

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

JOANNE M. O’CONNOR, :
Plaintiff, :
 :
v. : C.A. No. 11-388 L
 :
CAROLYN W. COLVIN, ACTING :
COMMISSIONER OF SOCIAL SECURITY, :
Defendant. :

REPORT AND RECOMMENDATION

Patricia A. Sullivan, United States Magistrate Judge

Plaintiff Joanne O’Connor (“Plaintiff”) seeks to recover attorney’s fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (“EAJA”) (ECF No. 15). Defendant¹ has filed an objection to the Motion. (ECF No. 19). This matter has been referred to me for preliminary review, findings, and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B).² I recommend that the Motion be granted to the extent that Plaintiff be awarded \$10,907.64 in attorney’s fees.

I. Background

Plaintiff brought this action pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), challenging the Defendant’s decision to deny her disability insurance benefits (“DIB”) and Supplemental Security Income (“SSI”) under the Social Security Act. On September 28, 2012, Magistrate

¹ Pursuant to Fed. R. Civ. P. 25(d), Acting Commissioner of Social Security Carolyn W. Colvin has been substituted as Defendant for former Commissioner of Social Security Michael J. Astrue.

² I acknowledge with gratitude the assistance of Magistrate Judge David L. Martin with the preparation of this Report and Recommendation. As the author of the Report and Recommendation that resolved the merits of this matter, his contribution was particularly appreciated.

Judge David L. Martin issued a Report and Recommendation (ECF No. 13) (“R&R”) recommending that Plaintiff’s Motion for Reversal be granted. No objection to the R&R was filed. On December 18, 2012, Senior District Judge Ronald R. Lagueux issued an order accepting and adopting the R&R. See Order (ECF No. 16) (“Order of 12/18/12”). On December 20, 2012, Judgment issued in favor of Plaintiff. See Judgment (ECF No. 17).

Plaintiff immediately filed this Motion seeking an award of attorney’s fees in the amount of \$13,381.72, for 74.1 hours of work compensated at the hourly rate of \$180.59.³ She contends that she is eligible for such award because her net worth was less than \$2,000,000 when the action was filed, she is a “prevailing party” and the Commissioner’s position “was not substantially justified.” 28 U.S.C. § 2412(b), (d)(1-2)(B). Defendant does not dispute either her eligibility⁴ for a fee award or her requested hourly rate. Rather, Defendant contends that the total amount of time spent on this case – 74.1 hours – is excessive and unreasonable, particularly when compared to an average of 20 to 40 hours, which has been accepted as reasonable in other circuits. Defendant also makes a granular attack on the fee motion, focusing on specific tasks and alleging either that the task is not compensable or that an excessive amount of time is being claimed.

For many of the tasks identified by Defendant, without conceding that the time is not compensable, Plaintiff has opted not to press for a fee award, thereby eliminating 6.4 hours for

³ Plaintiff requests that the attorney’s fee award be paid directly to her counsel; this aspect of her fee petition is denied. The Supreme Court has made clear that attorney’s fees awarded pursuant to 28 U.S.C. § 2412(d)(1)(A) are payable to the litigant – payment to counsel is not permitted. Astrue v. Ratliff, ___ U.S. ___, 130 S.Ct. 2521, 2527, 2529 (2010); see also Cruz v. Comm’r of Soc. Sec., 437 F. A’ppx 67, 69 (3d Cir. 2011) (attorney’s argument that fee be paid directly to him rejected as “meritless as the Supreme Court has explicitly held that EAJA fees are directly payable only to litigants and not their attorneys”) (citing Ratliff, 130 S.Ct. at 2529); August v. Astrue, C.A. No. 10-386M, at 4 n.1 (D.R.I. Mar. 21, 2012) (Report and Recommendation of Martin, M.J.).

⁴ Because the Court reversed and remanded the Commissioner’s decision under Sentence Four of § 405(g), Plaintiff is the “prevailing party.” Shalala v. Schaefer, 509 U.S. 292, 302 (1993). Defendant’s acquiescence to Plaintiff’s claim that substantial justification is not a barrier to a fee award eliminates that issue from further consideration. See Pierce v. Underwood, 487 U.S. 552, 565 (1988); Schock v. United States, 254 F.3d 1, 5 (1st Cir. 2001).

such matters as a motion to extend time, services at the agency level, some of the time spent on the fee petition and clerical tasks such as filing the Complaint or reviewing NEFs. What remains for decision is the reasonableness of the number of hours Plaintiff spent reviewing the record and researching and writing her initial memorandum (35.6 hours) and her reply (29.3 hours), for a total of 64.9. She also now seeks compensation for an additional 6.2 hours, for time spent responding to Defendant's objection to the fee petition. In total, the revised fee petition seeks \$13,345.60 based on 73.9 hours of time. Defendant contends that the appropriate amount of time for the record review and brief writing is 35 hours, a reduction of 29.9 hours. In all, Defendant argues that 38.8 hours or \$7,006.89 is reasonable, without addressing the 6.2 hours spent on the reply to the objection to the fee petition.⁵

II. Law

The EAJA requires a court to award a prevailing party "reasonable" attorney fees, costs and other expenses "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(b), (d)(1)(A). An EAJA fee applicant bears the burden of demonstrating to the court that the number of hours charged is reasonable. Case v. Unified Sch. Dist. No. 233, Johnson Cnty., Kan., 157 F.3d 1243, 1259 (10th Cir. 1998) (parties seeking attorney's fees have "the burden to prove that their hours were reasonable"); Heasley v. Comm'r of Internal Revenue, 967 F.2d 116, 123 (5th Cir. 1992) (taxpayers "had the burden of establishing that their attorneys expended a reasonable number of hours on this case and that the hours were reasonably expended"). Hours that are excessive, redundant, or otherwise unnecessary are not reasonably expended. See Hensley v. Eckerhart,

⁵ Of course, Plaintiff's original petition did not include compensation for preparing the reply. This request was added in the reply itself, and the Local Rules do not afford Defendant another briefing opportunity. Therefore, this Court will review the reasonableness of the time spent on the reply as if Defendant had challenged it as unreasonable.

461 U.S. 424, 434 (1983); Torres-Rivera v. O'Neill-Cancel, 524 F.3d 331, 336 (1st Cir. 2008) (citing Hensley); see also Oklahoma Aerotronics, Inc. v. United States, 943 F.2d 1344, 1347 (D.C. Cir. 1991) (“there is a point at which thorough and diligent litigation efforts become overkill”).

In the judicial struggle to properly exercise the duty to protect the public fisc while fairly rewarding attorneys for their work as required by EAJA, many courts try to bracket what is “average” or “typical” or a “benchmark.” Hayes v. Sec’y of Health & Human Servs., 923 F.2d 418, 420 (6th Cir. 1990) (“average” is 30 and 40 hours); Marshall v. Astrue, No. 7:09-CV-33 (HL), 2011 WL 2604768, at *2 (M.D. Ga. May 10, 2011) (“typical” is 20 to 40 hours); Kanges v. Astrue, No. 08-CV-117-HU, 2011 WL 1002185, at *5 (D. Or. Mar. 18, 2011) (“benchmark” is 20 to 40 hours). Defendant relies on these cases, which focus on averages between 20 and 40 hours, to argue that Plaintiff’s request for more than 70 hours of attorney work cannot be reasonable. While this argument has some value, it remains that “[t]he relevant question . . . is not what is required in most social security cases but what did this case require.” August v. Astrue, CA 10-386 M, Report & Recommendation of 3/21/12 at 7 (quoting Glass v. Sec’y of Health & Human Servs., 822 F.2d 19, 20 (6th Cir. 1987)).

The point is illustrated by the analysis of the district court in Poulin v. Astrue, where the court faced a fee request for a total of 38.25 hours, of which 30.25 was spent on the brief. No. 3:10cv1930 (JBA), 2012 WL 264579, at *3 (D. Conn. Jan. 27, 2012). While noting that the total number of hours was under the “average,” the court nevertheless focused on specific tasks and shaved five hours from the time spent on the brief, observing that the record was only 435 pages and the issues relatively straightforward. Id. Similarly, courts do not hesitate to award fees in excess of the average where the facts of a specific case warrant such an award. Scott v. Astrue,

474 F. Supp. 2d 465, 466 (W.D.N.Y. 2007) (collecting cases finding that hours between 51.9 and 95.5 reasonable; 51 hours total, with 38 for work on the brief found reasonable); Gibson-Jones v. Apfel, 995 F. Supp. 825, 827 (N.D. Ill. 1998) (65.75 hours spent on district court litigation and 96.5 hours spent on appeal both found reasonable in light of size of medical record, over 400 pages, and fact specific nature of the case).

When the focus is on the reasonableness of the number of hours, as it is here, the court should examine the case for special difficulties that would make it reasonable to exceed the average. Cruz v. Apfel, 48 F. Supp. 2d 226, 231 (E.D.N.Y. 1999) (60 hours reasonable in light of difficulties inherent in working with depressed claimant). For example, the sheer length of the record is a factor that courts accept as a justification for a greater investment of time, particularly if the issues in the case require a fact-specific analysis. Wirth v. Barnhart, 325 F. Supp. 2d 911, 915 (E.D. Wis. 2004) (30 hours on main brief and 14 hours on reply brief, for a total of 61.1, is reasonable). The fact that counsel did not handle the case at the administrative phase and therefore needed time to learn the record is an additional reason justifying the reasonableness of a greater time investment. Id. (counsel did not represent plaintiff below and was required to learn case from scratch); Sahs v. Astrue, 832 F. Supp. 2d 1066, 1069 (D. Neb. 2011) (90.22 hours found reasonable where, among other factors, counsel had to take time to familiarize himself with record below).

III. Application and Analysis

Here, Plaintiff faced several of the challenges that justify more than an average amount of work. The record in this case was unusually voluminous (1,128 pages, including 931 of medical evidence) and reviewing and discussing it clearly required more time than would be needed for a claim involving fewer medical records. Further, the issues in the case were fact specific so that it

was necessary for Plaintiff to parse the voluminous record with care. Moreover, counsel had not been involved in the administrative proceedings and therefore had to familiarize himself with the record for the first time here. There is no question that this is a case where it was reasonable for counsel to spend more than the average number of hours.

Nevertheless, Defendant correctly points out that the case was not unusually complex and that no novel legal issues were raised. Plaintiff's initial memorandum is much longer (30 pages) than it needed to be because it contained eleven pages of single-spaced treatment notes copied verbatim from the record, which buried the Court in a mountain of detail, not all of which was relevant. Similarly, Plaintiff's reply memorandum is largely a regurgitation of arguments that were developed in her initial memorandum. Indeed, some paragraphs or sentences appearing in Plaintiff's memorandum are repeated verbatim (or nearly verbatim) in Plaintiff's reply memorandum, many of the points argued in Plaintiff's initial memorandum are repeated in Plaintiff's reply and reply itself is repetitious.⁶ Accordingly, a reduction of 20% for the time spent reviewing the record, preparing the initial memorandum and the reply is appropriate.

This Court also must review the reasonableness of the request for 6.2 hours spent on the reply to Defendant's opposition to the fee petition. Plaintiff achieved efficiency in the time spent on the reply by her decision to withdraw her claim for time challenged by Defendant, at least some of which amounted to nit-picking. Crosby v. Halter, 152 F. Supp. 2d 955, 962 (N.D. Ill. 2001) (time spent in pursuing application is also reasonable where objections by the Commissioner represent nit-picking). She also laudably refrained from performing independent

⁶ The purpose of a reply memorandum is not to reiterate arguments which have already been made in an initial memorandum. See Colon-Fontanez v. Municipality of San Juan, 671 F. Supp. 2d 300, 308 (D.P.R. 2009) (criticizing attorney for a "reply memorandum with lengthy repetition of arguments previously made to the Court"); see also Malay v. City of Syracuse, 638 F. Supp. 2d 303, 310 (N.D.N.Y. 2009) ("The purpose of reply papers is to address new material issues raised in the opposition papers so as to avoid giving unfair advantage to the answering party.") (internal quotation marks omitted).

research to better marshal cases where more hours than the average have been approved by other courts. There is no question that the work on this brief is compensable. McDonald v. Sec’y of Health & Human Servs., 884 F.2d 1468, 1480-81 (1st Cir. 1989). Nevertheless, the total hours requested seem somewhat high for a brief that simply explained to the Court what counsel had accomplished and why it took longer than average. Therefore, a modest reduction of 10% is appropriate, reducing the compensable hours for time spent on the reply to 5.6 hours. Wirth, 325 F. Supp. 2d at 918-19 (5.8 hours reasonable on EAJA reply submission).

In summary, while the record was lengthy, this case was not unusually complex and did not involve novel legal issues. Plaintiff’s initial memorandum was unnecessarily long, and its arguments could have been stated more concisely. Plaintiff’s reply memorandum also repeated arguments that were presented in her initial memorandum. For these reasons, I find that Plaintiff has not met her burden of demonstrating that the number of hours for which compensation is sought (73.9 hours) is reasonable. After consideration, I find that reducing the number of hours for work on the initial memorandum and the reply by 20% is appropriate; accordingly, I recommend that the time spent reviewing the record and preparing the initial memorandum be reduced from 35.6 hours to 28.5 and the time spent on the reply be reduced from 29.3 hours to 23.5, for a total of 52. To these hours, the other work that Defendant did not challenge (2.8 hours) must be added, as well as the work on the reply memorandum regarding the EAJA fee petition (5.6 hours), for a total of 60.4 hours.

Accordingly, I recommend that the Motion be granted to the extent that Plaintiff be compensated for 60.4 hours at \$180.59 per hour for a total of \$10,907.64.

IV. Conclusion

For the reasons stated above, I recommend that the Motion be granted to the extent that Plaintiff be awarded attorney's fees of \$10,907.64. To the extent that the Motion seeks a greater amount of attorney's fees or seeks the payment of the fee award directly to counsel, I recommend that the Motion be denied.

Any objections to this Report and Recommendation must be specific and must be filed with the Clerk of Court within fourteen (14) days of service. See Fed. R. Civ. P. 72(b); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district court and of the right to appeal the district court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
March 15, 2013