

SAMPLE BARE-BONES EAJA APPLICATION USING HISTORIC RATES

By Eric Schnauffer

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS

FIRSTNAME LASTNAME,	)	Case No.
	)	
Plaintiff,	)	
	)	MEMORANDUM IN SUPPORT OF
v.	)	PLAINTIFF'S MOTION
	)	FOR ATTORNEY FEES
JO ANNE B. BARNHART,	)	AND COSTS UNDER THE
Commissioner of Social Security,	)	EQUAL ACCESS TO JUSTICE
	)	ACT
Defendant.	)	

I. Statement of the Nature of the Matter

This is an application by Plaintiff, FIRSTNAME LASTNAME, for attorney fees and costs under the Equal Access to Justice Act (EAJA). 28 U.S.C. § 2412(a), (d).

II. Statement of the Facts

In September 2000, an ALJ decided that Plaintiff was not disabled and thus not entitled to Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C. § 423(d). (Tr. at 369.) After the ALJ's decision became final, Plaintiff initiated a civil action, seeking a judicial finding of disability and award of benefits or, alternatively, a reversal with a remand for further administrative proceedings. (Docket No. 3, 6.) The Commissioner sought affirmance. (Docket No. 5.) On May 27, 2004, the Honorable NAMEOFMAGISTRATE issued a Recommendation and Report, recognizing that Plaintiff was disabled and entitled to an immediate award of benefits, but also stating that the exact onset of her disability needed to be determined. (Docket No. 9.) On June 18, 2004, the Honorable NAMEOFJUDGE adopted the Recommendation and Report. (Docket No. 10.) Judgment was entered accordingly. (Docket No. 11.)

### III. Argument

#### A. Plaintiff is a Prevailing Party.

Plaintiff is a prevailing party by virtue of the fact that on DATE, this Court reversed the Commissioner's final decision (with and without a remand for a rehearing). 42 U.S.C. § 405(g) (sentence four); Shalala v. Schaefer, 509 U.S. 292, 296-97 & n.2 (1993); Goatcher v. Chater, 57 F.3d 980, 981 (10th Cir. 1995). A corresponding judgment was entered on DATE.

#### B. Plaintiff is an Eligible Party.

Plaintiff is an eligible party because her net worth was less than \$2,000,000.00 when the civil action was filed. 28 U.S.C. § 2412(d)(2)(B). Plaintiff avers, consistent with her testimony and the administrative record, that her net worth was less than two million dollars when the civil action was filed.

#### C. The Commissioner's Position Was Not Substantially Justified.

Plaintiff is entitled to attorney fees under the EAJA if the Commissioner's "position" was not "substantially justified." 28 U.S.C. § 2412(d)(1)(B).<sup>1</sup> Plaintiff alleges that the Commissioner's position was not substantially justified. 28 U.S.C. § 2412(d)(1)(B). Because the Commissioner has the burden of persuasion to show that her position was substantially justified, see Scarborough v. Principi, 124 S. Ct. 1856, 1865 (2004); Gilbert v. Shalala, 45 F.3d 1391, 1394 (10th Cir. 1995), Plaintiff will fully brief in a reply brief any argument the Commissioner

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<sup>1</sup> The Commissioner's "position" "means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based[.]" 28 U.S.C. § 2412(d)(1)(D); see also Fulton v. Heckler, 784 F.2d 348, 349 (10th Cir. 1986) (discussing definition of "position").

To be "substantially justified," the Commissioner's position must have had a reasonable basis in law and in fact. Pierce v. Underwood, 487 U.S. 552, 566 n.2 (1988).

offers regarding the issue of substantial justification. Further, not addressing the issue of substantial justification now will minimize attorneys fees if the Commissioner does not argue that her position was substantially justified. See Commissioner, INS v. Jean, 496 U.S. 154 (1990) (plaintiff may receive attorney fees under the EAJA for attorney-fee matters).

D. Plaintiff Requests Reasonable Attorney Fees.

For civil actions commenced on and after March 29, 1996, \$125.00 per hour is the EAJA's statutory rate. 28 U.S.C. § 2412(d)(2)(A).<sup>2</sup> An increase in the cost of living since March 1996 justifies an increase in the statutory rate. Id. The hourly rate for 2003 is \$147.50, and the hourly rate until March 2004 is \$150.00.<sup>3</sup> These hourly rates are below the market rate for the same kind and quality of legal services as performed in this case.<sup>4</sup>

Plaintiff seeks an EAJA award for 0.5 hours of attorney time reasonably incurred in this civil action by attorney NAME-1,<sup>5</sup> 4.9 hours of attorney time reasonably incurred in this civil action by attorney NAME-2; and 33.0 hours of attorney time reasonably incurred in this civil action by attorney Eric Schnaufer. The time record for attorney NAME-1 is attached as Exhibit

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<sup>2</sup> See Pub. L. 104-121, § 232(b)(1); 110 Stat. 847, 863-64 (1996).

<sup>3</sup> In March 1996, the CPI-All Items Index was 155.7. Available at <http://www.bls.gov/data/>. The increase in the cost of living for 2003 is 1.18 (184.0/155.7). Therefore, the hourly rate for 2003 is \$147.50 (\$125.00 x 1.18). The increase in the cost of living until March 2004 is 1.20 (187.4/155.7). Therefore, the hourly rate for 2004 is \$150.00 (\$125.00 x 1.20).

<sup>4</sup> To minimize attorney fees for the fee litigation, Plaintiff does not present extended argument about the hourly rates requested. If the Commissioner disagrees with the hourly rates, Plaintiff will present additional argument about the rates in a reply brief and request reasonable attorney fees for that additional argument.

<sup>5</sup> Attorney NAME-1 served as local counsel.

A. The time record for attorney NAME-2 is attached as Exhibit B. The time record for attorney Schnauffer is attached as Exhibit C.<sup>6</sup>

Plaintiff thus requests \$5,693.00 in attorney fees under the EAJA:<sup>7</sup>

<u>Attorney</u>	<u>Hours</u>	<u>Hourly Rate (\$)</u>	<u>Total (\$)</u>
NAME-1	0.3	147.50 (2003)	44.25
NAME-1	0.2	150.00 (2004)	30.00
NAME-2	2.6	147.50 (2003)	383.50
NAME-2	2.3	150.00 (2004)	345.00
Schnauffer	23.9	147.50 (2003)	3,525.25
Schnauffer	9.1	150.00 (2004)	1,365.00
			Total: \$5,693.00

E. Plaintiff Requests the Filing Fee as Costs.

Plaintiff seeks as costs the \$150.00 filing fee. 28 U.S.C. § 2412(a).

#### IV. Conclusion

Plaintiff requests that the Court find that she meets the statutory requirements for an award of attorney fees under the EAJA and that the Commissioner's position was not substantially justified, and award \$5,693.00 in attorney fees under 28 U.S.C. § 2412(d) and \$150.00 in costs under 28 U.S.C. § 2412(a).

Respectfully submitted,

/s NAME-1

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<sup>6</sup> Attorney Schnauffer has done Social Security litigation for many years. See, e.g., Gisbrecht v. Barnhart, 535 U.S. 789 (2002) (Schnauffer representing the petitioners).

<sup>7</sup> Plaintiff will file a supplemental fee petition for any attorney time reasonably incurred replying to any response by the Commissioner to Plaintiff's EAJA motion.