IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JAMES M. HARDESTY,	)	
Plaintiff,	)	CIVIL NO. 1:07-CV-01396-LJM-DML
	)	HON. LARRY J. MCKINNEY,
V.	)	DISTRICT JUDGE
	)	HON. DEBRA MCVICKER LYNCH,
MICHAEL J. ASTRUE,	)	MAGISTRATE JUDGE
COMMISSIONER OF	)	
SOCIAL SECURITY,	)	
Defendant.	)	

PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO PLAINTIFF'S PETITION FOR ATTORNEYS' FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

In his Response to Plaintiff's petition for Attorneys' Fees under the Equal Access to Justice Act (EAJA), the Commissioner correctly set forth the proper standards applicable to an award of EAJA fees under 28 U.S.C. § 21412(d)(1)(A). Further, an applicant for disability benefits becomes a prevailing party for the purposes of the EAJA if the denial of her benefits is reversed and remanded regardless of whether disability benefits ultimately are awarded. *Shalala v. Schaefer*, 509 U.S. 292, 300-02 (1993); *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998) ("[A] party is eligible for fees under the EAJA if [she] wins at any intermediate stage in the proceedings -- for instance, by obtaining a remand from the appeals court.").

Yet, the Commissioner misstated the facts of this case as to the reason for remand and whether or not the Commissioner's legal position was substantially justified. As such, the Commissioner has not met his burden of proof as to substantial justification, and his opposition to Plaintiff's Petition must fail. In addition, the Commissioner's assertion that Plaintiff's fee request is unreasonable must fail also in that current market rates in Central Indiana substantially support the award of this hourly fee amount as well as the hours involved to prosecute an appeal to the Court of Appeals level over a period of seven (7) years.

DISCUSSION

A. Why was this case remanded?

In the Commissioner's Response, he claims the following:

> It was not until August 2009, over two years after the ALJ's decision and five months after this Court had issued an order affirming the Commissioner's decision, and Plaintiff had filed a notice of appeal to the Seventh Circuit, that Plaintiff was able to obtain additional records from the Department of Veterans' Affairs that might support his claim. It was principally on the basis of this new and material evidence that the Commissioner asked this Court to grant relief from judgment under Fed. R. Civ. P. 60(b) (Def.'s Motion for Relief from Judgment at 1-2). Defendant's Response, p. 6.

Yet, Defendant's Motion for Relief from Judgment (referred to as Appellee's Motion for Remand below) does not cite 'new evidence' as the reason for recommending remand in this matter. To the contrary, the Motion actually says:

> Rule 60(b)(6) of the Federal Rules of Civil Procedure allows a court to relieve a party from a final order or judgment for "any . . . reason justifying relief . . . ." Fed. R. Civ. P. 60(b)(6). Because the Commissioner now agrees with Mr. Hardesty that a remand for further administrative proceedings is warranted pursuant to 42 U.S.C. § 405(g), relief from the Court's March

> 31, 2009, judgment is justified under Rule 60(b)(6). Defendant's Motion for Relief from Judgment, p. 2.

The words 'new evidence' do not appear AT ALL in the Defendant's Motion for Relief from Judgment. Similarly, when this Court indicated its willingness to grant the Motion for Remand in this matter, the words "new evidence" did not appear in the Opinion and Order either. Specifically, Judge McKinney wrote:

> In accordance with Seventh Circuit Rule 57, the Commissioner has requested that this Court indicate whether it is inclined to grant his motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. The basis for such action stems from the fact that the Commissioner now agrees with Mr. Hardesty that remand for further administrative proceedings is warranted pursuant to 42 U.S.C. § 405(g), thereby justifying relief from the Court's March 31, 2009, judgment in accordance with Fed. R. Civ. P. 60(b)(6). *See Brown v. United States*, 976 F.2d 1104, 1110 (7th Cir. 1992) ("[i]n such circumstances we have directed district courts to review such motions promptly, and either deny them or, if the court is inclined to grant relief, to so indicate so that we may order a speedy remand.").
>
> Having thus reviewed the record, the Court agrees that further administrative proceedings are warranted, and the Court is inclined to grant the relief sought by the Commissioner if the case is remanded by the United States Court of Appeals for the Seventh Circuit for purposes of modifying the judgment. Opinion and Order, November 13, 2009, p. 1-2.[1]

[11] The omission of a reason for remand is curious. By way of example, the Entry in another SSA disability remand case is instructive and seems to reflect the customary way of explaining the reason for remand. In *Sheets v. Astrue*, Judge Lawrence set forth the reasons for remand, specifically the ALJ's errors at hearing, when he wrote:

> In finding that Mathews-Sheets retained the residual functional capacity to perform a full range of sedentary work, the ALJ in this case relied primarily upon medical opinions regarding her residual functional capacity that did not take into account her subjective symptoms. In finding that Mathews-Sheets' allegation of disabling pain and other symptoms was not fully credible, the ALJ relied upon evidence of record that simply is not inconsistent with her allegation and does not support a finding that her pain is something less than disabling. Accordingly, this case must be, and is, REVERSED AND REMANDED for proceedings consistent with this Entry. In addition to addressing the credibility issue, the ALJ shall on remand fully address the effects of Mathews-Sheets' obesity and her impairments

Further, the Mandate of the Seventh Circuit Court of Appeal also does not use the words "new evidence". Specifically, Judge Easterbrook's order says:

> Upon consideration of the APPELLEE'S MOTION FOR REMAND PURSUANT TO SEVENTH CIRCUIT RULE 57, filed on November 30, 2009, by counsel for the appellant, IT IS ORDERED that the motion is GRANTED. In light of the district court's indication of its willingness to modify its judgment, this appeal is REMANDED to the district court for further proceedings. The parties are reminded that a new notice of appeal must be filed by any party dissatisfied with the judgment as modified. See Cir. R. 57. The mandate in this appeal shall issue forthwith. Mandate, p. 2.

The only indicator as to the 'real' reason for remand is the language of the statute upon which all such remands are ordered. Specifically, the Court may remand a case to the Commissioner under sentence six of 42 U.S.C. 405(g) for good cause in two instances:

1. Before the Commissioner files his answer, or
2. At any time upon a showing of new and material evidence for which there was good cause for the failure to incorporate the evidence earlier. 42 U.S.C. 405(g).

If the Court remands under sentence six of 42 U.S.C. 405(g), the Court retains jurisdiction of the case until the further administrative actions are complete. Here, we presume from Judge McKinney's order that jurisdiction still lies in the District Court even though administrative proceedings have been ordered pursuant to the Opinion and Order quoted *supra*. But since the Commissioner's Motion for Remand issued BEFORE filing his Brief of Defendant-Appellee, indicating that he had no reasonable defense to present to the Seventh Circuit in this matter, it is as reasonable to assume that this remand issued because the Commissioner had not yet answered as it is to assume that

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in combination on her ability to perform substantial gainful activity. Entry of Judgment, p. 8, March 11, 2010, *Sheets v. Astrue*, Case 1:08-cv-01426-WTL-DML (2010).

this matter was remanded for new evidence. From the face of the document regarding remand in this case, it is impossible to show which of the two contingencies the Court used as the basis for remand. Hence, the reason for remand cannot be definitively determined.

Because there is no clear indication that 'new evidence' is the reason for remand, the Commissioner's assertion to the contrary is completely without basis. He has set forth no evidence whatsoever to indicate that this case was remanded on the basis of new evidence. He simply says that it was. In fact, it is equally as likely that any one or all of the Six (6) errors set forth in Appellant's Brief before the Seventh Circuit could form the basis for remand.[2] The fact is that the exact reason for remand in this case remains

[2] Those alleged errors, which the Commissioner specifically declined to address, but casually dismissed, merely setting forth a generic argument that the ALJ's action, as well as this Court's decision, were substantially justified, are as follows:

1. The ALJ erred when he failed to give any evidentiary weight to Plaintiff's Veteran's Administration disability rating. Brief of Appellant, p. 16-19;
2. The ALJ's decision that Plaintiff's testimony was not credible was in error where the ALJ did not set forth explicit, specific, and cogent reasons for his disbelief in Plaintiff's credibility, focusing instead on current (as of 2005 when the hearing was held) daily activities which Plaintiff Hardesty enjoys, for example, barbequing outside for an evening with his friends, instead of solely considering he period of time between the date of onset of his disability in September 1971 and the March 1973 expiration of his insured status. Brief of Appellant, p. 19-28, particularly p. 22, n. 8;
3. If this Court determines that the ALJ's credibility determination was defective, then the RFC determination was erroneous, necessitating reversal and remand for reconsideration in light of Plaintiff's limitations and required VE testimony. Brief of Appellant, p. 28-31.;
4. The ALJ's use of the SSA disability grid to determine that Plaintiff was not disabled was in error where evidence shows that Claimant suffered from both exertional and nonexertional limitation, making consideration of the testimony of a VE mandatory. Brief of Appellant, p. 31-35;
5. The ALJ erred by failing to require evidence from a VE as to whether jobs exist for Plaintiff in the national economy pursuant to 42 U.S.C § 423(d)(2)(A) and 20 C.F.R. §§ 404.1512(g) and 404.1560(c), Brief of Appellant, p. 35-37 and
6. The ALJ erred in rendering a decision where one ALJ heard the testimony at hearing, but another ALJ (HOCALJ) signed the decision without any apparent authorization to do so. Alternatively, if the case was reassigned, but no subsequent hearing was held under HALLEX requirements, Claimant was prejudiced by omission of required vocational evidence, and the refusal to determine his credibility based on testimony as to the newly

unknown, and the Commissioner has given no valid or even colorable basis whatsoever for his claim that 'new evidence' is the reason for remand in this matter.

B. What is 'new evidence'?

Most Americans find some work of Shakespeare, perhaps Hamlet[3], on the syllabus of their high school English class. When they read the famous "To be or not to be" soliloquy, they become acquainted with Shakespeare's writings. This is likely the first exposure that they have to Shakespeare's work, so his thoughts on tragic existentialism and his iambic pentameter form of prose are 'new' to them. Yet these words were written in the early 1600s, more than 400 years ago. Thus, Shakespeare's writings cannot be said to be 'new' because they have been in existence for hundreds of years. They can only be said to be 'new' to these students because the students were unaware of his work. Clearly, the work is far from 'new' because it existed hundreds of years before these students were born. Further, this material has been available to these students since their conception. Yet, unless earnest mothers read sonnets to the infants or took them to Shakespeare festivals as young children, these students were not exposed previously to Shakespeare's work even though they may have heard of him or had some notion about his literary prowess. But Shakespeare's work cannot be called 'new' just because these students were not exposed to it before high school English class. His work existed before the students were born and was technically available to them since they took their first breath.

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acquired military medical evidence of his permanently disabling condition and VA disability rating in violation of HALLEX I-2-840. Brief of Appellant, p. 37-41.

[3] http://en.wikipedia.org/wiki/Hamlet

As applied to this case, the evidence from the Department of Defense (DOD) and the Veteran's Administration (VA) in this matter as to the massive injuries that Plaintiff suffered from friendly short mortar fire in Vietnam in 1968 cannot be considered 'new' evidence either. Brief and Required Appendix of Plaintiff-Appellant James M. Hardesty, p. 6-9, (Brief of Appellant), R. 58, 287, 292-293, 296, 300, 343-355. First, since Plaintiff's injury occurred in 1968, this DOD/VA evidence has been in existence for the past 42 years. Thus, it is NOT 'new' evidence and has been theoretically available since 1968.

Second, the ALJ was aware of the existence of this evidence because he knew of Plaintiff's Vietnam service and VA disability rating at the time of the 2005 hearing, if not before. As set forth in the Brief of Appellant:

> Specifically, ALJ Hanson left the record open for receipt of military medical records from the date of Plaintiff's accident in 1969 to 1973 even though Plaintiff was honorably discharged as totally and permanently disabled in 1969. (R. 362) as cited in Brief of Appellant, *Id.*

Thus, the ALJ had reason to know that Plaintiff was a disabled veteran at the time of the hearing, if not before that time, and he could have used his power to compel DOD/VA records to flesh out the disability determination. Yet, he chose not to do so.

Third, Plaintiff had requested his military medical records, but it took DOD and VA considerable time to produce them. (R. 283). On October 25, 2005, Plaintiff sent all of his military medical records from 1967 to 1969 to the ALJ. (R. 281). Those records (R. 281-323) included details of his injury, the Medical Examination Board (MEB) report (R. 290-293, 309), the Physical Examination Board (PEB) disability determination and

honorable discharge (R. 58 , 300), and his VA disability rating[4], which was augmented by what the Commissioner again refers to as 'new' evidence. It was actually entitled 'Motion to Supplement Record' because it was a subsequent, supplemental filing with the District Court detailing the VA's disability rating from October 1969 as well as a continuing affirmation of Plaintiff's total disability rating in 2005. Since the records (not the Motion to Supplement) were submitted on October 25, 2005 and the ALJ, albeit a different ALJ, issued his denial on March 30, 2007, the deciding ALJ had Seventeen (17) months to consider this 'new' evidence from the DOD/VA, which was not 'new' in 2007 at all.

Fourth, Defendant's Response tells us that:

> Approximately one month after the ALJ issued his decision, Plaintiff submitted additional evidence to the Appeals Council and

[4] On May 1, 1969, Plaintiff was placed on PermDsabl Ret'd List Part 10001, MCSM & CMC Mag1444Z Jun69 &VA codes 5165 5317, 5320, 5319 effective June 16, 1969. He was honorably discharged and decorated with a National Service Medal, Vietnamese Service Medal, Vietnamese Campaign Medal, a Purple Heart, and a Good Conduct Medal. R. 58. The VA code numbers refer to the Schedule of Disability Ratings from the Code of Federal Regulations, which can be found at http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&rgn=div5&view=text&node=38:1.0.1.1.5&idno=38. Thus, the VA codes from 1969 translate as follows:
5165: Amputation of the thigh, lower, permitting prosthesis, rated 40
5317: Group XVII. Function: Extension of hip (1); abduction of thigh; elevation of opposite side of pelvis (2, 3); tension of fascia lata and iliotibial (Maissiat's) band, acting with XIV (6) in postural support of body steadying pelvis upon head of femur and condyles of femur on tibia (1). Pelvic girdle group 2: (1) Gluteus maximus; (2) gluteus medius; (3) gluteus minimus, severe, rated 50
5320: Group XX. Function: Postural support of body; extension and lateral movements of spine. Spinal muscles: Sacrospinalis (erector spinae and its prolongations in thoracic and cervical regions), severe, rated 60
5319: Group XIX. Function: Support and compression of abdominal wall and lower thorax; flexion and lateral motions of spine; synergists in strong downward movements of arm (1). Muscles of the abdominal wall: (1) Rectus abdominis; (2) external oblique; (3) internal oblique; (4) transversalis; (5) quadratus lumborum, rated 50
The combined rating table is found at this website and is identified as 41 FR 11293, Mar. 18, 1976, as amended at 54 FR 27161, June 28, 1989; 54 FR 36029, Aug. 31, 1989. Applying these codes and their disability rating numbers (50, 50, 60, and 40) to the combined table as per the instructions, it appears that Plaintiff's VA disability rating is 94.

> requested review of the ALJ's decision (R.8, 234-301). The Appeals Council considered the new evidence, but denied review, leaving the ALJ's decision as the final decision of the Commissioner (R. 4-6). Defendant's Response, p. 1.

Again, the Commissioner has misstated facts. The ALJ issued his decision on March 30, 2007. Plaintiff submitted the 'new' evidence in question on October 25, 2005, 17 months BEFORE, NOT one month AFTER, the ALJ's March 30, 2007 decision. When the Commissioner writes the following paragraph, he is simply wrong as to the timing, the content of the evidence submitted in August 2009, and the reason for remand:

> At the conclusion of Plaintiff's August 2005 hearing, the ALJ stated that he would keep the record open so that Plaintiff could submit additional evidence (R. 362), but Plaintiff's attorney did not submit relevant records by the time the ALJ ultimately issued his decision in March 2007 (R. 18-23). It was not until August 2009, over two years after the ALJ's decision and five months after this Court had issued an order affirming the Commissioner's decision, and Plaintiff had filed a notice of appeal to the Seventh Circuit, that Plaintiff was able to obtain additional records from the Department of Veterans Affairs that might support his claim. It was principally on the basis of this new and material evidence that the Commissioner asked this Court to grant relief from judgment under Fed. R. Civ. P. 60(b). Def.'s Motion for Relief from Judgment at 1-2). Defendant's Response, p. 6.

Correctly stated, Plaintiff filed his Request for Review on April 23, 2007 and the Appeals Council took action on August 30, 2007, considering this 'new' evidence, which had actually been submitted to the ALJ Eighteen (18) months before the Appeals Council's refusal. Further, the Commissioner also misses the fact that this 'new' evidence, the very evidence which he claims necessitated remand in this matter, became part of the evidentiary record when it was submitted to the ALJ in October 2005. The fact that the Appeals Council considered it in making its August 30, 2007 refusal is

irrelevant[5]. The DOD/ VA evidence as to Plaintiff's injury and disability rating were before the ALJ for 17 months before his decision, making it a substantial part of the Record even though the ALJ and the District Court apparently did not consider it in denying Plaintiff's disability benefits. Simply put, there is no 'new' evidence here.

All this toil and trouble as to 'new' evidence stems from the fact that while the VA disability determination, complete with injury/disability codes, from March 21, 1969, was submitted to the ALJ in October 2005, Plaintiff supplemented that VA determination in August 2009 to reflect the VA's continuing affirmation of Plaintiff's total disability rating from 1967 through August 2009. Plaintiff's Motion to Supplement the Record confirms this point:

> . . . the documents submitted to supplement the record are exclusively related to the Claimant, James M. Hardesty's service and the medical records from the Veterans Administration, which records were not submitted by the Veterans Administration when requested after the hearing before the Administrative Law Judge. Said records support the disability rating by the Veterans Administration of James M. Hardesty. Motion to Supplement Record, August 25, 2009.

The documents actually submitted at that time were:

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[5] The Seventh Circuit holds that the administrative record does not include new evidence first submitted to the Appeals Council. *See Eads v. Secretary*, 983 F.2d 815, 817 (7th Cir.1993). In *Eads*, the Seventh Circuit held:

> Since the submission of the evidence precedes the Appeals Council's decision, and that decision, even when it denies review is a precondition to judicial review, the new evidence is a part of the administrative record that goes to the district court in the judicial review proceeding, and then to this court if there is an appeal. It might seem therefore that the district judge and we would be free to consider the new evidence in deciding whether the decision denying benefits was supported by the record as a whole. And of course this is right when the Council has accepted the case for review and made a decision on the merits, based on all the evidence before it, which then becomes the decision reviewed in the courts. It is wrong when the Council has refused to review the case. For then the decision reviewed in the courts is the decision of the administrative law judge. The correctness of that decision depends on the evidence that was before him. [Emphasis added] [citations omitted].

1. A one page letter, dated August 12, stating that Plaintiff has been rated 80% disabled, resulting in 100% unemployablity since 1975. It confirms that the injury is permanent and totally disabling. It states that Claimant has been paid as 100% disabled from 1975 to the present day,
2. A one page Veterans Benefit Award from 1970,
3. A one page statement of benefit amount pursuant to 100% disability from 2006,
4. An August 2009 letter responding to plaintiff's request for a statement from the VA as to his disability,
5. A copy of Plaintiff's July 2009 letter to the VA,
6. Fifteen pages of disability ratings based on the medical opinions from DOD treating sources in 1968-1970 which were submitted in October 2005 to the ALJ and referred to supra in Footnote 4 herein, and
7. A one page letter, dated August 3, 2009, from Plaintiff's brother, Troy Hardesty, as to Plaintiff's disability in 1970-2001.

Thus, the sticking point for the Commissioner in his Response is that the Plaintiff submitted 'new' evidence as to his disability rating. But this is incorrect. This DOD/VA evidence is no more 'new' than Shakespeare's Hamlet is. Plaintiff submitted sufficient evidence of his disability in October 2005. At that time, he provided extensive notes from treating sources within the DOD as to the extent of his injuries, the surgeries he underwent, how he healed, the extent of permanent injuries, and most importantly, the recommendation from his treating sources that Plaintiff be declared totally disabled and discharged before the Medical Examination Board (MEB) (R. 281-323, 290-293, 309), which resulted in the Physical Evaluation Board's (PEB)[6] decision that Plaintiff was

[6] The MEB and PEB based their disability decision on reports from Plaintiff's treating physicians and examining sources. For example, the Report of Medical Examination for Disability Evaluation gives extensive details about Plaintiff's physical condition from an examining source, Dr. Robert J.W. Kinzel, M.D., at the VAOP Clinic in Indianapolis. (R. 284). Further, the MEB report was based on hospital records from the Philadelphia Naval Hospital (January 1969), and Great Lakes Naval Hospital (July 1968)(R. 292-293). Details about the surgery, losses, and scarring came from doctors who operated on, treated, and assessed Plaintiff. If, in their opinion, Plaintiff had not merited disability consideration, then they would not have recommended referral to the MEB. Likewise, the MEB would not have recommended that Plaintiff's case be considered by the PEB unless its members felt that Plaintiff's condition qualified for disability consideration. (R. 293).

totally and permanently disabled (R. 58, 300- 343) as is shown herein at Footnote 4, making him eligible for lifetime VA benefits for total and permanent disability. The submission of 'new' evidence in August 2009, meaning the seven documents set forth above and in Plaintiff's Motion to Supplement the Record, did just that: it SUPPLEMENTED, confirmed, and updated the 1969 DOD/VA decision to discharge

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While there is no specific opinion statement from one of Plaintiff's treating physicians or examining source as to Plaintiff's ability to work, it follows logically that if Plaintiff's doctors and examiners had not believed that he was totally and permanently disabled, they would not have referred his case to the PEB for discharge. If the opinion of a treating physician is supported by acceptable medical evidence and is not inconsistent with other substantial evidence in the record, it must be given controlling weight. 20 C.F.R.§ 404.1527(d)(2); *Schmidt v. Astrue*, 496 F. 3d 833 (7th Cir. 2007) *as cited in Oakes v. Astrue*, 258 Fed. Appx. 38 (7th Cir. 2007).

SSA regulations advise claimants that:

> . . . a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) will be given "controlling weight if the opinion is "well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record. 20 C.F.R. § 404.1527(d)(2) (emphasis added). *Green-Younger v. Barnhart*, 335 F.3d 99 (2nd Cir. 2003). *See Shramek v. Apfel*, 226 F.3d 809 (7th Cir. 2000), *Moss v. Astrue*, 555 F.3d 556 (7th Cir. 2009), *Bauer v. Astrue*, 532 F.3d 606 (7th Cir. 2008), *Collins v. Astrue*, 2009 U.S. App. LEXIS 9950 (7th Cir. 2009), and *Day v. Astrue*, 2009 U.S. App. 9227 (7th Cir. 2009).

Therefore, there is a presumption that the opinion of a treating physician is entitled to great deference. If an ALJ does not give the treating physicians' opinion controlling weight, he must offer "good reasons" for explaining how much weight he has given the physician's medical opinion. 20 C.F.R. § 404.157(d)(2) and *Schmidt v. Astrue*, 496 F. 3d 833 (7th Cir. 2007) *as cited in Day v. Astrue*, 2009 U.S. App. LEXIS 9227 (7th Cir. 2009).

It is at least that the ALJ, Appeals Council, and this Court should have accorded controlling weight to the inherent opinions of the treating physicians that formed the basis of the MEB/PEB determination which found Plaintiff totally and permanently disabled instead of completely ignoring it. Initially then, the ALJ should have given controlling weight to the treating physicians' recommendation that the Plaintiff be evaluated for total and permanent disability, or he should have set forth good reasons for ignoring that evidence. Had he done so, we would likely not have bothered the Appeals Council, this Court, and the Seventh Circuit with this matter, only to pop up on remand again. It is quite possible to conclude that the ALJ erred in disregarding any treating physician evidence as to the foundation for the VA disability rating, as well as in disregarding the rating itself. If so, then the Appeals Council and this Court also missed these crucial factors.

Plaintiff as totally and permanently disabled[7]. By definition, "evidence is new when it is not duplicative, cumulative or repetitive." HALLEX I-3-3-6(A). Since this 'new' evidence merely supplemented, confirmed, updated, and repeated what the ALJ knew at least as of October 2005, this was NOT 'new' evidence.

C. The Commissioner had no substantial basis for a genuine dispute.

The Commissioner has the burden of proving that his position was substantially justified in both law and fact, a significant burden. *Cunningham v. Barnhart*, 440 F.3d 862, 864 (7th Cir. 2006); *Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004) and H.R. Rep. No. 120, 99th Cong., 1st Sess. At 9-1-, reprinted in 1985 U.S. Code Cong. & Admin News 132, 138 (1985).

The Commissioner must meet this burden twice: he must not only show that his litigation position had a reasonable basis in law and fact, but he must also establish that the agency's pre-litigation conduct had a reasonable basis in law and fact. Commissioner, I.N.S. v. Jean, 496 U.S. 154, 158-160, 110 S. Ct. 2316, 2319-2320 (1990). Thus, both the ALJ's decision, as well as the Commissioner's position in the district

[7] The disability rating from the VA is germane because if forms the basis of one of the ALJ's alleged errors: that he failed to properly consider and afford adequate weight to the VA disability determination in this matter. Here, the ALJ's statements at hearing obviously indicate that he knew of (and requested more evidence of) Plaintiff's disabled Veteran status. But he wanted 'papers' to prove it. R. 344-347. As argued in Plaintiff's brief and excerpted from his Motion to Supplement Record:

> (T)his Supplement to the record is pursuant to a Seventh Circuit Court of Appeals case of *Allord v. Barnhart*, 455 F.3d 818, (2006), decided by Judge Richard Posner. Judge Posner wrote in the *Allord* case *supra* as follows:
> We have said that SSA should give the VA's determination of disability "some weight." *Davel v. Sullivan*, 902 F.2d 559, 560-61, n. 1 (7th Cir. 1990). *Allord, Id.* It is therefore important that the relevant information concerning Claimant's VA disability rating be **clarified** (emphasis added) as evidenced by the records requested to be supplemented herein. Plaintiff's Motion to Supplement Record.

court litigation, must have a reasonable basis in order for the Commissioner to meet his burden to prove substantial justification.

Writing for the Seventh Circuit in *US v. Thouvenot, Wade & Moerschen, Inc.*, a consolidated matter which addressed EAJA fees in two Social Security Disability cases, Judge Posner said:

> The title of the statute—Equal Access to Justice Act—and the fact that eligibility for an award is limited to persons . . . of limited financial means (with immaterial refinements and exceptions, the prevailing party may not have a net worth in excess of $2 million if an individual. . . .28 U.S.C. § 2412(d)(2)(B)) suggest that Congress's concern was not limited to frivolous cases—that it wanted the government to take care before deploying its formidable litigation resources against a weak opponent[8].
>
> The Equal Access to Justice Act has thus been called an "anti-bully" law. *Battles Farm Co. v. Pierce*, 806 F.2d 1098, 1101 (D.C. Cir. 1986), *vacated and remanded*, 487 U.S. 1229 (1988), *for reconsideration in light of Pierce v. Underwood*; Melissa A. Peters, "The Little Guy Myth: The Fair Act's Victimization of Small Business," 42 Wm. & Mary L. Rev. 1925, 1928-30 (2001).
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> Between frivolous and meritorious lie cases that are " 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person [and hence has a] 'reasonable basis both in law and fact.' "[9] The case must have sufficient merit to negate an inference that the government was coming down on its small opponent in a careless and oppressive fashion. *US v. Thouvenot, Wade & Moerschen, Inc.,* 596 F.3d 378 (7th Cir. 2010).

In *US v. Thouvenot, Wade & Moerschen, Inc.*, the Seventh Circuit considered the denial of EAJA fees to Christine Bauer in her Social Security disability case. In an appeal from the decision of an administrative agency, the court has to decide not whether the government lacked substantial justification for bringing the case—for a social security

[8] *See McDonald v. Schweiker*, 726 F.2d 311, 315 (7th Cir. 1983); *Dole v. Phoenix Roofing, Inc.,* 922 F.2d 1202, 1207 (5th Cir. 1991); *Myers v. Sullivan*, 916 F.2d 659, 667-68 (11th Cir. 1990); *Feldpausch v.Heckler*, 763 F.2d 229, 231-32 (6th Cir. 1985).
[9] *Pierce v. Underwood, supra*, 487 U.S. at 565; *see also Potdar v.Holder*, 585 F.3d 317, 319-20 (7th Cir. 2009); *Kolman v. Shalala*, 39 F.3d 173, 177 (7th Cir. 1994); *Ericksson v. Commissioner of Social Security*, 557 F.3d 79, 81-82 (2d Cir.2009).

case begins as an application for benefits—but whether the agency had a substantial justification for turning down the application. *Stewart v.Astrue*, 561 F.3d 679, 683 (7th Cir. 2009) (per curiam); *Bricks, Inc. v. EPA*, 426 F.3d 918, 922 (7th Cir. 2005); *Hill v. Gould*, 555 F.3d 1003, 1006 (D.C. Cir. 2009) as cited in *US v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378 (7th Cir. 2010).

The appeal in a social security case goes from the agency to the district court rather than directly to the court of appeals, but the loser in the district court can, as Plaintiff Hardesty did, appeal to the Court of Appeals. In *Bauer*, the district court affirmed the denial of Bauer's application for benefits, but the Seventh Circuit reversed, *Bauer v. Astrue*, 532 F.3d 606 (7th Cir. 2008), as it did in the matter at hand, and Bauer, like Plaintiff Hardesty, then moved in the district court for an award of fees.

Again writing for the Court, Posner noted that:

> As a result of our reversal of the district court, the matter had gone back to the Social Security Administration for a redetermination of Bauer's entitlement to benefits. The proceedings on remand were not yet completed (as far as we know they still haven't been . . .) when her motion for fees was considered. But her success in our court in obtaining the vacation of the Administration's denial of benefits (rather than merely a remand to enable the agency to consider new evidence), showing that she had incurred additional legal expenses as a result of the agency's error, made her a prevailing party within the meaning of the Equal Access to Justice Act, whatever the ultimate outcome of her claim for benefits[10].
>
> A district judge who has been reversed for ruling against the party that the court of appeals decides should have prevailed must be careful not to let his superseded view of the merits color his determination of whether there was a substantial justification for the government's position.[11] He

[10] *Shalala v. Schaefer*, 509 U.S. 292, 300-02 (1993); *Conrad v. Barnhart*, 434 F.3d 987, 990 (7th Cir.2006); *Le v. Astrue*, 529 F.3d 1200, 1201 and n. 1 (9th Cir. 2008); *see also Muhur v. Ashcroft*, 382 F.3d 653, 654-55 (7th Cir. 2004).

[11] *United States v. Real Property at 2659 Roundhill Drive*, 283 F.3d 1146, 1152-53 (9th Cir. 2002); *Friends of Boundary Waters Wilderness v. Thomas,* 53 F.3d 881, 885-86 (8th Cir. 1995); *Oregon Natural Resources Council v. Madigan*, 980 F.2d 1330, 1332 (9th Cir. 1992).

> must accept the appellate court's view of the merits as the premise for evaluating the government's position. Our view might be that it was a close case—that the government's position, though the district judge should in the end have rejected it, was substantially justified. *See United States v. Paisley, supra*, 957 F.2d at 1167-68. But if it is apparent from our opinion that we think the government lacked a substantial justification for its position, though the judge had thought it not only substantially justified but correct, he must bow. *Golembiewski v. Barnhart*, 382 F.3d 721, 724-25 (7th Cir. 2004); *Friends of Boundary Waters Wilderness v. Thomas, supra*, 53 F.3d at 885-86. This is such a case. *US v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378 (7th Cir. 2010).

Specifically, as Posner suggests, a court will look to both the agency's pre-litigation conduct and its litigation position and make one determination as to the entire civil action. *Golembiewski*, 382 F.3d at 724. To be "substantially justified," the Commissioner's position must have a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Cunningham*, 440 F.3d at 864. "Substantially justified" does not mean "justified to a high degree"; the standard is satisfied if there is a "genuine dispute," or if reasonable persons could differ as to the appropriateness of the contested action. *Stein v. Sullivan*, 966 F.2d 317, 320 (7th Cir. 1992), *citing Pierce*, 487 U.S. at 565.

The standard of review that applies to the merits of benefits decisions is deferential to the Commissioner. If the court has remanded the denial of benefits, that deferential standard of review does not automatically mean that the Commissioner's position could not have been substantially justified for purposes of the EAJA. Under the EAJA, the test is whether the Commissioner had a rational ground for thinking that he had a rational ground for denying benefits. *Kolman v. Shalala*, 39 F.3d 173, 177 (7th Cir. 1994).

A. When is the Commissioner substantially justified?

A comparison of the Seventh Circuit's decisions in *Cunningham* and *Golembiewski* provides a good illustration of when the Commissioner's position is and is not substantially justified. In *Golembiewski*, the district court remanded the denial of disability insurance benefits, but denied plaintiff's petition for EAJA fees. The Seventh Circuit reversed, finding that the district court had abused its discretion in denying the fee petition. *Golembiewski*, 382 F.3d at 725. The Court held that remand was necessary where the ALJ violated clear and longstanding judicial precedent and violated the Commissioner's own rulings and regulations. *Id*. at 724. Further, the Court held that the ALJ had failed to address credibility at all and had failed to apply the familiar factors under SSR 96-7p for evaluating a claimant's subjective complaints of pain. Continuing, the Court said that the ALJ also mischaracterized and ignored significant medical evidence. *Ibid*.

In contrast, the *Cunningham* Court affirmed the district court's denial of fees under EAJA and distinguished *Golembiewski*. In *Cunningham*, the Court remanded because the ALJ's decision did not explain the reasoning as carefully and thoroughly as necessary. Specifically, the Court wrote:

> "It was not that the ALJ failed to engage in any credibility determination as in *Golembiewski*; rather, the ALJ failed to connect all the dots in his analysis." *Cunningham*, 440 F.3d at 865; in accord, *Stein*, 966 F.2d at 319-20 (affirming denial of EAJA fee petition after case was remanded based on ALJ's inadequate explanation of reasoning).

Based on these cases, it is possible to 'forecast' when courts will award EAJA fees. In general, if the case for remand is strong and clear-cut, *Golembiewski* teaches that it will probably be an abuse of discretion to deny fees. If the case for remand is closer, and especially if it is focused primarily on an inadequate

explanation of what might well be a reasonable bottom-line decision, *Cunningham* teaches that it will probably not be an abuse of discretion to deny fees.

Here, the case to remand was very clear cut. The Seventh Circuit never reached the argument or deliberation stage. The Commissioner conceded, as his Motion for Remand states, that further administrative review was necessary, which is tantamount to admitting error. Otherwise, why not brief the case and let the Seventh Circuit decide?

Prior to such deliberation and even before submitting a Brief of the Appellee-Defendant, the Commissioner conceded that remand was proper. Thus, there was no Seventh Circuit opinion. One was not necessary. The necessity for remand was clear because:

1. The ALJ did not consider the DOD/VA evidence of Plaintiff's total and permanent disability, giving it "some weight" under *Allord,*
2. The ALJ did not consider the treating source opinions of the DOD doctors in 1968-1970, and
3. As Footnote 2 shows, there are at least 5 other alleged, viable basis for errors from which the Court could have ordered reversal and remand.

In sum, the ALJ in this matter violated clear and longstanding judicial precedent and violated the Commissioner's own rulings and regulations in committing/allowing/arguing in favor of these errors, which required reversal and remand for further consideration. The Commissioner's baseless assertion was that this matter was remanded for 'new' evidence when in fact this matter was remanded because the ALJ did not adequately apply the law to the relevant facts, which he had a duty to

fully develop, on the Commissioner's watch. Hence, there can be no substantial justification for the Commissioner where such error existed.

Even if the Commissioner can somehow cobble the evidence from 1968, received by the ALJ in 2005, and reviewed by the Appeals Council in 2007, into 'new' evidence presented in 2009 in order to support his view of this remand, he cannot carry his burden to prove that his opposition in this matter has been substantially justified. In short, the Commissioner argues that:

> It was reasonable for the ALJ, who did not have access to the new evidence submitted to this Court, to conclude, as this Court did, that Plaintiff had not sustained his burden to prove disability, and it was likewise reasonable for the Commissioner to defend the ALJ's decision, and on appeal, to recommend remand for consideration of the newly-proffered (original emphasis) evidence. Because, at both the pre-litigation and litigation stages of this case, Defendant "had a rational ground for thinking it ha(d) a rational ground for its action, *Kolman*, 39 F. 3d at 177, this Court should find that the Commissioner's position was substantially justified and that Plaintiff is therefore not entitled to attorney fees under the EAJA. Defendant's Response, p. 6.

This paragraph requires both a shovel, to dig out the truth, and a parachute, to survive the assumptions and leaps of logic herein. In short, the Commissioner's justification is flawed for the reasons set forth below.

1. New Evidence?

First, as argued above, the evidence from the DOD/VA was submitted to the ALJ in October 2005, 18 months BEFORE his decision. Six of the seven documents submitted to supplement the Record in August 2009 merely confirm, repeat, and continue the decisions made in 1968-1970 based on the DOD/VA medical evidence, disability recommendations from DOD treating sources, and the DOD discharge/VA

disability determination submitted in August 2005. The August 2009 documents do not further any knowledge not apparent already in the evidence submitted to the ALJ in October 2005. As the Commissioner's Response admits, at the very least, this evidence was before the Appeals Council and the District Court. Thus, the ALJ, the Appeals Court and the District Court knew full well that they were dealing with a disabled veteran who was declared totally and permanently disabled by the DOD and VA more than 40 years ago.

There were no surprises here. The supplemental material merely confirmed and updated this 40 year old knowledge. It offered nothing new, except for a one page letter from Plaintiff's brother as to his perception of Plaintiff's condition circa 1970-2001. Forty year old evidence is 40 year old evidence, and where it was submitted well in advance of the ALJ's opinion (17 months), there can be NO rational ground for the Commissioner's alleged thinking (that) it ha(d) a rational ground for its action.

In sum, the ALJ, Appeals Council, and District Court had constructive and actual knowledge that Plaintiff had submitted evidence of Record which conclusively showed his total and permanent disability pursuant to treating sources at the DOD and VA since 1970 in October 2005. As such, it was unreasonable for the ALJ, the Appeals Council, and this Court to ignore it, concluding instead that Plaintiff did not meet his burden to prove disability when in fact he submitted conclusive DOD/VA records in October 2005, records which proved his permanent and total disability since 1970, but they failed to consider it or even mention it in their opinions.

2. Substantial Justification ignores evidence of disability contra to the *Allord* holding?

This unreasonable result is particularly egregious in that the *Allord* decision, discussed *supra* at Footnote 7, requires that the VA disability rating be given 'some weight' in determining disability. Herein, none of these adjudicative bodies even contemplated, let alone weighed properly, the VA disability rating in determining Plaintiff's disability. This is clear error, not substantial justification. Advocating such a position as substantially justified is mere folly. There can be no 'rational ground for thinking that it (the Commissioner) had a rational ground for its action' when the Commissioner, the ALJ, the Appeals Council and this Court cavalierly disregarded Plaintiff's treating sources and DOD/VA disability rating of total and permanent disability *contra* to the *Allord* holding. This is patently unreasonable and likely IS the true reason for remand in this matter.

3. Substantial Justification ignores ALJ Duty to Fully Develop a Case?

The Commissioner's position cannot be substantially justified because it cuts against the ALJ's duty to fully develop a case. If we accept the Commissioner's assertions in his Response, the ALJ never saw the October 2005 evidence from DOD/VA because it was 'new' as of August 2009. And Hamlet debuts on Broadway this summer. Thus, the Commissioner, the Appeals Council and this District Court had not seen the DOD/VA evidence either. Assuming for argument's sake that the ALJ had not seen this DOD/VA evidence of disability, as the Commissioner contends, we know from the Record at hearing that the ALJ knew or had ample reason to know of Plaintiff's disabled veteran status from his testimony alone. If so, that knowledge put the ALJ on notice that

as the ALJ, he had a duty to fully develop the matter by compelling the DOD/VA records. In reality, the ALJ did leave the record at hearing open to accept this evidence, which he did accept on October 2005 contrary to the Commissioner's version of the truth.

Nevertheless, the Commissioner argues that if evidence of the DOD/VA disability rating was not before the ALJ, it was reasonable to conclude that Plaintiff was not disabled. He omits the fact that if relevant evidence is not before the ALJ, he has a duty to obtain it.

An ALJ has a general duty to "develop a full and fair record." *Smith v. Sec'y of Health, Educ. & Welfare*, 587 F.2d 857, 860 (7th Cir. 1978); *see Nelms v. Astrue*, 553 F.3d 1093, 1098 (7th Cir. 2009) *as cited in Martin v. Astrue*, 2009 U.S. App. LEXIS 21075 (7th Cir. 2009). An ALJ is required to make a "reasonable effort" to ensure that the claimant's record contains, at a minimum, enough information to assess the claimant's RFC and to make a disability determination. *See* 20 C.F.R. §§ 416.912(d), 416.927(c)(3); S.S.R. 96-8p; *Skinner v. Astrue*, 478 F.3d 836, 843-44 (7th Cir. 2007). In *Luna v. Shalala*, 22 F.3d 687, 692-93 (7th Cir. 1994), the Seventh Circuit held that the ALJ sufficiently developed the record because he probed all relevant issues, extensively questioned claimant about his pain, medication, and activities, and reviewed available medical records. *See* S.S.R. 96-8p, 1996 SSR LEXIS 5; 20 C.F.R. § 416.912(d).

In *Nelms v. Astrue*, *Id.,* albeit a pro se case, the Seventh Circuit held that the ALJ erred because he failed to adequately develop the record where he did not question the pro se claimant about recent medical history or make any attempt to gather additional records despite a two-year evidentiary gap. In the case at hand, the ALJ was faced with a

35 year evidence gap (!) if we believe the Commissioner's argument that the DOD/VA records were not submitted to the ALJ in October 2005. Using the Commissioner's 'point of view' in light of the ALJ's duty to fully develop the record, it is egregious error that the ALJ did not compel the DOD/VA records prior to denying Plaintiff's disability. How can such a glaring error ever form 'substantial justification' for the Commissioner?

In *Martin v. Astrue*, the Court held that Martin had the burden to show that he was prejudiced by the absence of medical records dating after 2005, a hurdle he did not overcome. *Martin v. Astrue,* 2009 U.S. App. LEXIS 21075 (7th Circuit 2009*), Nelms*, 553 F.3d at 1098; *Nelson v. Apfel*, 131 F.3d 1228, 1235 (7th Cir. 1997). Unlike this case, Martin did not identify or provide additional records during the proceedings before the Appeals Council or the District Court, and even at the Seventh Circuit level, he did not attempt to detail what additional information about his condition the ALJ would have uncovered. *Martin, Id., and See Nelms*, 553 F.3d at 1098. Moreover, Martin failed to explain how additional evidence could have led to a finding of disability for him.

But additional evidence of disability, assuming as the Commissioner does that the ALJ did not have the DOD/VA evidence before him 18 months prior to decision (and neither did the Appeals Council or this Court), would have changed the outcome for Plaintiff. If, as the Commissioner's argument apparently assumes, the ALJ, Appeals Council and this Court did not have or consider the DOD/VA evidence submitted in October 2005, then the ALJ and the subsequent bodies all erred in that the ALJ had a duty to go farther, to further develop and find all relevant evidence as to Plaintiff's disability if he believed that more DOD/VA records were necessary. Sadly, he did not do so. Because the ALJ denied disability benefits to Plaintiff without compelling DOD/VA

records, under the Commissioner's view, he rendered a decision without the benefit of the DOD/VA disability evidence, arguably definitive evidence, necessitating error under *Allord*. And this error simply snowballed as Plaintiff's appeal moved up the chain to the Appeals Council and District Court. Finally, the Seventh Circuit caught it, reversed, and remanded.

Hence, the problems multiply for the Commissioner: not only did he try to substantially justify denial of disability after conclusive evidence from the DOD /VA was submitted in October 2009. He continued to claim that denial was substantially justified even though the ALJ had a duty to fully develop the record as to Plaintiff's disability, but he failed to compel those records from the DOD/VA. Further, the Commissioner did not ask the ALJ, Appeals Council, or this Court to remand for full development of Plaintiff's Record, and yet, he still claims that there was no error in in this case at all, but particularly, no error in failing to consider the DOD/VA disability rating in the face of Seventh Circuit precedent clearly to the contrary. Such a laundry list of mistakes cannot equal 'substantial justification'.

In conclusion, there can be no 'substantial justification' for the Commissioner's position pre-litigation or litigation where:

a. He does not know the correct date on which DOD/VA records were made a part of the Record,
b. He does not know what evidence was before the ALJ, the Appeals Council or the District Court, and
c. He does not realize that even under his imaginary view of the events, the ALJ had the duty to fully develop the record and obtain the DOD/VA records to

weigh evidence properly as to Plaintiff's disability at the moment he learned that Plaintiff was a disabled veteran.

For any or all of these reasons, the Commissioner's arguments herein are efully misled and must fail.

D. The requested EAJA fees are reasonable in this matter given the current market rate for attorneys as well as the skill and time commitment required to pursue an appeal to the Seventh Circuit and win reversal and remand in the face of the Commissioner's unjustified arguments.

The Commissioner's Response sets forth the relevant statutory EAJA provisions for attorney fees, noting the cap of $125 per hour, as drafted in 1985. He complains that the hours expended in this matter are excessive as well as expensive. Yet he fails to set forth a recent survey of what other attorneys are receiving as EAJA fees in similar cases.

In a 2005 case in Connecticut, Judge Underhill awarded EAJA attorney fees of $300 per hour. Specifically, he wrote that:

> Congress passed the EAJA in an effort to remedy "the economic deterrents to contesting governmental action[,]" which are "magnified in [cases where individuals are forced to defend against unreasonable government action] by the disparity between the resources and expertise of these individuals and their government." H.R. Rep. No. 96-1418, at 5-6, reprinted in 1980 U.S.C.C.A.N. 4984. Thus, under the EAJA, "a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment." *Id*. at 4991. *Healey v. Leavitt*, 2005 WL 2850163, at *3 (D.Conn. Oct.26, 2005), *affirmed in Healey v. Leavitt*, 485 F.3d 63 (2nd Circuit 2007).

In *Healey*, Judge Underhill found that lawyers for the Plaintiffs were entitled to $300 per hour, in light of the fact that some big firm lawyers in Hartford, Conn., currently earned $500 per hour. Underhill also noted that in 1999, the year he left the Stamford, Conn., offices of Day, Berry & Howard for the bench, his own hourly rate was $340. He justified his elevation of the statutory rate of $125 to $300 thusly:

> Enhancing the hourly rate based upon an attorney's unique proficiency in a particular area of the law recognizes two facts. First, knowledgeable attorneys can pursue a case with efficiency, which ultimately reduces costs and fees. Second, uninitiated attorneys are reluctant to take on the burden of becoming familiar with a complex area of the law with little or no promise of remuneration. Indeed, without the benefit of significant knowledge of the actual process at issue, the legal issues and arguments would be impossible to efficiently identify and frame in order to prevail. Therefore, the court finds that plaintiffs' attorneys should be compensated at prevailing market rates. *Healey v. Leavitt*, 2005 WL 2850163, at 3 (D.Conn. Oct.26, 2005), *affirmed in Healey v. Leavitt*, 485 F.3d 63 (2nd Circuit 2007).

A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation. *Blum v. Stenson*, 465 U.S. at 895-96 n. 11, 104 S.Ct. at 1547 n. 11 (1984). Satisfactory evidence at a minimum is more than the affidavit of the attorney performing the work. *Blum*, 465 U.S. at 896, 104 S.Ct. at 1547 n. 11. Evidence submitted by attorney fee applicants in prior cases may also be relied on. There is no requirement that each attorney develop all of the evidence for the hourly rate he seeks from scratch. *National Ass'n of Concerned Veterans*, 675 F.2d at 1326.

In Plaintiff's counsel's Petition for EAJA fees, he referred to the case of *Barker v. City of West Lafayette*, 894 N.E.2d 1004 (Ind. App. 2008) for the proposition that the current market rate for EAJA representation was $250. In that case, Barker noted that he presented significant evidence to the trial court in support of the requested hourly rates for his attorneys--$ 325 per hour for Attorney Waples[12], $ 250 per hour for

[12] Waples described his practice and qualifications:
My practice consists of almost exclusively plaintiffs' § 1983 litigation. Few lawyers in the state of Indiana maintain a similar practice, and, while my office is located in Indianapolis, my practice area is state-wide. I have litigated cases originating in most counties of the state, and I practice regularly before the federal district courts for both the Southern and Northern Districts of Indiana, as well as before state courts in counties throughout the state. Appellees' App. at 61-62. *Barker, Id.*

Attorney Hanger, and $ 175 per hour for Attorney Brimm. This evidence included affidavits from the attorneys themselves, testimony from several attorneys familiar with the Indiana civil rights litigation market, and testimony regarding market rates for plaintiff's civil rights attorneys in Lafayette, Indiana in 1996, a community 27 miles away from Plaintiff's counsel's place of practice, Frankfort, IN. Further, Indianapolis attorney Henry J. Price testified in *Barker* as follows:

> The market for attorneys who practice in the civil rights area is the entire State of Indiana. It is often the case that lawyers in smaller communities in the state are either unprepared or unwilling to accept the litigation of complex federal matters, including civil rights cases. For this and other reasons, it is often necessary for lawyers in Indianapolis who concentrate their practice in civil rights work to litigate cases throughout the state. Appellees' App. at 10. *Barker v. City of West Lafayette*, 894 N.E.2d 1004 (Ind. App. 2008).

Likewise, there are not many attorneys, especially in small, rural towns like Frankfort, who are willing to take the risk or forego other paying work in favor of complicated appeals to the District Court, let alone the Seventh Circuit, which require tedious research and writing and take almost a decade to litigate. . .and to receive payment, if any. Thus, it is already hard to vindicate one's rights if one is poor, as most SSA disability claimants logically are. Reducing or eradicating EAJA fees, the stated purpose of which is to remedy this inequity, to willing practitioners has a chilling effect on a potential plaintiff's ability to take on, as Judge Posner called it, the bully inherent in the government's "formidable litigation resources against a weak opponent" in *US v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378 (7th Cir. 2010).

Another West Lafayette attorney, Edward Chosnek, testified that "local market attorney fees in and about Lafayette for attorneys of Mr. Waples' experience is $ 200.00 to $ 225.00 per hour." Appellant's App. at 74. *Barker v. City of West Lafayette*, 894 N.E.2d 1004 (Ind. App. 2008).

Returning to *Barker*, the Court of Appeals said:

> Even the trial court noted in its original fees order that "[t]his case would not have been desirable to many local attorneys. It is not unusual or unexpected that the Plaintiff would seek out-of-town counsel." Appellant's App. at 72. *Barker v. City of West Lafayette*, 894 N.E.2d 1004 (Ind. App. 2008).

The *Barker* Court noted that a reasonable fee is "the prevailing market rate for lawyers engaged in the type of litigation in which the fee is being sought." *Cooper v. Casey*, 97 F.3d 914, 920 (7th Cir. 1996) (emphasis in original) *as cited in Barker v. City of West Lafayette*, 894 N.E.2d 1004 (Ind. App. 2008). Thus, the *Barker* decision is persuasive evidence that an attorney engaged in similar legal work in a similar small, rural Indiana town was entitled to hourly attorney fees of at least $225 per hour, if not an enhanced amount of $325. Nationwide, the median hourly billing rate for equity partners in law firms was $305 per hour in 2006[13]. In the 2004 immigration case of *Muhur v. Ashcroft*, the Seventh Circuit said this about EAJA fees: "The top rate sought here, $225 an hour for Herbert Igbanugo, is modest by current standards of attorney compensation. *Muhur v. Ashcroft,* 355 F3d 958 (7th Cir. 2004). In a 2005 Illinois district court case, Magistrate Judge Morton Denlow wrote that:

> Based on the Court's many years of experience in private practice and almost ten years of experience in assessing attorney's fees in a variety of cases, this Court awards Petitioner an attorney's fee of $ 350.00 per hour for EAJA fees. *Hodges-Williams v. Barnhart*, 400 F. Supp. 2d 1093 (N.D. Ill. 2005).

In 2007, there is evidence that the rate for attorney work in the Indianapolis market was $275 to $350 per hour for defense work on behalf of the Marion County

[13] 2007 AltmanWeil Survey of Law Firm Economics http://www.altmanweil.com/index.cfm/fa/r.resource_detail/oid/87716caa-56df-4ad9-b375-9e9366ba6d60/resource/New_Survey_Provides_Snapshot_of_Law_Firm_Economics_Across_US.cfm.

Sheriffs Department[14] while the Indiana Administrative Code assumes that $200 per hour is an average attorney fee[15]. As such, $225 per hour, as requested by Plaintiff's counsel in this matter, is a reasonable, prevailing market rate.

The Seventh Circuit has ruled that "[t]he burden of proving the market rate is on the party seeking the fee award. However, once an attorney provides evidence establishing his market rate, the opposing party has the burden of demonstrating why a lower rate should be awarded." *Gautreaux v. Chicago Hous. Auth.*, 491 F.3d 649, 659-60 (7th Cir. 2007). Thus, once a fee applicant has provided support for his requested rate, the burden falls on the opposing party to go forward with evidence that the rate is erroneous. And when the opposing party attempts to rebut the case for a requested rate, it must do so by equally specific countervailing evidence. *National Ass'n of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1326 (D.C. Cir. 1982). Unless the fee applicant's evidence is so weak that it may be challenged as unsubstantiated, "in the normal case, the opposing party must either accede to the applicant's requested rate or provide specific contrary evidence tending to show a lower rate would be appropriate." *Id.*

Here, the Commissioner opposes the rate of $225 as excessive and claims that too many hours were expended, even though this litigation took 7 years, reached to the Seventh Circuit, and has still not concluded. Since the *Barker* case places Plaintiff's counsel's claim of $225 per hour well within the prevailing market rate, the Commissioner must now come forward to show specific, contrary evidence of a lower,

[14] http://www.indy.com/posts/sheriff-has-spent-3m-on-law-firm-2
[15] Ind. Code § 4-22-2.1-5(a)(3) at http://www.in.gov/legislative/iac/20070905-IR-052060571EIA.xml.html.

appropriate rate. To date, he has failed to do so, and given the facts presented herein, he cannot do so. Clearly all the hours expended were necessary to obtain justice for Plaintiff Hardesty where, more than 40 years after his injury and 7 years after his application for disability benefits, the Commissioner still unreasonably and unjustifiably opposes his claim.

The Seventh Circuit has spoken as to claims of excessive hours in *Tchemkou v. Mukasey*, 517 F. 3d 506, 509 (7th Cir. 2008). In that immigration matter, the Government took issue with the number of hours spent, particularly on the opening brief, claiming that "[e]ven the least experienced attorney should be able to prepare a fact-based asylum brief from an unfamiliar record in one work week." But the Court disagreed:

> The administrative record for this matter is approximately 600 pages long, contained in this record are numerous fact-laden documents produced by the State Department, by the United Nations and by Amnesty International. Given the nature of the administrative record, it would be a herculean feat, indeed, to be able to master such a record and incorporate it into an intelligible appellate brief in the time proposed by the Government. *Tchemkou v. Mukasey*, 517 F. 3d 506, 509 (7th Cir. 2008).

In conclusion, the *Tchemkou* Court believed the hours for which reimbursement was sought were "reasonably expended", and reimbursed plaintiff's counsel for 247.75 hours of preparation time.

In the case at hand, the Commissioner objects to Plaintiff's counsel's request for 120.75 hours. Broken down, those hours were spent during the past 7 years thusly: 48 hours in the District Court from complaint to order, and 72.75 hours pursuant to the Seventh Circuit appeal and remand to this Court for a total of 120.75. At $225 per hour, the total cost for both appeals was $27,168.75. Considering that the Record contained

nearly 400 pages of hearing transcript as well as medical records, poorly printed DOD and VA records in addition to the various social security forms and 166 pages of recent records from the VA, this was no small task to coordinate. Further, the delay between the proceedings meant that time had to be taken to refresh issues and research as to new, relevant decisions. With 7 years from application to remand order, many hours were necessary to properly present a fair statement of Plaintiff's case, working out to less than 17 hours per year, although litigation never falls within neat, calendar divisions. As such, 120.75 hours is not unreasonable. Both the time and rates claimed herein are well within the range of what is commonly sought and granted in these cases.

For the reasons state herein, the Commissioner's objections in the form of his Response must fail as a matter of law and fact. He gets the facts all wrong. There was no 'new' evidence after October 2005 as the Commissioner claims. Beyond that date, Plaintiff SUPPLEMENTED the already existing evidence with redundant and continuing affirmation that Plaintiff was still considered totally and permanently disabled by the VA. Thus, the ALJ, the Appeals Council and this Court had all the relevant DOD/VA evidence as to treating sources, injuries, and disability ratings before them, but ignored it, claiming that it was not in the Record. Yet even if it had not been in the Record as the Commissioner claims, the ALJ knew at the hearing (if not before) that Plaintiff was a disabled veteran. As such, he had a duty to fully develop the case and compel those DOD/VA records. But he remained silent on that matter, most likely because he actually did have those DOD/VA records as of October 2005.

Instead, the ALJ and this Court found Plaintiff's testimony as to his pain, suffering, and ability to work not credible even though no explicit, specific, and cogent reasons for discrediting Plaintiff were given. If the treating sources had been properly according the weight anticipated by SSA rulings, then Plaintiff's disability, as well as his credibility as to pain and suffering, would have been established. If this credibility analysis was faulty, then logically, the RFC determination was erroneous because it was not based on Plaintiff's pain, suffering, and ability to work. If those factors had been considered, then Plaintiff would have had exertional and nonexertional limitations, making an analysis under the SSA Grid inappropriate, and requiring VE testimony, which was not given in this case. And lastly, where this decision was handed off to numerous ALJs without requisite notice, the Commissioner violated his own regulations.

The Commissioner makes no attempt to explain these errors, merely claiming that his position was substantially justified, but not specifically discussing why. There is no justification, substantial or otherwise, for the ALJ's multiple failures to follow the law or for the Commissioner's failure to sustain it.

In truth, this list of errors formed the real reason that the Seventh Circuit remanded this case, not 'new' evidence, as the Commissioner claims. The Seventh Circuit saw clear error without substantial justification on the Commissioner's part, and sent the matter back for proper determination. But winning this remand took 7 years of legal work at a high level. Such work reasonably took 120.75 hours, calculated at the reasonable market rate of $225 as set forth in the

authorities herein. By presenting this evidence, the Plaintiff has now placed the burden on the Commissioner to disprove the reasonableness of this rate.

E. The Court should award EAJA fees for this Reply.

When the Court awards fees, it should include payment of fees for litigating fees as per the EAJA statute. The Plaintiff's counsel spent 10 hours in preparing this reply. The Plaintiff's attorney therefore requests an additional fee in the amount of $2,250, for a total request of $32,960.08.

F. Conclusion

For all the above cited reasons, the Plaintiff respectfully requests that this Court issue an Order:

1. Awarding attorney fees to Plaintiff's counsel pursuant to EAJA in the amount of 30,710.08 as originally requested, and
2. Awarding an additional $2,250 (for 10 hours at $225 per hour) to Plaintiff's counsel for preparing this Reply, bringing the total EAJA fee to $32,960.08.

Respectfully submitted,

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Certificate of Service

I certify that on the ___ day of _____, 2009, service of a true and complete copy of the above foregoing pleading or paper was made upon Thomas E. Kieper by the Court's CM/ECF delivery system as well as by first class mail, postage prepaid.

POWER, LITTLE & LITTLE

BY:_____

C. David Little

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