

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

JORGE TORRES,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 6:23-cv-1691-RBD-RMN

REPORT AND RECOMMENDATION

This cause comes on for consideration without oral argument on Plaintiff's Opposed Motion for Attorney's Fees (Dkt. 34), filed September 24, 2024 ("Motion"). This matter was referred to me for issuance of a report and recommendation. For the reasons discussed below, I recommend that the Motion be granted in part and denied in part.

I. BACKGROUND

In this action, judgment was entered reversing the decision of the Commissioner and directing the Commissioner to calculate an award of benefits from December 1, 2014, and to award Plaintiff the same. Dkt. 31 at 5; Dkt. 32. Plaintiff now moves for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) ("EAJA"). Dkt. 34.

II. ANALYSIS

A party seeking an award of attorney fees pursuant to the EAJA must demonstrate that he is eligible for an award of EAJA fees and that the amount sought is reasonable. Plaintiff requests an award of attorney's fees in the amount of \$27,317.59, and costs of \$402.00 for the filing fee. Dkt. 34 at 1.

A. Eligibility for EAJA Fees

A party may recover an award of attorney fees against the government provided the party meets five requirements: (1) the party seeking the award is the prevailing party; (2) the application for such fees, including an itemized justification for the amount sought, is timely filed; (3) the claimant had a net worth of less than \$2 million at the time the complaint was filed; (4) the position of the government was not substantially justified; and (5) there are no special circumstances which would make an award unjust. *See* 28 U.S.C. § 2412(d)(1), (d)(2). For the reasons discussed below, I find that Plaintiff qualifies for an award of fees under EAJA.

1. Plaintiff is a prevailing party.

The Court reversed the decision of the Commissioner and directed the Commissioner to calculate an award of benefits from December 1, 2014. Dkt. 31 at 5. The Clerk then entered judgment in Plaintiff's favor. Dkt. 32. I find that Plaintiff is a prevailing party.

2. Plaintiff's application is timely.

A plaintiff must file an application for fees and other expenses within 30 days of the “final judgment in the action.” 28 U.S.C. § 2412(d)(1)(B). A final judgment is defined as a judgment that “is final and not appealable.” *Id.* § 2412(d)(2)(G). The Commissioner generally has 60 days in which to appeal, thus a judgment typically becomes final after 60 days. Fed. R. App. P. 4(a)(1)(B). As discussed above, the plaintiff then has 30 days in which to move for EAJA fees. Therefore, a motion for EAJA fees is timely if it is filed within 90 days after the judgment is entered. *Jackson v. Chater*, 99 F.3d 1086, 1095 n.4 (11th Cir. 1996). The judgment in this case was entered on June 27, 2024, and the Motion was filed on September 24, 2024. Dkts. 32, 34. Plaintiff's Motion is therefore timely.

3. Plaintiff's net worth is less than \$2 million.

Plaintiff states that he had a net worth of less than \$2 million when the complaint was filed. Dkt. 34 at 4; Dkt. 34-2. This statement is uncontroverted. Thus, I find that Plaintiff qualifies under EAJA.

4. The government's position was not substantially justified.

“The government's position is substantially justified under the EAJA when it is justified to a degree that would satisfy a reasonable person – i.e. when it has a reasonable basis in both law and fact.” *U.S. v. Douglas*, 55 F.3d 584, 588 (11th Cir. 1995) (internal quotations omitted).

The Commissioner bears the burden of proving that her position was substantially justified. *United States v. Jones*, 125 F.3d 1418, 1425 (11th Cir. 1997). Unless the Commissioner comes forth and satisfies this burden, the government’s position will be deemed not substantially justified. The Commissioner never responded to the Motion, and so I find that its position was not substantially justified.

5. There are no special circumstances.

I find that there are no special circumstances that would make an award of fees unjust.

B. Reasonableness of EAJA Fee & Costs

Plaintiff represents that his attorney expended 76.6 hours in 2023, at an hourly rate of \$244.62, and 34.2 hours in 2024, at an hourly rate of \$250.87. *Id.* Plaintiff attaches a detailed timesheet to the Motion. Dkt. 34-3. The hourly rate requested does not exceed the EAJA cap of \$125 per hour adjusted for inflation. Dkt. 34 at 4–6. Although the Motion states that it is opposed, Defendant has not responded and the time to do so has passed. *Id.* at 1, 2, 14–15; see Local Rule 3.01(c) (“A party may respond to a motion within fourteen days after service of the motion.”). “If a party fails to timely respond, the motion is subject to treatment as unopposed.” Local Rule 3.01(c). I recommend the Court treat the Motion as unopposed, and, based on the information provided, find that the hourly rates and

time requested for work on this matter are reasonable, especially in view of the significant record that accumulated over a decade of litigation.

Plaintiff also requests an award of costs for the \$402.00 filing fee. Dkt. 34 at 1. Costs are permissible under the EAJA “as enumerated in section 1920 of this title ” 28 U.S.C. § 2412(a)(1). Section 1920 enumerates “fees of the clerk and marshal.” 28 U.S.C. § 1920(1). I find that the \$402.00 in filing fees is reasonable because this was the fee charged for opening a civil action in the Middle District of Florida when Plaintiff instituted this action. Thus, the request for costs is compensable under 28 U.S.C. § 2412(a)(1).

In sum, I find that Plaintiff is entitled to recover \$27,317.59 in attorney’s fees and \$402.00 in costs and recommend that the Court award same.

C. Assignment of EAJA Fees

Plaintiff states, “[i]f the United States Treasury Department determines that [Plaintiff] does not owe a federal debt, he asks that the Commissioner accept his assignment of EAJA fees to counsel, and that payment be made directly to his attorney.” Dkt. 34 at 2. In *Astrue v. Ratliff*, 560 U.S. 586, 598 (2010), the United States Supreme Court held that EAJA fees are awarded to the “prevailing party” or the litigant rather than to the litigant’s attorney. The Supreme Court noted, however, that

nothing in the statute or its holding affects the prevailing party's contractual right to assign the right to receive the fee to an attorney, analogizing those cases interpreting and applying 42 U.S.C. § 1988 where the Court has held a prevailing party has the right to waive, settle, negotiate, or assign entitlement to attorney's fees. *Id.* at 596–98. An assignment, however, must comply with the requirements in 31 U.S.C. § 3727(b) to be valid. *See Farm Bureau Mut. Ins. Co. v. United States*, 5 Cl. Ct. 142, 145 (Cl. Ct. 1984).

Section 3727(b) provides that “[a]n assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued.” 31 U.S.C. § 3727(b). An assignment made before the award of attorney's fees therefore necessarily violates section 3727(b) because the claim has not been allowed, the amount of the claim has not been determined, and a warrant for the claim has not been issued. *Id.* Thus, any assignment of EAJA fees which predates an award and determination of the amount of fees is voidable. *See Delmarva Power & Light Co. v. United States*, 542 F.3d 889, 893 (Fed. Cir. 2008); *Young v. Astrue*, No. 3:09-cv-132, 2011 WL 1196054, at *3–4 (M.D. Ga. Feb. 24, 2011).

In this case, because Plaintiff's assignment, Dkt. 34-1, predates my recommendation of an award of fees under the EAJA, it does not satisfy

section 3727(b). *Crumbly v. Colvin*, No. 5:13-cv-291, 2014 WL 6388569, at *4–5 (M.D. Ga. Nov. 14, 2014); *Huntly v. Comm’r of Soc. Sec.*, No. 6:12-cv-613, 2013 WL 5970717, at *5 (M.D. Fla. Nov. 3, 2013). I therefore recommend the Court conclude the award of EAJA fees should be made payable to Plaintiff as the prevailing party. *See Kerr for Kerr v. Comm’r of Soc. Sec.*, 874 F.3d 926, 935, 937 (6th Cir. 2017) (holding in an appeal of a Social Security case that “attorney fees ordered under EAJA are to be paid to the prevailing party” and 31 U.S.C. § 3727(b) “could serve as a bar to an EAJA fee award assignment[.]”).

III. CONCLUSION

Accordingly, I respectfully **RECOMMEND**:

1. The Motion (Dkt. 34) be **granted** to the extent the Court awards EAJA attorney’s fees and costs to Plaintiff, as the prevailing party, in the total sum of \$27,719.59;
2. The rest of the Motion be **denied**;¹ and
3. The Clerk be directed to close the case.

NOTICE TO PARTIES

“Within 14 days after being served with a copy of [a report and recommendation], a party may serve and file specific written objections to the proposed findings and recommendations.” Fed. R. Civ. P. 72(b)(2). “A

¹ Of course, the Commissioner may waive the application of 31 U.S.C. § 3727(b) to the fee award. *Kerr*, 874 F.3d at 934–35.

party may respond to another party's objections within 14 days after being served with a copy." *Id.* A party's failure to serve and file specific objections to the proposed findings and recommendations alters review by the district judge and the United States Court of Appeals for the Eleventh Circuit, including waiver of the right to challenge anything to which no objection was made. *See* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(B); 11th Cir. R. 3-1.

Entered in Orlando, Florida, on October 22, 2024.



ROBERT M. NORWAY
United States Magistrate Judge

Copies furnished to:

Hon. Roy B. Dalton, Jr.

Counsel of Record