

IP 04-1446-C Y/L Mogg v Astrue  
Judge Richard L. Young

Signed on 04/30/07

**NOT INTENDED FOR PUBLICATION IN PRINT**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

LARRY R. MOGG, )  
Plaintiff, )  
 )  
vs. ) 1:04-cv-1446-RLY-WTL  
 )  
MICHAEL J. ASTRUE, ACTING )  
COMMISSIONER OF SOCIAL SECURITY, )  
Defendant. )  
 )

**ENTRY ON PLAINTIFF’S APPLICATION FOR ATTORNEY FEES UNDER THE  
EQUAL ACCESS TO JUSTICE ACT and PLAINTIFF’S MOTION FOR ADDITION TO  
AMOUNT OF E.A.J.A. ATTORNEY FEES**

Plaintiff, Larry R. Mogg (“Mogg”), brings this action seeking attorney’s fees pursuant to the Equal Access to Justice Act 28 U.S.C. § 2412(d)(1) (“EAJA”) as the prevailing party in an action against the United States. Defendant, Michael J. Astrue,<sup>1</sup> Commissioner of Social Security (“Commissioner”) objects. For the reasons set forth below, the court **DENIES** Plaintiff’s motion for attorney fees and his supplemental motion for additional attorney fees.

**I. Procedural History**

On January 25, 2002, Mogg filed his application for benefits, alleging disability due to various ailments, including osteoarthritis of the knees and degenerative arthritis of the spine. After a denial of his application, Mogg filed a request for hearing before an Administrative Law

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<sup>1</sup> On February 12, 2007, Michael J. Astrue became the Acting Commissioner of Social Security. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Michael J. Astrue should be substituted, therefore, for Commissioner Jo Anne B. Barnhart, as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

Judge (“ALJ”). Mogg’s case was assigned to an ALJ, who conducted a hearing on September 30, 2003, at which Mogg appeared and testified. On February 27, 2004, the ALJ determined that Mogg was not disabled.

On September 3, 2004, Mogg appealed the ALJ’s decision to this court, and on July 19, 2005, the court affirmed the judgment of the ALJ in a Memorandum Decision. On September 19, 2005, Mogg appealed this court’s decision to the Seventh Circuit Court of Appeals. On October 12, 2006, the Seventh Circuit vacated the judgment of this court and remanded the case to the ALJ to more adequately articulate his reasoning at Step Three of the analysis. Mogg now moves for fees under the EAJA.

## **II. Discussion**

Pursuant to the EAJA, 28 U.S.C. § 2412(d)(1)(A), a court

shall award to a prevailing party other than the United States fees and other expenses. . . , incurred by that party in any civil action . . . brought by or against the United States . . . , unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Accordingly, a plaintiff is entitled to fees and expenses if “(1) he was a ‘prevailing party’; (2) the government’s position was not ‘substantially justified’; (3) there existed no special circumstances that would make an award unjust; and (4) he filed a timely application with the district court.” *Cunningham v. Barnhart*, 440 F.3d 862, 863 (7th Cir. 2006). The only element in dispute is whether the government’s position was substantially justified.

A court may award attorney fees if either the Commissioner’s pre-litigation conduct or her litigation position was not substantially justified. *Id.* The ALJ’s decision is considered a part of the Commissioner’s pre-litigation conduct. *Id.* at 864.

Although the EAJA does not define “substantial justification,” the Supreme Court has

defined the term to mean “justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The standard is satisfied upon the existence of a “genuine dispute,” or if reasonable people could differ as to the appropriateness of the contested action. *Pierce*, 487 U.S. at 565 (quotations omitted); *see also Stein v. Sullivan*, 966 F.2d 317, 320 (7th Cir. 1992).

. . . [A] position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

*Id.* at 566 n. 2. *See also Kolman v. Shalala*, 39 F.3d 173, 177 (7th Cir. 1994) (“The test for substantial justification is whether the agency had a rational ground for thinking it had a rational ground for its decision.”). The burden of proving substantial justification rests with the Commissioner. *Jackson v. Chater*, 94 F.3d 274, 278 (7th Cir. 1996); *Smith v. Bowen*, 663 F.Supp. 59, 60 (S.D.Ind. 1987).

In the instant case, the Seventh Circuit held that the ALJ failed to adequately articulate the basis for his finding that Mogg’s impairments did not meet or equal a medical listing at Step Three of his analysis. *Mogg v. Barnhart*, 199 Fed.Appx. 572, 576 (7th Cir. 2006). The Court’s criticism focused on the fact that the ALJ not only failed to specify the relevant Social Security listings, but also failed to properly evaluate certain documents showing that Mogg “could not ambulate effectively according to Listing 1.02, and that the movement of his spine was limited according to Listing 1.04.” *Id.*

The Seventh Circuit’s opinion did not reject the court’s determination that there was substantial evidence in the record supporting the ALJ’s decision. Rather, it held that there was some contrary evidence in the record that the ALJ failed to consider, or at least failed to

articulate that he had considered. *Id.* As there was some evidence to support the Commissioner's position, the court finds that a genuine dispute existed, and thus, the Commissioner's position was substantially justified. *See Stein*, 966 F.2d at 320 ("The requirement that the ALJ articulate his consideration of the evidence is deliberately flexible . . . That the ALJ failed to meet this articulation requirement in no way necessitates a finding that the Secretary's position was not substantially justified."); *see also Cunningham*, 440 F.3d at 864 (holding that a court did not abuse its discretion in denying an award of EAJA fees where the case was remanded for further articulation). Mogg's motion for EAJA attorney fees and his supplemental motion for additional fees are therefore **DENIED**.

### **III. Conclusion**

For the reasons explained above, the court hereby **DENIES** Plaintiff's Application for Attorney Fees Under the Equal Access to Justice Act (Docket # 34) and **DENIES** Plaintiff's Motion for Addition to Amount of E.A.J.A. Attorney Fees (Docket # 40).

**SO ORDERED** this 30th day of April 2007.

s/ *Richard L. Young*  
RICHARD L. YOUNG, JUDGE  
United States District Court

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