

**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

MINH H. NGUYEN,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner, Social
Security Administration,

Defendant.

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CIVIL ACTION NO. H-04-1382

MEMORANDUM AND ORDER

This case is before the court on Plaintiff Minh Nguyen's motion for attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (Dkt. 18).¹ The Commissioner has not filed a response. Under Rule 7.4 of the Local Rules of the Southern District of Texas, failure to respond to a motion will be taken as a representation of no opposition. Plaintiff's motion is well-founded and is granted.

In September, 2004, the district court adopted this court's Memorandum and Recommendation and granted plaintiff's motion for summary judgment. A Final Judgment remanding this case for further administrative proceedings was entered September 27, 2004. Nguyen's counsel now requests an award of \$3,927.93 for attorney's fees, calculated at the

¹ United States District Judge David Hittner referred the motion to this Magistrate for determination (Dkt. 19).

rate of \$148.21 per hour for 24.90 hours of attorney work, and at the rate of \$95.00 per hour for 2.50 hours of paralegal work.²

“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 Nguyen, 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 has also made no objection to the amount of the award.

² There is some question as to the timeliness of plaintiff’s request, filed December 22, 2004, 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).

Based on Consumer Price Indexes for the Houston-Galveston-Brazoria area published by the Bureau of Labor Statistics, plaintiff's counsel testifies that an adjusted rate of \$148.21 applies for work performed in 2004. *Perales v. Casillas*, 950 F.2d 1066, 1077 (5th Cir. 1992) ("Cost-of-living adjustments under the EAJA must be made to reflect the appropriate rate in the year in which the services were rendered."). Plaintiff's counsel also testifies based on his knowledge and experience in the legal community in this area that experienced paralegal time is charged from \$90 per hour.

Plaintiff's counsel has submitted an itemized statement of attorney and paralegal time as required by 28 U.S.C. § 2412(d)(1)(B). "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

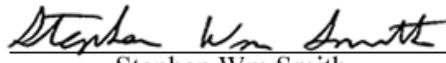
setting. *Id.* at 434. “The burden of proof of reasonableness of the number of hours in on the fee applicant.” *Leroy v. City of Houston*, 831 F.2d 576, 586 (5th Cir. 1987).

The court finds that the number of hours for which plaintiff’s counsel seeks fees is reasonable 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 court will award plaintiff's counsel fees at the rate of \$148.21 per hour for 24.90 hours of attorney time and \$95.00 per hour for 2.5 hours of paralegal time, for a total award of \$3,927.03.

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