

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

United States District Court  
Southern District of Texas

*ENTERED*

Apr 14, 2005

Michael N. Milby, Clerk

ALBERTO A. GONZALEZ,

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Plaintiff,

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§

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vs.

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CIVIL ACTION NO. H-04-2902

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JO ANNE B. BARNHART,

§

Commissioner, Social

§

Security Administration,

§

§

Defendant.

§

**MEMORANDUM AND ORDER**

This case is before the court on Plaintiff Alberto A. Gonzalez's motion for attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (Dkt. 25). The Commissioner has filed a response (Dkt. 28). For the reasons explained below, the motion is granted in part, with a small reduction in the number of hours and an adjustment to the rate.

After the parties briefed cross-motions for summary judgment, the Commissioner requested that this case be remanded to the Administrative Law Judge for further administrative action under the fourth sentence of 42 U.S.C. § 405(g). Judgment reversing the administrative decision and remanding this case for further administrative proceedings was entered January 7, 2005. Gonzalez now requests an award of \$7,901.19 for attorney's

fees, calculated at the rate of \$159.62 per hour for 49.5 hours of work.<sup>1</sup> The Commissioner asserts that the correct rate is \$148.70 per hour, and a more reasonable number of hours is 34.5, for a total award of \$5,130.15.

“The EAJA, 28 U.S.C. § 2412(d)(1)(A), requires an award of attorney’s fees to a claimant against the Government if: (1) the claimant is a ‘prevailing party’; (2) the Government’s position was not ‘substantially justified’; and (3) there are no special circumstances making the award unjust.” *Davidson v. Veneman*, 317 F.3d 503, 506 (5th Cir. 2003) (citations omitted). A plaintiff is a “prevailing party” under the EAJA if she succeeds on any significant issue in litigation which achieves some of the benefit she sought in bringing the suit. *See id.* A party such as Gonzalez, who obtains a remand pursuant to the fourth sentence of 42 U.S.C. § 405(g), qualifies as a prevailing party for purposes of attorney’s fees under the EAJA. *Breaux v. U.S. Dep’t of Health & Human Servs.*, 20 F.3d 1324, 1325 (5th Cir. 1994). The burden of proving “substantial justification” rests on the government. *See Davidson*, 317 F.3d at 506. The Commissioner has neither asserted that her position was substantially justified, nor claimed that there are any special circumstances that would render the award of attorney’s fees unjust. The Commissioner only seeks an adjustment in the amount of the award.

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<sup>1</sup> There is some question as to the timeliness of plaintiff’s request, filed February 28, 2005. *See* 28 U.S.C. § 2412(d)(1)(B) (“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 . . .”). The Commissioner has not objected to an award of fees on timeliness grounds.

The court has discretion in determining the amount of a fee award, including the reasonableness of the hours claimed by the prevailing party. *See Hensley v. Eckerhart*, 461 U.S. 424, 433-37 (1983); *see also Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 161 (1990) (*Hensley* standard applies to EAJA fee requests).

EAJA fees are generally determined by the time expended and the attorney's hourly rate, capped at \$125 per hour. *See* 28 U.S.C. §§ 2412(d)(1)(B), 2412(d)(2)(A). A higher fee may be awarded based on an increase in the cost of living after the March 29, 1996 effective date of the EAJA. 28 U.S.C. § 2412(d)(2)(A)(ii).

The affidavit of plaintiff's counsel states that "there has been a 27.7% increase in the cost of living from March 29, 1996 to date." It is unclear how plaintiff's counsel arrived at this figure,<sup>2</sup> but it is error to base the fee on an increase in the cost of living up to the current date. "Cost-of-living adjustments under the EAJA must be made to reflect the appropriate rate in the year in which the services were rendered." *Perales v. Casillas*, 950 F.2d 1066, 1077 (5th Cir. 1992). In this case, the work for which plaintiff's counsel seeks fees was performed in 2004.<sup>3</sup>

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<sup>2</sup> Counsel's affidavit refers to "attached information from the Bureau of Labor [Statistics]," but no information is attached.

<sup>3</sup> *See* Plaintiff's Attorney's Affidavit (Dkt. 27), ¶ 9.

The Commissioner submits evidence that the Bureau of Labor Statistics Consumer Price Index for 2004 is 181.8 and the Consumer Price Index for March 1996 is 152.4.<sup>4</sup> The difference, calculated as a percentage increase in the Consumer Price Index since March 1996, is 18.96%  $((181.8 - 152.4)/152.4 = .189633)$ . Applying the 18.96% increase in the Consumer Price Index to the hourly fee of \$125.00 results in an hourly rate of \$148.70. The court adopts this calculation of the correct rate based on the increased cost of living since March 1996.

Plaintiff's counsel has submitted an itemized statement of attorney time and expenses as required by 28 U.S.C. § 2412(d)(1)(B). Counsel seeks reimbursement for 49.5 hours broken down as follows: 2.5 hours for filing and serving the petition; 6.5 hours for reviewing the file; 5.0 hours for reviewing the transcript of the administrative proceeding; 8.5 hours for researching case law; 14.5 hours for briefing is motion for summary judgment, and 12.5 hours for responding to the Commissioner's cross-motion. The Commissioner objects that these hours are excessive and should be reduced by 15 hours.

“The party seeking an award of fees should submit evidence supporting the hours worked. *Hensley*, 461 U.S. at 433. The court then excludes hours not “reasonably expended,” that is to say, those hours that are excessive, redundant, or unnecessary, and those hours that would not be properly billed to one's client in a private setting. *Id.* at 434. “The

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<sup>4</sup> See Exhibit A to Commissioner's response.

burden of proof of reasonableness of the number of hours in on the fee applicant.” *Leroy v. City of Houston*, 831 F.2d 576, 586 (5th Cir. 1987).

A review of numerous cases suggests that the number of hours requested here is only slightly higher than average for this type of case. *See, e.g., Rodriguez v. Bowen*, 865 F.2d 739, 747 n.4 (6th Cir. 1989) (*en banc*) (citing an “in-house” survey encompassing seven years of data that the average number of hours asserted in fee petitions was 37.3); *Nugent v. Massanari*, 2002 WL 356656, at \*2 (N.D. Ca. 2002) (reviewing EAJA cases suggesting the borderline for reasonableness is in the forty-hour range); *Patterson v. Apfel*, 99 F. Supp. 2d 1212, 1214 n.2 (C.D. Ca. 2000) (surveying numerous cases suggesting a customary range between twenty and fifty hours); *Hardy v. Callahan*, 1997 WL 470355, at \*9 n.10 (E.D. Tex. 1997) (awarding fees for forty hours rather than the requested 58.5 because the case did not involve any factually or legally complex issues, and explaining that forty hours is an appropriate average); *Hutchinson v. Chater*, 1996 WL 699695, at \*3 (D. Kan. 1996) (“The typical EAJA fee application in social security cases claims between thirty and forty hours”); *Pribek v. Secretary, Dep’t of Health & Human Servs.*, 717 F. Supp. 73, 75 (W.D.N.Y. 1989) (forty hours adequately reflects a reasonable expenditure of time on an unextraordinary case); *DiGennaro v. Bowen*, 666 F. Supp. 426, 433 (E.D.N.Y. 1987) (compensated hours generally range from twenty to forty hours); *see also Commissioner, I.N.S v. Jean*, 496 U.S. 154, 161 n.9 (out of 502 fee applications under the EAJA in 1989, 413 were granted, averaging around \$4,482.00 per award). The Commissioner contends that counsel’s request for 11.5 hours to

review the file and transcript, 8.5 hours for legal research, and 27 hours to prepare briefs is excessive because plaintiff's brief contained essentially the same arguments presented by plaintiff's prior lawyer to the Appeal's Council.

The court recognizes that a claim for fees should be reduced for duplication, padding or frivolous claims. *See Northcross v. Board of Educ.*, 611 F.2d 624, 636 (6th Cir. 1979). Nonetheless, representation of a client on appeal in the district court is not entirely duplicative of work performed by counsel during the administrative process. While counsel should refer to prior briefing for assistance, he has an obligation to ensure that the legal citations and factual arguments he submits in briefing to this court are accurate and supported by the record. Therefore, reducing the request by 15 hours would be unduly harsh.

Nonetheless, the hours expended for certain items strikes the court as slightly high, and plaintiff's counsel has provided scant detail in his affidavit as to precisely what, if anything, was particularly novel or complex about this case that required significant legal research and drafting time. Therefore, the court will reduce the number of hours for drafting plaintiff's brief in response to the Commissioner's brief from 12.5 to 10, and for researching case law from 8.5 to 5.5, for a total reduction of 5.5 hours.

The court will award plaintiff's counsel fees at the rate of \$148.70 per hour for 44 hours, for a total award of \$6,542.80. The court will issue a separate final judgment in this amount.

Signed at Houston, Texas on April 13, 2005.

  
Stephen Wm Smith  
United States Magistrate Judge