

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

LYLE J. KLIMENT,

Plaintiff,

vs.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. C 09-4030-MWB

**ORDER REGARDING PLAINTIFF'S
APPLICATION FOR ATTORNEY
FEES UNDER THE EQUAL ACCESS
TO JUSTICE ACT**

I. INTRODUCTION AND BACKGROUND

On April 28, 2005, Plaintiff Lyle Kliment filed applications for Title II¹ disability insurance and Title XVI² supplemental security income benefits, alleging a disability onset date of July 1, 2002. Kliment's applications were denied initially and on reconsideration. An Administrative Law Judge ("ALJ") held a hearing, as requested, on Kliment's claims on May 9, 2008. The ALJ issued a decision on May 29, 2008, which found that Kliment was mildly mentally retarded but did not have an impairment that met the Listing level of severity. The ALJ also found that Kliment retained the residual functional capacity for "maximum sustained work activity" and that he could "perform his past relevant work as

¹Title II of the Social Security Act provides insurance benefits to individuals who establish that they suffer from a physical or mental disability. *See* 42 U.S.C. § 423.

²Title XVI of the Social Security Act provides supplemental income to individuals who are disabled while also indigent. *See* 42 U.S.C. § 1382.

a kitchen helper and dishwasher.” R. at 22. For these reasons, the ALJ found Kliment was not disabled. On March 16, 2009, the Social Security Appeals Council denied Kliment’s request to review the ALJ’s decision, and this denial constituted a final decision of the Commissioner of Social Security (“Commissioner”).

On March 31, 2009, Kliment filed a complaint in this court seeking review of the Commissioner’s decision (docket no. 3). The case was referred to Chief United States Magistrate Judge Paul A. Zoss for a report and recommendation, in accordance with Administrative Order #1447. On February 23, 2010, Judge Zoss issued his Report and Recommendation (docket no. 12), which recommended reversing the Commissioner’s decision, on multiple grounds, and remanding the case for further proceedings. This court accepted Judge Zoss’s Report and Recommendation on April 28, 2010, in its Memorandum Opinion and Order Regarding Magistrate Judge’s Report and Recommendation (docket no. 15) and remanded the case for further proceedings.

On April 30, 2010, Kliment filed his Application for Attorney Fees Under the Equal Access to Justice Act 28 U.S.C. § 2412 (docket no. 17). In his application, Kliment requests \$6,537.87 in attorney fees for his attorney Roger Carter’s work on the case—Kliment requests \$4,969.98³ for Carter’s work in 2009 and \$1,567.89⁴ for his work in 2010—and alleges that the Commissioner’s position was not substantially justified. Kliment attaches, to his application, Exhibit A, which is a copy of the Consumer Price Index for All Urban Consumers. Kliment also attaches, as Exhibit B, an itemization of the time Carter spent on the case. Kliment provides additional argument in support of his

³ Kliment’s itemization of Carter’s work reflects 28.86 hours worked in 2009, at a rate of \$172.21 (28.86 times \$172.21 equals \$4,969.98).

⁴ Kliment itemization of Carter’s work reflects 9 hours worked in 2010, at a rate of \$174.21 (9 times \$174.21 equals \$1,567.89).

application in his Memorandum in Support of Application for Attorney Fees Under the Equal Access to Justice Act 28 U.S.C. § 2412 (docket no. 17-1).

On May 13, 2010, the Commissioner filed his Response to Plaintiff's Application for Attorney Fees Pursuant to the Equal Access to Justice Act (docket no. 18). According to the Commissioner, the parties reached an agreement for a total EAJA fee payment of \$6,200. In accordance with *Ratliff v. Astrue*, 540 F.3d 800 (8th Cir. 2008), *reh'g denied* (Dec. 5, 2008), *petition for cert. granted*, 130 S.Ct. 48 (Sept. 30, 2009) (No. 08-1322), the Commissioner does not object to the payment of the fee award directly to Carter.⁵

II. LEGAL STANDARDS

Attorney fees may be awarded to a "prevailing party" in a social security appeal under the EAJA. 28 U.S.C. § 2412(d). The statute provides:

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was *substantially justified* or that *special circumstances* make an award unjust.

Id. (emphasis added). The Eighth Circuit Court of Appeals has had little occasion to elaborate on what constitutes "special circumstances." *See Koss v. Sullivan*, 982 F.2d

⁵ The United States Supreme Court has recently reversed the Eighth Circuit Court of Appeals' opinion in *Ratliff*, 540 F.3d 800, and held that EAJA fees under 28 U.S.C. § 2412(d) are payable to the litigant. *See Astrue v. Ratliff*, --- S.Ct. ---, 2010 WL 2346547, *3 (2010).

1226, 1229 (8th Cir. 1993) (looking to see whether special circumstances make an award unjust, and finding none, but stating “the denial of fees to counsel whose efforts brought about the Secretary’s change of position is unjust”). However, the Eighth Circuit Court of Appeals has specifically addressed, many times, when a position is substantially justified. *See, e.g., Cornella v. Schweiker*, 728 F.2d 978, 981-982 (8th Cir. 1984); *Lauer v. Barnhart*, 321 F.3d 762, 764-65 (8th Cir. 2003).

A position enjoys substantial justification if it has a clearly reasonable basis in law and fact. Accordingly, the Commissioner can advance a losing position in the district court and still avoid the imposition of a fee award as long as the Commissioner’s position had a reasonable basis in law and fact. Further, a loss on the merits by the Commissioner does not give rise to a presumption that [he or] she lacked substantial justification for [his or] her position. The Commissioner does, however, at all times bear the burden to prove substantial justification.

Goad v. Barnhart, 398 F.3d 1021, 1025 (8th Cir. 2005) (citations omitted); *see Lauer*, 321 F.3d at 765 (recognizing “the overriding, fundamental principal that the government’s position must be well founded in fact to be substantially justified”); *Sawyers v. Shalala*, 990 F.2d 1033, 1034 (8th Cir. 1993) (“To be substantially justified, the [Commissioner] must show that [his] position was ‘justified to a degree that could satisfy a reasonable person.’”) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)).

In order to obtain an award, the party must apply for the award “within thirty days of final judgment in the action” and “allege that the position of the United States was not substantially justified.” 28 U.S.C. § 2412(d)(1)(B). In *Scarborough v. Principi*, the United States Supreme Court found that “the provision’s 30-day deadline for fee

applications and its application-content specifications are not properly typed ‘jurisdictional⁶,’ but instead are “ancillary to the judgment of a court.” *Scarborough v. Principi*, 541 U.S. 401, 414 (2004). Therefore, the government can waive this requirement because it is present to protect the government’s interests. *See Vasquez v. Barnhart*, 459 F.Supp.2d 835, 836 (N.D. Iowa 2006).

If attorney fees are appropriate, the reasonable hourly rate for such fees is established by statute:

[A]ttorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A)(ii); *see Johnson v. Sullivan*, 919 F.2d 503, 505 (8th Cir. 1990) (holding that “where . . . an EAJA petitioner presents uncontested proof of an increase in the cost of living sufficient to justify hourly attorney’s fees of more than \$75 per hour [(the applicable statutory amount in the case)], enhanced fees should be awarded.”). Section 2412 also provides that “[f]ees and other expenses awarded under [subsection (d)] to a party shall be paid by any agency [(the Social Security Administration)] over which the party prevails from any funds made available to the agency by appropriation or otherwise.” 28 U.S.C. § 2412(d)(4). This court also notes that the United States Supreme Court has recently held that attorney fees, under § 2412(d), are payable to the litigant, not the directly to the litigant’s attorney. *See Astrue*, --- S.Ct. ---, 2010 WL 2346547 at *3.

⁶ Before *Scarborough v. Principi*, courts had repeatedly labeled the thirty day deadline as jurisdictional (*see Sullivan v. Hudson*, 490 U.S. 877, 886 (1989); *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987); *Monark Boat Co. v. NLRB*, 708 F.2d 1322, 1327 (8th Cir. 1983)) and that failing to comply with the thirty day requirement barred an award. *Premachandra v. Mitts*, 753 F.2d 635, 642 (8th Cir. 1985).

Filing fees and other costs may also be awarded under the EAJA to plaintiffs who prevail in social security cases. Section 2412 provides:

(a)(1) Except as otherwise specifically provided by statute, a *judgment for costs*, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

28 U.S.C. § 2412(a)(1) (emphasis added). Title 28, Section 1920 of the United States Code provides that “[f]ees of the clerk” and “[f]ees for exemplification and copies of papers necessarily obtained for use in the case” may be “tax[ed] as costs.” *Id.* § 1920(1). Section 2412 also directs that the “costs pursuant to subsection (a)” are paid by the Secretary of the United States Treasury. *See id.* § 2412(c)(1) (indicating that these costs are “paid as provided in section[] 2414”); *id.* § 2414 (stating the payment of final judgments “shall be made on settlements by the Secretary of the Treasury”); *see also* 31 U.S.C. § 1304(a)(1) (“Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when . . . (1) the payment is not otherwise provided for. . . .”).

III. LEGAL ANALYSIS

The court finds that Kliment is a “prevailing party,” and the Commissioner, by not objecting to the payment of attorney fees, has not shown either “substantial[]

justi[fication]” or “special circumstances” to preclude an award of reasonable attorney fees. *See* 28 U.S.C. § 2412(d)(1)(A). However, the Commissioner’s lack of objection is based on the agreed upon fee award of \$6,200—the Commissioner alleges that Kliment agrees to the reduced amount of fees, and Kliment has not contested that there is such an agreement. Upon a review of Kliment’s Exhibit B attached to his application—containing an itemization of the hours Carter logged for this case—the court finds that an award of fees in the amount of \$6,200 is reasonable and appropriate. Kliment’s fee request is also supported by “uncontested proof of an increase in the cost of living” to justify counsel’s hourly rate.⁷ *See Johnson*, 919 F.2d at 505. Finally, although the Commissioner does not object to the payment of the fee award in this case, under EAJA, directly to Carter, the United States Supreme Court recently held that the payments shall be made to the litigant, rather than directly to the litigant’s attorney. *See Astrue*, --- S.Ct. ---, 2010 WL 2346547 at *3. Therefore, the court will order that the fees be paid to Kliment.

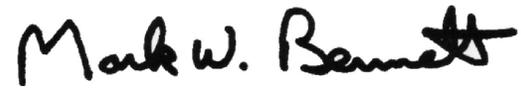
IV. CONCLUSION

THEREFORE, Plaintiff Lyle J. Kliment’s Application for Attorney Fees Under the Equal Access to Justice Act 28 U.S.C. § 2412 (docket no. 17) is granted to the extent that the court awards \$6,200 in attorney fees to Kliment—the fees are payable to Kliment and not directly to Roger Carter.

⁷ Kliment supports Carter’s rates of \$172.21 and \$174.21, for 2009 and 2010, respectively—which are greater than the statutory amount in 28 U.S.C. § 2412(d)(2)(A)(ii)—with uncontested evidence of cost of living increases (*see* docket no. 17). *See Johnson*, 919 F.2d at 505 (holding that “where... an EAJA petitioner presents uncontested proof of an increase in the cost of living sufficient to justify hourly attorney’s fees of more than \$75 per hour [(the applicable statutory amount in the case)], enhanced fees should be awarded.”).

IT IS SO ORDERED.

DATED this 15th day of June, 2010.

Handwritten signature of Mark W. Bennett in black ink.

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA