

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

<b>GARY BLACKWELL,</b>	)	
<b>Plaintiff</b>	)	
	)	
<b>v.</b>	)	<b>Civil Action No. 1:09cv00066</b>
	)	
	)	
	)	<b><u>REPORT AND</u></b>
	)	<b><u>RECOMMENDATION</u></b>
<b>MICHAEL J. ASTRUE,</b>	)	
<b>Commissioner of Social Security,</b>	)	<b>By: PAMELA MEADE SARGENT</b>
<b>Defendant</b>	)	<b>United States Magistrate Judge</b>

Plaintiff’s counsel in this social security case seeks an award of attorneys’ fees pursuant to the Equal Access to Justice Act, (“EAJA”), 28 U.S.C.A. § 2412(d) (West 2006). This case is before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

The plaintiff, Gary Blackwell, filed suit in this court to obtain a review of the denial of a claim for benefits under the Social Security Act. The Commissioner of Social Security answered and both parties thereafter moved for summary judgment on the basis of the administrative record. Thereafter, a final judgment was entered remanding the case to the Commissioner pursuant to “sentence four” of 42 U.S.C.A. § 405(g) (West 2003 & Supp. 2010) (Docket Item No. 28). Plaintiff’s counsel now has filed a timely motion for an award of attorneys’ fees and costs pursuant to the EAJA. (Docket Item No. 29) (“Motion”). The Commissioner does not object to the award of attorneys’ fees and costs, and the parties have executed a Stipulation allowing for the

payment of attorneys' fees in the amount of \$1250.00 and costs and expenses in the amount of \$366.62.<sup>1</sup> (Docket Item No. 34).

Under the EAJA, the court must award attorneys' fees to a prevailing party in civil cases such as this one against the United States unless it finds that the government's position was substantially justified or that special circumstances make an award unjust. *See* 28 U.S.C.A. § 2421(d)(1)(A) (West 2006). Blackwell is the "prevailing party" because of the remand pursuant to "sentence four" or 42 U.S.C. § 405(g). *See Shalala v. Schaefer*, 509 U.S. 292, 302 (1993). The government has the burden of showing that its position was justified. *See Scarborough v. Principi*, 541 U.S. 401, 403 (2004).

The government does not dispute that its position was not substantially justified in this case, and because no special circumstances have been presented that would make an award of attorneys' fees unjust in this case, I recommend that the court find that the plaintiff is entitled to an award of EAJA fees. However, for the reasons that follow, I further recommend that the court award a fee in an amount less than that set forth in the parties' Stipulation.

The EAJA provides that the amount of fees awarded must be based "upon prevailing market rates" and must not exceed \$125.00 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.A. § 2412(d)(2)(A) (West 2006.)

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<sup>1</sup> The court notes that Blackwell, in his petition for EAJA fees, sought attorneys' fees in the amount of \$1375.00 and costs and expenses in the amount of \$366.62. Thus, the Stipulation executed by the parties allows for a lesser amount of attorneys' fees.

Blackwell's counsel has submitted a sworn, itemized record of his time expended in this case, showing a total of 11 hours. (Docket Item No. 30). Counsel contends that he performed all of the itemized tasks. Despite the fact that some of the entries clearly involved clerical duties, there is no indication that any of these services were performed by nonattorneys, such as secretaries or legal assistants, and the full hourly rate is sought for all of the activities enumerated.

As stated above, the Commissioner has not objected to the award of attorneys' fees and costs, but the parties have entered into a Stipulation allowing for a lesser amount of attorneys' fees. (Docket Item No. 34). However, using this court's fairly recent case of *Chapman v. Astrue* as guidance, I find that it is proper to award a reduced hourly rate under the EAJA for nonattorney time spent "on the theory that their work contributed to their supervising attorney's work product, was traditionally done and billed by attorneys, and could be done effectively by nonattorneys under supervision for a lower rate, thereby lowering overall litigation costs." 2009 WL 3764009, at \*1 (W.D. Va. Nov. 9, 2009) (quoting *Cook v. Brown*, 68 F.3d 447, 453 (Fed. Cir. 1995)). As further stated by this court in *Chapman*, "it is not proper to award a full attorney rate for activities that should more effectively be performed by nonlawyers." 2009 WL 3764009, at \*1 (citing *Spell v. McDaniel*, 824 F.2d 1380, 1401-02 (4<sup>th</sup> Cir. 1987)). Additionally, "purely clerical tasks are ordinarily a part of a law office's overhead and should not be compensated for at all." *Chapman*, 2009 WL 3764009, at \*1 (citing *Keith v. Volpe*, 644 F. Supp. 1312, 1316 (C.D. Cal. 1986)).

Keeping these principles in mind, an examination of the itemized record submitted by counsel in this case makes clear that some of the time should be reduced in rate or eliminated. Additionally, there are other billed activities that would more appropriately have been included at a nonattorney rate or are excessive. Plaintiff's counsel has claimed 1 hour for preparation of the civil cover sheet, Complaint and

three summonses. As this court noted in *Chapman*, such documents are forms routinely submitted by plaintiff's counsel to this court. That being the case, I recommend reducing this entry to 1.00 hour of paralegal time and .25 hour of attorney time. Plaintiff's counsel also is claiming .25 hour of time for submission of certified green cards to the court. I recommend that .25 hour of paralegal time be allowed for this activity. Plaintiff's counsel seeks compensation for .25 hour of time for review of the Commissioner's motion for extension of time to file his summary judgment motion and supporting brief, .25 hour of time for review of the order granting the same and .25 hour of time for review of the oral order transferring the case. However, pursuant to *Chapman*, such documents are forms routinely submitted to this court and with which plaintiff's counsel is familiar. Both the motion for extension and the order granting the motion were one page in length. The oral order transferring the case was a docket entry only. Thus, I recommend that only .25 hour of attorney time be allowed for these activities. Similarly, plaintiff's counsel seeks .25 hour of time for preparation and submission of the plaintiff's first motion for extension of time to file his motion for summary judgment and brief, .25 hour of time for review of the oral order granting the same and .25 hour of attorney time for preparation and submission of the plaintiff's second such motion. I recommend only .50 hour of paralegal time and .25 hour of attorney time for these activities. Likewise, plaintiff's counsel seeks .25 hour of attorney time for review of the Commissioner's Answer, .25 hour of attorney time for review of the magistrate judge's notice to counsel and .25 hour of attorney time for mailing the magistrate's notice to the court. Again, based on the same reasoning, I recommend only .25 hour of attorney time be allowed for these activities. Next, plaintiff's counsel seeks .25 hour of attorney time for review of the briefing notice to counsel, .25 hour of attorney time for review of the order granting the plaintiff's second motion for extension and .25 hour of attorney time for review of the order referring the case to the magistrate judge. I recommend .25 hour of attorney time be allowed for these activities. Plaintiff's counsel seeks 5 hours of attorney time for the

preparation of the summary judgment motion and supporting brief. However, as this court stated in *Chapman*, “[i]n the present context, the organization of a client’s medical records is a routine and rote task. Although potentially more time consuming when performed by a nonlawyer, this task is easily handled by nonattorney staff under supervision. The benefit of a lower hourly rate should therefore accrue to the client.” 2009 WL 3764009, at \*2. Thus, I recommend that 1 hour of paralegal time and 4 hours of attorney time be allowed for this activity. Plaintiff’s counsel also seeks .25 hour of attorney time for reviewing the court’s Report and Recommendation and .25 hour of attorney time for the accompanying order. The order is a mere one-page document stating that the Commissioner’s motion for summary judgment is denied and remanding the case to the Commissioner for further evaluation. Once having read the actual Report and Recommendation, the time taken to review the accompanying order is, as stated by this court in *Chapman*, “barely cognizable.” 2009 WL 3764009 at \*2. Thus, I will allow .25 hour of attorney time for both of these activities combined. Finally, plaintiff’s counsel seeks compensation for .25 hour of attorney time for submission of additional medical evidence to the court. I find that such submission is a “routine and rote” task, capable of performance by nonattorney staff, and that the lower rate should accrue to the client. Therefore, I recommend allowing .50 hour of paralegal time for this activity.

Based on the above reasoning, I recommend that the court not award the \$1,250.00 in attorneys’ fees as set forth in the Stipulation. Based on the revisions stated above, the fee computation is divisible into two categories of costs: attorney time and nonattorney time. There are a total of 6.5 hours of attorney time compensable at the \$125 per hour attorney rate, for a total of \$812.50 in compensable attorney time. The remaining nonattorney activities total 3.25 hours. This court has held that an award of \$75 per hour is fair compensation under the circumstances for such nonattorney time. *See Chapman*, 2009 WL 3764009, at \*2 (citing *Alexander S.*

*v. Boyd*, 113 F.3d 1373, 1377 n.1 (4<sup>th</sup> Cir. 1997) (paralegal services compensated at \$65 per hour where lead counsel compensated at \$225 per hour and associate counsel at \$100 per hour). That being the case, the nonattorney time charges in this case total \$243.75. Adding the respective attorney and nonattorney totals amounts to a total compensable fee in this case of \$1,056.25.<sup>1</sup>

## **RECOMMENDED DISPOSITION**

For the foregoing reasons, I recommend that the Motion be granted, but that attorneys' fees under the EAJA in the reduced amount of \$1,056.25 be awarded to plaintiff's counsel. Although this court's past practice has been to order that attorneys' fees be paid directly to plaintiff's counsel, the Fourth Circuit has recently ruled that "[a]ttorney's fees under the EAJA are [to be] awarded to the 'prevailing party,' not the attorney." *Stephens v. Astrue*, 565 F.3d 131, 140 (4<sup>th</sup> Cir. 2009). In this case, the parties stipulated that any attorneys' fees awarded be made payable to plaintiff's counsel. (Docket Item No. 34). Thus, I recommend that attorneys' fees in the amount of \$1,056.25 be paid directly to plaintiff's counsel. I further recommend that \$366.62 in costs and expenses be awarded to plaintiff's counsel, as well.

### **Notice to Parties**

Notice is hereby given to the parties of the provisions of 28 U.S.C.A. §

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<sup>2</sup>Plaintiff's counsel initially requested a fee of \$1,375.00, reflecting a total of 11 hours at \$125.00 per hour. Although the Commissioner does not object to the award of attorneys' fees, and despite the fact that the parties have executed a Stipulation allowing for the payment of attorneys' fees in the amount of \$1,250.00, this court is obligated under the EAJA to determine the proper fee. *See Design & Prod., Inc. v. United States*, 21 Cl. Ct. 145, 152 (1990) (holding that under the EAJA, "it is the court's responsibility to independently assess the appropriateness and measure of attorney's fees to be awarded in a particular case, whether or not an amount is offered as representing the agreement of the parties in the form of a proposed stipulation.").

636(b)(1)(C) (West 2006 & Supp. 2010):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14-day period, the Clerk is directed to transmit the record in this matter to the Honorable James P. Jones, United States District Judge.

DATED: January 26, 2011.

/s/ Pamela Meade Sargent  
UNITED STATES MAGISTRATE JUDGE