

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

JAMES M. HARDESTY,
Plaintiff-Appellant,

v.

1:07-cv-1396-LJM-DML

MICHAEL J. ASTRUE, Commissioner
of the Social Security Administration,
Defendant-Appellee.

Plaintiff-Appellant's Petition for Attorney Fees

Under the Equal Access To Justice Act

Plaintiff-Appellant, James M. Hardesty, hereby submits his application for an award of attorney's fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412 in the amount of \$30,710.08. Defendant-Appellee's position was not "substantially justified", and Plaintiff-Appellant is the prevailing party under EAJA. Plaintiff-Appellant's net worth is less than \$2,000,000 currently and at the time of the filing of the civil action as evidenced by financial affidavit attached to this Petition as Exhibit A. In support of this Petition, Plaintiff-Appellant states as follows:

1. The Appeals Council denied Plaintiff-Appellant's Request for Review on August 30, 2007, making the ALJ's ruling the final decision of the Commissioner. 20 C.F.R. § 404.981. Therefore, the ALJ and the Commissioner will be referred to interchangeably.

2. On October 7, 2007, Plaintiff-Appellant filed a timely Complaint, requesting judicial review of the Commissioner's final determination, in the United States District

Court for the Southern District of Indiana, Indianapolis Division, pursuant to 42 U.S.C. § 405(g).

3. On March 31, 2009, U.S. District Court Judge Larry J. McKinney affirmed the Commissioner's decision.

4. On May 29, 2009, Plaintiff-Appellant filed a timely Notice of Appeal on May 29, 2009 with the United States Court of Appeals for the Seventh Circuit.

5. On August 28, 2009, Plaintiff-Appellant filed his Brief of Plaintiff-Appellant.

6. Defendant- Appellee moved for extensions of time to file his Brief of Defendant- Appellee to November 12, 2009. On or about November 9, 2009, Assistant Regional Counsel Edward J. Kristof phoned counsel for the Plaintiff-Appellant, advising counsel that he intended to move for a remand pursuant to Seventh Circuit Rule 57. Commissioner subsequently filed on November 12, 2009 a Motion to Stay the Briefing pending District Court action on Rule 60(b) and subsequently filed a Motion for Remand pursuant to Seventh Circuit Rule 57 on November 30, 2009.

7. No objections having been filed, the Seventh Circuit issued an order remanding this matter to the District Court for further proceedings on December 2, 2009.

8. Under *Shalala v. Schaffer*, 509 U.S. 292, 300-02 (1993), Plaintiff-Appellant is a prevailing party by virtue of this remand, made pursuant to 42 U.S.C. §405(g). Plaintiff can file a timely Petition for Attorney's Fees at this time.

9. The position of the United States was not substantially justified. *See* 28 U.S.C. § 2412(d)(1)(B). The "position of the United States" includes the action of the agency leading to litigation. 28 U.S.C. § (d)(2)(D). Moreover, the Government has the burden of

leading to litigation. 28 U.S.C. § (d)(2)(D). Moreover, the Government has the burden of proof to demonstrate it was “substantially justified” in both law and fact at both the administrative and court stages of adjudication. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 142 n. 6 (1990). Substantial justification means “justified in the substance or in the main’ – that is, justified to a degree that could satisfy a reasonable person.” *Underwood*, 487 U.S. at 565.

10. The Commissioner’s lack of substantial justification in the pre-litigation action of the Agency and in the litigation in the District Court is demonstrated by the Commissioner’s recognition of his own errors and his motion for remand. The ALJ’s actions were unreasonable, even though the Commissioner acted reasonably in requesting the remand.

11. Because the Commissioner has conceded that his position was not substantially justified by voluntarily requesting remand, the only issue under the EAJA is the amount of fees due to Plaintiff-Appellant.

12. Plaintiff-Appellant moves this Court to grant an hourly rate of \$225.00 for attorney work performed at the District Court and the Court of Appeals levels. *Barker v. City of West Lafayette*, 894 N.E.2d 1004 (Ind. Ct. of App. 2008) and *Richlin Security Service v. Chertoff*, 128 S. Ct. 2007, 170 L. Ed 2d 960 (2008). The time summary and fee calculation for the foresaid attorney is attached and marked as Exhibit B. Plaintiff-Appellant also requests compensation for time spent preparing this motion as set forth in Exhibit C, as is allowed under the EAJA. See *Commissioner, I.N.S. v. Jean*, 496 U.S. at 162.


13. Counsel also requests filing fees for the District Court and the Court of Appeals the sums of \$350 and \$455 respectively, as well as the cost collating and presenting the Brief in final acceptable form and the filing of the same as provided by Counsel Press, LLC in the sum of \$1105.08 for a total of \$1910.08.

WHEREFORE, Plaintiff-Appellant hereby makes application to the Court for an award of attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, payable to C. David Little of Power, Little and Little, as Counsel¹, in the total sum of \$28,800.00 and for costs in the sum of \$1910.08.

Dated: January 29, 2010

Respectfully Submitted,

POWER, LITTLE & LITTLE
253 North Jackson Street
Frankfort, IN 46041
Telephone : (765) 654-4340

BY: 
C. David Little, #8857-12
Attorney for Plaintiff-Appellant
James M. Hardesty


¹ Plaintiff-Appellant has assigned any fees awarded under the EAJA to his attorney, C. David Little of Power, Little and Little. Assignment of EAJA fees is attached at Exhibit D. Therefore, the EAJA attorney fees should be paid in the name of C. David Little of Power, Little and Little and sent to his office address.

Certificate of Service

I certify that on the 29th day of January, 2010, service of a true and complete copy of the above foregoing pleading or paper was made upon each party or attorney of record herein by depositing the same in the United States mailing envelopes properly addressed to each of them and with sufficient first class postage affixed.

POWER, LITTLE & LITTLE

By: _____


C. David Little

Distribution:

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Attachments:

- Exhibit A – Affidavit of Net Worth of James M. Hardesty
- Exhibit B - Time Summary and Fee Calculation
- Exhibit C – Time Spent Preparing EAJA Motion
- Exhibit D – Assignment of fees of James M. Hardesty