

SAMPLE MOTION FOR EAJA FEES AND COSTS ADDRESSING  
EVIDENCE OF THE PARALEGAL MARKET RATE

By Eric L. Buchanan

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TENNESSEE

SAMPLE PLAINTIFF,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No.
	§	
JO ANNE B. BARNHART,	§	
Commissioner of Social Security,	§	
	§	
Defendant.	§	

PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS  
UNDER THE EQUAL ACCESS TO JUSTICE ACT, 28 U.S.C. § 2412

Now comes the Plaintiff, FIRSTNAME LASTNAME, through counsel, claiming fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) in the amount of \$XXXX, plus the cost of \$150 for the filing fee paid to commence this action, 28 U.S.C. § 2412(a), for a total award of \$XXXX. A memorandum in support is attached, as well as an affidavit of time spent on this case.

Respectfully submitted,  
Eric L. Buchanan

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MEMORANDUM IN SUPPORT OF PLAINTIFF’S  
MOTION FOR EAJA FEES AND COSTS

Plaintiff, through counsel, respectfully submits this memorandum for consideration by the Court in support of this motion for attorney fees pursuant to 28 U.S.C. § 2412 (d), the Equal Access to Justice Act (EAJA). According to EAJA, “a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action, including proceedings for judicial review of agency action.” 28 U.S.C. § 2412(d)(1)(A). In order to qualify, the plaintiff must be a prevailing party, the position of the United States must not be substantially justified, and the plaintiff’s motion must be timely filed.

I. THE PLAINTIFF IS THE PREVAILING PARTY

In order to qualify for EAJA attorney fees, a plaintiff must be a “prevailing party.” 28 U.S.C. § 2412(d)(1)(A). In 1991, the Supreme Court held that there are only two types of remands authorized under 42 U.S.C. § 405(g): remands under sentence four and remands under sentence six of § 405(g). Melkonyan v. Sullivan, 501 U.S. 89, 98-103 (1991). Two years later, the Supreme Court held that a plaintiff who wins a judgment under sentence four of § 405(g) reversing the Commissioner’s final decision with a

remand for a rehearing is a prevailing party. Shalala v. Schaefer, 509 U.S. 292 (1993). Plaintiff is a prevailing party in this case by virtue of the fact that Plaintiff obtained a judgment under sentence four of § 405(g), reversing the Commissioner’s final decision with a remand for a rehearing.

## II. THE COMMISSIONER’S POSITION WAS NOT SUBSTANTIALLY JUSTIFIED

Under EAJA, attorney fees can be awarded to a “prevailing party” if the position of the United States was not “substantially justified” in defending its claim, or if the Court determines that special circumstances would make an award unjust. 28 U.S.C. § 2412(d)(1)(A). The term “substantially justified” means that the position of the defendant must have been reasonable, both at the administrative and judicial levels. 28 U.S.C. § 2412(d)(2)(D). A position is substantially justified if it had a reasonable basis in both law and fact. Pierce v. Underwood, 487 U.S. 552, 566 n.2 (1988).

The burden is on the United States to show that its position was substantially justified. Scarborough v. Principi, 124 S. Ct. 1856, 1865 (2004).

This case was remanded after the Court determined that the Commissioner’s decision was not supported by substantial evidence. The Commissioner cannot meet her burden of proving that her position was substantially justified.

## III. THIS MOTION FOR EAJA FEES IS TIMELY FILED

The EAJA’s thirty-day “lock begins to run after the time to appeal that ‘final judgment’ has expired.” Melkonyan, 501 U.S. at 96. “In sentence four cases, the filing period begins after the final judgment (‘affirming, modifying, or reversing’) is entered by the court and the appeal period has run, so that the judgment is no longer appealable.” Id.

at 102; see also 28 U.S.C. § 2412(d)(2)(G). With exceptions not relevant here, this means that an EAJA motion must be filed within 30 days of entry of a judgment under Federal Rule of Civil Procedure 58 reversing the Commissioner’s final decision (with or without a remand for a rehearing). Schaefer, 509 U.S. at 302-03. Plaintiff’s motion is timely filed.

#### IV. THE PLAINTIFF IS ENTITLED TO ATTORNEY FEES AND COSTS IN THIS CASE

Pursuant to 28 U.S.C. § 2412(d)(2)(A) “fees and other expenses includes . . . reasonable attorney fees.” The EAJA explains that the reasonable fees

shall be based upon prevailing market rates for the kind and quality of the services furnished, except that . . . (ii) attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

28 U.S.C. § 2412(d)(2)(A). As the language of the statute makes clear, the \$125 per hour maximum fee can be adjusted upward for an increase in the cost of living.

As of the filing of this motion, the Commissioner has agreed that the attorneys’ hourly rate requested could be adjusted for the increase in the cost of living. In several previous cases, the Court has recommended using the consumer price index (CPI) for size B/C cities to calculate the appropriate cost of living increase. The Court calculated the CPI adjusted rate to be \$134.72, rounded to \$135. The Plaintiff requests an EAJA hourly rate for attorney time at \$135 per hour for the XXXX hours of attorney work in this case.

The Plaintiff also claims EAJA fees for XXXX hours of paralegal work. This Court had traditionally reimbursed paralegals at the rate of \$40 per hour for EAJA fees in Social Security Disability cases, and the Plaintiff’s attorneys’ firm generally had not

sought more in this district. For the reasons stated below, the Plaintiff's counsel requests paralegal fees at the rate of \$65 per hour.

Under the EAJA the Court should award fees based on the prevailing market rate for the kind and quality of services furnished. 28 U.S.C. § 2412(d)(2)(A). Attorney's fees are generally calculated according to the prevailing market rates in the relevant community. Blum v. Stenson, 465 U.S. 886, 895 (1984). The same should be the rule for paralegal rates. In order to determine the prevailing market rate, the Court should consider evidence that is available concerning that rate. The evidence of the rate cannot be limited to evidence in Social Security cases. First, there is no free market for Social Security fees because 42 U.S.C. § 406(b) mandates that all work before a court must be on a contingency basis. See Gisbrecht v. Barnhart, 535 U.S. 789, 795 (2002). Second, to the undersigned's knowledge, there are no other paralegals other than those that work for the undersigned's firm who do this work regularly or to the same extent in this District. Third, EAJA requires consideration of the "prevailing market rate for the kind and quality of services." 28 U.S.C. § 2412(d)(2)(A). It does not limit consideration to that specific area of the law.

In Missouri v. Jenkins, 491 U.S. 274 (1989), the Supreme Court approved a rate of \$40 for paralegals for work done in the early 1980's. Adjusting the hourly rate from that found in Missouri v. Jenkins for the increase of the cost of living supports a similar current hourly rate. In June 1984, the CPI-U was 103.7. As of February 2000, it is 169.7. Thus \$40.00 in June 1984 equates to \$65.46.

This Court has noted in the past, "it is difficult to establish the market rate of young attorneys who perform solely social security work because there is a paucity of

firms performing solely that type of work in this area.” Hackney v. Apfel, No. 3:98-cv-58, at 2 (E.D. Tenn. Aug. 13, 1999). It is even more difficult to determine the market rate for paralegals that perform mostly Social Security Disability work at the Court litigation level.

The firm of Eric Buchanan & Associates, P.L.L.C. currently employs a paralegal, Norma Schvaneveldt, who spends a large part of her time performing paralegal duties related to court litigation of Social Security cases. [Footnote omitted.] The hourly rate for the work performed by this paralegal on Social Security cases is set by the Commissioner or Court, so the rate set in previous cases cannot be evidence of the real “market rate” for similar work in this community. [Footnote omitted.] Other paralegals’ fees are not capped, but are set by the true “market rate.” Additionally, most of the work performed by Mrs. Schvaneveldt and is performed on a contingency basis, so it is not billed at a regular hourly rate. In those few cases in which a client has been willing to pay an hourly rate for their services, clients have paid this paralegal \$75 per hour.

The Altman Weil survey

When confronted with the problem of the lack of comparable firms specializing in Social Security Disability in Hackney, this Court turned to “The 1998 Survey of Law Firm Economics,” published by Altman Weil, Publications, Inc. Hackney, No. 3:98-cv-58, at 9. The Court found the Altman Weil Survey to be “relevant and persuasive evidence of a reasonable prevailing market rate . . . .” Id.

The Plaintiff’s counsel has recently obtained an updated report from that same publisher. Attached as Exhibit “A” is “The 2000 Small Law Firm Economic Survey.” Page 23 of this Survey shows that nationally, the average hourly rate of all paralegals is

\$69 per hour, and the median is \$70. Furthermore, the report shows that nationally, senior paralegals are billed on average at \$74 per hour, or a median of \$75 per hour. More junior “legal assistants” are billed on average, nationally, \$66, and the median is \$60.

This survey includes Tennessee in the geographic region it calls the “South.” Page 24 of the Altman Weil Survey shows that, as of January 1, 2000, the average hourly rate for all paralegals in the “South” was \$63, and the median rate was \$60. Page 28 of the Survey shows that for firms of 2 to 5 lawyers both the Median and Average hourly rates for all paralegals is \$70. For firms of 6 to 12 lawyers, the average is \$69 and the median is \$65.

Page 30 of the Altman Weil Survey shows the average hourly rate of all paralegals in cities of 100,000 to 249,999 to be \$70, and the median is \$73. In larger cities, 250,000 to 499,999 the average is actually lower at \$64, while the median hourly rate is \$65. [Footnote omitted.]

The Lowest range of these paralegal hourly billing rates is that for the “South,” yet it shows the average hourly rate to be \$63 and the median to be \$60 as of January 1, 2000. All of the other rates, which take into account firm size, size of city, are higher than that. Therefore, based on this survey, the lowest average market rate on January 1, 2000 was \$63. Using the CPI-U for B/C size cities in the south, this would support a current market rate of \$64.61 for October, 2000, the most recent figure available. [Footnote omitted.] As figures are not available for November or December 2000, and the Plaintiff has used the lowest average from all the different categories, the Plaintiff suggests that the current hourly rate of paralegals at \$65 per hour is well supported and reasonable; the Plaintiff hereby request an hourly rate for paralegals of \$65 per hour.

Other evidence of the local market rate

Attached as Exhibits “D” and “E” are affidavits from two local attorneys on the market rate for paralegals. These attorneys practice in areas of the law in which paralegals are regularly billed at published hourly rates, and the attorneys’ skills, qualifications, and experience are set out in the resumes that are part of the attached exhibits.

These affidavits show that the market rate, measured by the rate at which paralegals are actually billed, is in the range requested. David Fowler states in his affidavit that the Firm of Spears, Moore, Rebman and Williams bills in the range of \$35 to \$70 per hour, and the effective “billing realization rate at that firm is about \$55 per hour.” [Footnote omitted.] Ferber Tracy provides an affidavit that the reasonable market rate for paralegals in Chattanooga is in “the range of \$50 to \$70” per hour.

These rates are in line with the rates shown on the Altman Weil survey, and show that the rate requested by the Plaintiff is in the range charged for similar work in the community. At a minimum, these affidavits show that \$40 per hour previously sought is \$15 per hour below the average charged at Mr. Fowler’s firm, is \$20 per hour below the average for the city of Chattanooga as stated by Mr. Tracy, and is even \$10 below the minimum charged generally in Chattanooga, according to Mr. Tracy.

The undersigned would remind this Court that should the Plaintiff eventually receive retroactive benefits in this matter, then the undersigned will reimburse the Plaintiff the lesser of the EAJA award and the 406(b) award. See Pub. L. 99-80, § 3, Aug. 5, 1985, 99 Stat. 186. The attorney is authorized only to keep the greater of the two, while the lesser is used to reimburse the Plaintiff. Id. Normally, the EAJA fees are less and the

EAJA fees are returned to Plaintiff and used to offset the attorney fees paid to litigate his or her claim.

Should a plaintiff ultimately prevail in a case such as this, the EAJA fees only partially compensate the disabled plaintiff for the cost of hiring an attorney to ensure that his or her case is properly considered. Nothing compensates the plaintiff for the years of anguish when the disabled plaintiff is, by definition, unable to work. While the Commissioner has been wrongfully denying this claim, the disabled Plaintiff has had little or no income, so in addition to the pain and suffering of the plaintiff's underlying disability, the plaintiff has had the additional embarrassment and worry of often not being able to pay for utilities, rent, and other basic bills.

Pursuant to 42 U.S.C. § 2412(d)(2)(B), the Plaintiff avers that the Plaintiff does not have a net worth in excess of \$2,000,000, and that he does not own a business worth more than \$7,000,000. Attorney for Plaintiff further moves the Court to allow submission of an amended EAJA motion to add any additional hours for litigation which may be required by Defendant's opposition to this motion for fees.

The Plaintiff hereby requests EAJA fees in the amount of \$XXXX, based on a rate of \$135 per hour for XXXX hours spent in this case, \$65 per hour for XXXX paralegal hours spent in this case, and \$150 (for the filing fee paid to commence this action). 28 U.S.C. § 2412(a), (d).

Respectfully submitted,

Eric L. Buchanan