def.’s Br. at 2) (citation omitted). The Court agrees.

First, the Court finds that the Commissioner meets her burden in establishing that her position had a reasonable basis in fact. As noted above, the Commissioner can consider “all [of Plaintiff’s] symptoms, including pain, and the extent to which [Plaintiff’s] symptoms are consistent with the objective medical evidence, and other evidence.” 20 C.F.R. §

416.929(a)(2004). In the absence of objective medical evidence, such as medical signs and laboratory findings, it was reasonable for the Commissioner to conclude that Plaintiff failed to demonstrate that her impairment was severe. Although Plaintiff's physician, Dr. Tabby, initially diagnosed Plaintiff with peripheral neuropathy of the legs, a neurological examination revealed "no electrophysiologic evidence of radiculopathy, neuropathy, or myopathy." (Def. Br. at 6.) Dr. Tabby later questioned his own diagnosis because Plaintiff's EMG did not support it. Id. Plaintiff's X-Rays revealed normal knees, lumbar spine and pelvis. Id. at 6; (Report & Recommendation at 6.) Another doctor, Dr. Seth, found no objective evidence of peripheral neuropathy. (Def. Br. at 6.) Plaintiff also underwent a bone scan which indicated "no evidence of significant degenerative disease." (Report & Recommendation at 7.)

Although Plaintiff offered "other evidence" to support her claim for disability, such evidence was suspect. For example, Dr. Seth stated that although Plaintiff "moved her neck very slowly when asked to do so," she "was able to move briskly and normally when she was caught off guard." Id. Dr. Seth also noted that "Plaintiff's subjective complaints pertaining to each body system made no sense, and her vague limitations of movement in range of motion testing were suspect." (Def.'s Br. at 6.) Notes from Plaintiff's family physician, which were contemporaneous to Dr. Seth's examination, indicate that Plaintiff "felt good" with "no symptoms." Id. at 7.

The Magistrate Judge remanded the case because a musculoskeletal examination conducted by a rheumatologist, Dr. Chung, revealed various tender points and Plaintiff's medical records contained repeated diagnoses of peripheral neuropathy and back problems.⁹

⁹ The Court believes that a musculoskeletal examination possibly falls into the category of objective medical evidence. However, the Court finds that it was reasonable for the Commissioner to minimize the results of this test since Plaintiff did not go to Dr. Chung until

(Report & Recommendation at 9-10.) The Magistrate Judge concluded that this evidence was sufficient given the minimal requirements of step two. Id. at 10. Yet, in light of the absence of objective medical evidence and the suspect “other evidence” that Plaintiff presented, the Court concludes that the Commissioner had a reasonable basis in fact to deny Plaintiff’s application for SSI benefits at step two.

Second, the Court finds that the Commissioner meets her burden in establishing that her position also had a reasonable basis in law. As described by Washington:

The case law has not prescribed a comprehensive formula for determining what constitutes a reasonable basis in law. As Dougherty makes clear, there is no *per se* rule that imposes counsel fees on the government when it loses merely because its legal theory is rejected. Dougherty v. Lehman, 711 F.2d 555, 566 (3d Cir. 1985) When the government's legal position clearly offends established precedent, however, its position cannot be said to be “substantially justified.”¹⁰

756 F.2d at 961-962.

As noted above, in step two, the Regulations enable the Commissioner to consider the *medical* severity of Plaintiff’s impairment, 20 C.F.R. § 416.920(4)(ii) (2004) (emphasis added). Medical findings consist of “symptoms, signs and laboratory findings.” Id. § 416.928. The Commissioner, relying on Bowen v. Yuckert, 482 U.S. 137, 141, (1987) and Regulation § 416.928, states that “all three criteria must show limitations in the ability to perform work-related functions.” (Def. Br. at 5.) Although Bowen and Regulation § 416.928 do not explicitly

five years after her alleged onset date and Dr. Chung “found no more than ‘mild’ signs [of degenerative joint disease] in Plaintiff’s left knee and observed no motor, sensory, or reflex abnormality.” (Def.’s Br. At 7.)

¹⁰ Alternatively, if the case turns on an unsettled or “close question of law,” the Commissioner will be able to establish that her legal theory was “reasonable,” even if it was not ultimately accepted as a legal rule by the courts. Washington, 756 F.2d at 961. Plaintiff concedes that “this case was not dealing with a close or unsettled question of law.” (Pl.’s Resp. at 7.) Therefore, the alternative is not applicable in the present case.

state that each medical finding (i.e. symptoms, signs and laboratory findings) must be present to conclude that an impairment is severe, the Commissioner's position is supported elsewhere. See 20 C.F.R. § 416.929(a) ("The Commissioner can consider all symptoms, including pain, and the extent to which such symptoms are consistent with objective medical evidence"); 20 C.F.R. § 416.929(a) ("Statements about [the Plaintiff's] pain or other symptoms will not alone establish that one is disabled; there must be medical signs and laboratory findings which show that [the Plaintiff has] a medical impairment(s) which could reasonably be expected to produce the pain . . ."); see also SSR 96-3p ("A determination that an individual's impairment(s) is not severe requires a careful evaluation of the medical findings that describe the impairment(s) (i.e. objective medical evidence and any impairment-related symptoms"); SSR 85-28 ("The severity requirement cannot be satisfied when medical evidence shows that the person has the ability to perform basic work activities"). Based upon the support found in the various Regulations and Social Security Rulings, the Court concludes that the Commissioner's position did not "offend established precedent" and therefore had a reasonable basis in law.

IV. CONCLUSION

The Court concludes that the Commissioner was substantially justified in **her attempt to deny Plaintiff's SSI disability benefits at step two of the evaluation process**. An appropriate order follows denying Plaintiff's Petition for attorneys' fees.

