

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

ALAN D. LAMBERT,
Plaintiff

v.

Civil Action No. 1:03cv00059

OPINION

JO ANNE B. BARNHART,
Commissioner of Social Security,
Defendant

By: PAMELA MEADE SARGENT
United States Magistrate Judge

In this social security action, I am asked to rule on a motion for an attorney’s fee and an amended motion for an attorney’s fee, (Docket Item Nos. 19, 20) ("the Motions"). Based on the reasoning set out below, the Motions will be denied.

Alan D. Lambert filed this action challenging the final decision of the Commissioner of Social Security, (“Commissioner”), denying his claim for a period of disability and disability insurance benefits, (“DIB”), and Supplemental Security Income, (“SSI”), under the Social Security Act, as amended, (“Act”), 42 U.S.C.A. §§ 423 and 1381 *et seq.* (West 2003). Jurisdiction of this court exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner answered the suit, filing the administrative record. By order entered May 10, 2004, the court remanded the case to the Commissioner pursuant to “sentence six” of 42 U.S.C. §405(g) for consideration of additional evidence. Lambert’s counsel represents to the court that, subsequent to remand, he requested and was awarded \$5,300.00 in fees and costs pursuant to the Equal Access to Justice Act, (“EAJA”), 28 U.S.C. § 2412(d)(1)(A) (West 1994 & Supp. 2004). He further represents to the court that, subsequent to

remand, the Commissioner found that Lambert was disabled and awarded benefits. Lambert's attorney filed a petition seeking approval of a fee of \$1,466.75 for representing Lambert in this court. The Commissioner responded that she did not object to the fee request. (Docket Item No. 20.) By order dated January 20, 2005, this court denied Lambert's fee petition because the Notice of Award for Lambert's DIB benefits attached thereto was dated April 17, 2004. The court found that the DIB award upon which counsel sought a fee in the case could not be the same claim which the court remanded on May 10, 2004. Thus, the court concluded that it had no evidence before it that there had been an administrative award of benefits on the claims remanded by the court, further concluding that an award of benefits was not appropriate at that time. *See Conner v. Gardner*, 381 F.2d 497, 500 (4th Cir. 1967) (court may award fee for work done before it on a DIB claim that was remanded, if, on remand, benefits are awarded on the claim).

In the Motions currently before the court, Lambert's attorney represents that, by Notice of Award letter dated December 5, 2004, the Social Security Administration informed Lambert that he would receive backpay in the amount of \$23,936.50, and that it had withheld 25 percent, or \$6,766.75, from Lambert's past due benefits to pay any claimed attorney's fee. (Docket Item Nos. 19, 20.) Again, the Commissioner responded that she does not object to the fee request. (Docket Item No. 21.) Although Lambert's attorney represents to the court that Lambert received a favorable disability decision by Notice of Award letter dated December 5, 2004, he did not file this letter with the court. Furthermore, Lambert's attorney has not provided the court with the required sworn itemized statement of his time expended in pursuing his claim in this court. Moreover, it is obvious to the court that counsel has inappropriately included time in the unsworn itemization that does not relate to the claim on which

counsel is seeking a fee for work performed in this court. Therefore, I find that an award of an attorney's fee on this record is inappropriate.

DATED: April 5, 2005.

/s/ Pamela Meade Sargent
UNITED STATES MAGISTRATE JUDGE