
OPINION SUPPLEMENTAL INFORMATION

COMPLETE NAME
OF CASE:

Carl H. Scott, Executor of
the Estate of Irene P. Scott
v.
Louis W. Sullivan, M.D.,
Secretary of Health and Human Services

DOCKET NO.:

CA 87-0458-R

COURT:

United States District Court
Eastern District of Virginia
Richmond Division

DATE OPINION
FILED:

August 17, 1989

JUDGE:

Hon. Richard L. Williams

ATTORNEY(S)
FOR PLAINTIFF:

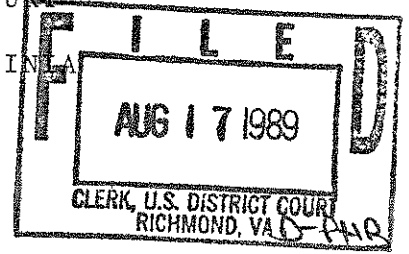
Charles H. Cuthbert, Jr., Esq.
Charles H. Cuthbert, Jr., P.C.
220 North Sycamore Street
Petersburg, VA 23803

ATTORNEY(S)
FOR DEFENDANT:

Robert W. Jaspen, Esq.
Debra J. Prillaman, Esq.
Assistant U.S. Attorneys
U.S. Attorney's Office
1100 E. Main Street
Richmond, VA 23219

published 6/5/90
(don't know who
authored this
opinion)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division



CARL H. SCOTT, Executor of
the Estate of Irene P. Scott,

Plaintiff,

v. CIVIL ACTION NO. 87-0458-R

LOUIS W. SULLIVAN, M.D.,
Secretary of Health and
Human Services,

Defendant.

MEMORANDUM AND ORDER

Carl H. Scott, Executor of the Estate of Irene P. Scott, plaintiff, brings this application for an award of attorney's fees and costs pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d)(1)(A). Jurisdiction is appropriate pursuant to 42 U.S.C. §405(g). The United States Magistrate, to whom this case was referred, filed his proposed opinion on May 31, 1989. Both plaintiff and defendant filed objections to that opinion.

The magistrate's proposed memorandum concluded that the position of the Secretary was not substantially justified and recommended that plaintiff's counsel be awarded attorney's fees in the amount of \$1,575.00 and \$140.00 in expenses.

Plaintiff filed an objections based upon his contention that the proposed opinion failed to consider enhancement of the \$75.00 hourly rate based upon the increase in cost of

living since 1981 and the limited availability of qualified attorneys specializing in Social Security disability cases in the area.

Defendant's objections focus on the argument that the Secretary's actions were substantially justified and an award of attorney's fees pursuant to EAJA would be improper.

In remanding this case to the Secretary for further consideration the Court found that the opinions of three treating physicians, Drs. Warren, Miller and Foster, had been improperly discounted. The administrative Law judge (ALJ) discounted the opinion of Dr. Foster, a board-certified psychiatrist, who reported that the claimant had a severe impairment of her ability of carry out and remember instructions, respond appropriately to supervision, respond to customary work pressures and changes in routine work settings. The ALJ found no basis for Dr. Foster's position that plaintiff's prior medical history supported his opinion of plaintiff's problems with depression as far back as 1977. A discharge summary in June, 1969, submitted by plaintiff contains a diagnosis of "anxiety with depression". In addition, a treating physician's notes in July, 1969, reflect plaintiff's suffering from depression. The fact that the treating physicians' rendered opinions regarding the claimant's condition after her insured status lapsed, as long as these opinions were based

upon objective medical criteria, is an insufficient basis for the ALJ's rejection. In Miller v. Schweiker, 725 F.2d 243, 246 (4th Cir. 1984), the Fourth Circuit Court of Appeals stated:

A treating physician's diagnosis of claimant's condition may be made after the relevant determination date and is entitled to significant weight if it is based on objective medical criteria.

The ALJ's rejection of the opinions of the three treating physicians and the testimony of the claimant and her daughter were based, at least in part, upon his assertions unsupported by the evidence of record. The ALJ's contention that the "testimony of the claimant and her daughter are obviously in an attempt to obtain these benefits" and that Dr. Foster "was merely trying to be helpful to the claimant" are not supported by the evidence.

The Court finds that the Secretary failed to give appropriate weight to the opinions of the treating physicians where there was no persuasive contradictory evidence and therefore, the Secretary's position was not substantially justified.

Having found plaintiff entitled to an award of attorney's fees and expenses pursuant to 28 U.S.C. §2412 (d)(1)(A), the issue of an appropriate amount is addressed. The magistrate found that an hourly rate of \$75.00 without any enhancement is appropriate. In the Court's opinion a cost of living adjustment since the 1981 enactment of

EAJA should justify a higher hourly rate. Plaintiff's counsel submitted an affidavit regarding the number of hours expended at the Court level, i.e. 21 hours. While the Court does not consider the suggested hourly rate of \$136.75 justified in this case, a rate of \$100.00 per hour is felt to be appropriate.

Accordingly, defendant's objections to the proposed opinion are overruled, plaintiff's objections are overruled and the proposed opinion, as modified herein, will be adopted as the opinion of the Court.

The Court awards plaintiff's counsel attorney's fees in the amount of \$2,100.00 under the Equal Access to Justice Act, and \$140.00 for expenses.

An appropriate order shall issue.


Richard L. Williams
UNITED STATES DISTRICT JUDGE

17 AUG 1989

Dated: _____

422	3	87	0458-R	07	01	87	2	863	1				Nearest \$1,000	J M	2214	51183		87	0
-----	---	----	--------	----	----	----	---	-----	---	--	--	--	-----------------	--------	------	-------	--	----	---

PLAINTIFFS

DEFENDANTS

~~SCOTT, IRENE P.~~ Substituted 1/20/88
 CARL H. SCOTT, Executor of the Estate of
 Irene P. Scott

SECRETARY, DEPARTMENT OF HEALTH & HU
 SERVICES

Judge Downs
JUDGE DOWNS

CASE CLOSED

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
 IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

42 U.S.C. Section 405 (g)

ATTORNEYS

Charles H. Cuthbert, Jr., Esquire
 CHARLES H. CUTHBERT, JR., P.C.
 220 North Sycamore Street
 Petersburg, VA 23803

(804) 861-3321

AUSA Robert W. Jaspen
 Debra J. Prillaman, Esq.
 Assistant U.S. Attorney

Case set: _____
 On Merits: _____
 IPTC : _____
 Status : _____
 On Motion: _____
 PRTC : _____

870480 331 90.
 700 90.
 100.
 100.
 111 9752 7/28/87 1

<input type="checkbox"/> CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARD	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE
	7-6-87	#16042 FF 120.00	968665-218	JS-5	8-1-87
			JS-6	09 MAR 1988	

CIVIL DOCKET CONTINUATION SHEET

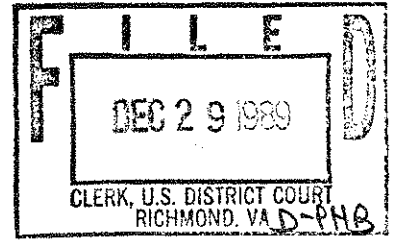
PLAINTIFF		DEFENDANT	CA 87-00458-R DOCKET NO. _____ PAGE <u>2</u> OF _____
CARL H. SCOTT, etc.		HHS	
DATE	NR.	PROCEEDINGS	
<u>1989</u>			
Aug. 24	34	Pltf's counsel's Supplementary Application, filed.	
Sep. 25	35	Pltf's counsel's Motion, filed.	
Oct. 10	36	Deft's Response to Pltf's Motion for Direction, filed.	
Oct. 19	37	PROPOSED MEMORANDUM of the Court. ENT 10/19/89, GWD, filed. Cps. mailed.	
Oct. 19	38	ORDER that proposed memorandum is FILED. Parties may object w/in 12 days. Failure to object in writing may result in adoption of memorandum and entry of an order in accordance therewith. ENT 10/19/89, GWD, filed. Cps. mailed.	
Oct. 30	39	Pltf's Objection to the Proposed Memorandum Opinion, filed.	
Oct. 30	40	Pltf's Application for atty.'s fee, filed.	
Nov. 7	41	Deft's Response to Pltf's Objections to Magistrate's Report & Recommendation filed.	
Nov. 27	42	Pltf's Rebuttal Brief in Support of His Objections to the Proposed Memorandum Opinion, filed.	
Dec. 29	43	MEMORANDUM AND ORDER of the Court. ENT 12/29/89, RLW, filed. Cps. mailed.	
Dec. 29	44	ORDER that proposed memorandum of the U.S. Magistrate is ADOPTED. Pltf's application for supplemental fees is DENIED. ENT 12/29/89, RLW, filed. Cps. mailed.	

sent to publishers
1-17-90

P
(Judge Downs?)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

CARL H. SCOTT, Executor
of the Estate of Irene
P. Scott,
Plaintiff,



v. CIVIL ACTION NO.87-0458-R

LOUIS W. SULLIVAN, Secretary,
Health and Human Services,
Defendant.

MEMORANDUM AND ORDER

Carl E. Scott, Executor of the Estate of Irene P. Scott, plaintiff, filed this action pursuant to 42 U.S.C. §405(g) seeking a review of the Secretary's final decision denying Irene P. Scott's claim for disability insurance benefits. The matter was remanded for further proceedings which resulted in a favorable decision for the plaintiff. Plaintiff then filed an application for attorney's fees and expenses under the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(d).

The U. S. magistrate, to whom this matter was referred, recommended the granting of an award of \$1,575.00 attorney's fees and \$140.00 in expenses. Objections were filed by both parties and the Court awarded plaintiff \$2,100.00 attorney's fees and \$140.00 expenses. Plaintiff

filed a supplemental application for an award of \$1,100.00 attorney's fee for 11 hours expended obtaining the EAJA fee award. Defendant filed objections to this award. The magistrate filed a proposed memorandum recommending that the supplemental application be denied on the ground that the defendant was substantially justified in opposing the initial fee application. Plaintiff has filed objections to the proposed memorandum.

Plaintiff's first objection to the proposed memorandum asserts that the magistrate erred in not finding, as a matter of course, that supplemental EAJA fee awards should be granted to a claimant who prevailed in obtaining the initial EAJA award. While plaintiff concedes the existence of a split of authority on this issue, he contends the better view is to routinely grant such supplemental awards.

This case presents a question of first impression in this Circuit. The Court has reviewed the decisions from other circuits and concludes that the most reasonable approach to this issue has been adopted in the Seventh, Eighth and Ninth Circuits. See Continental Web Press, Inc. v. N.L.R.B., 767 F.2d 321, 324 (7th Cir. 1985); Cornella v. Schweiker, 741 F.2d 170, 171 (8th Cir. 1984); Rawlings v. Heckler, 725 F.2d 1192 (9th Cir. 1984). Rather than a routine approval of EAJA awards for fee applications, these Circuits hold that the same principles apply to these matters as to the initial EAJA request, i.e. the government's position must be reviewed to determine if its position in opposing

the EAJA award in the first instance was substantially justified. To hold otherwise would "chill" the United States from opposing any EAJA award or contesting the amount requested. This case presents a prime example. Here plaintiff sought attorney's fees in the amount of \$2,871.75. The government filed its opposition with the ultimate result that plaintiff's requested amount was reduced by approximately 25%. This is not to say that had plaintiff been awarded the full amount requested the government would not have been justified in opposing the request. Each case must be judged on its own merits. In this case, the Court is of the opinion that the government was substantially justified in opposing the initial request. If the United States considers that an EAJA award is not warranted or the requested amount is excessive, then its efforts should not be thwarted by a threat of a supplemental fee application.

Plaintiff's second objection claims the magistrate erred in finding the Secretary was substantially justified in opposing the initial application for attorney's fees under EAJA. As stated above, the government was partially successful in resisting the request since there was a resulting 25% reduction in the amount requested. Further, since this is a question of first impression in this Circuit, this constitutes additional justification for

opposing the application. See Rawlings v. Heckler, supra, (where issues unsettled in a particular circuit, the Secretary is substantially justified in litigating them).

The statutory criterion in EAJA is whether the governmental agency was substantially justified in opposing the claimant, either on the merits of the claim or on a subsequent application for attorney's fees. In either instance, if the agency is not substantially justified, then it lays itself open to an additional award of fees. See Continental Web Press, Inc. v. N.L.R.B. supra.

For the reasons stated, plaintiff's objections to the proposed memorandum opinion are overruled and the magistrate's opinion will be adopted as the memorandum of the Court.

Plaintiff's application for supplemental attorney's fees under the Equal Access to Justice Act will be DENIED.

An appropriate order shall issue.


UNITED STATES DISTRICT JUDGE

Dated: 29 DEC 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

CHAMBERS OF
RICHARD L. WILLIAMS
U.S. DISTRICT JUDGE
P.O. BOX 2-AD
RICHMOND, VIRGINIA 23205

January 17, 1990

publisk

Debra J. Prillaman
Assistant United States Attorney
Eastern District of Virginia
P.O. Box 1257
Richmond, Virginia 23210

Re: Carl H. Scott, Executor of the Estate of
Irene Scott v. Louis W. Sullivan, M.D.,
Secretary, HHS, Civil Action No. 87-0458-R

Dear Ms. Prillaman:

Arrangements have been made to grant your request of
January 17 concerning the above case. In due course it will
appear in Fed. Supp.

Very truly yours,


Richard L. Williams

cc: Charles H. Cuthbert, Jr., Esq.
220 Sycamore Street
Petersburg, VA 23803

Robert S. Drum, Esq.
Assistant Regional Counsel
Department of Health & Human Services
Office of General Counsel, Region III
P.O. Box 13716, Room 9100
Philadelphia, PA 19101



U.S. Department of Justice

United States Attorney
Eastern District of Virginia

Post Office Box 1257
Richmond, Virginia 23210

January 17, 1990

The Honorable Richard L. Williams
United States District Court for
the Eastern District of Virginia
Post Office Box 2-AD
Richmond, Virginia 23205

Re: Carl H. Scott, Executor of the Estate of
Irene Scott v. Louis W. Sullivan, M.D.,
Secretary, HHS, Civil Action No. 87-0458-R

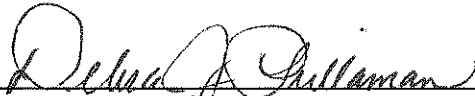
Dear Judge Williams:

The Office of General Counsel of the Department of Health and Human Services and I join in requesting that you consider publication of your memorandum opinion filed December 29, 1989 in the captioned case. As the Court pointed out in its memorandum, this case presents a question of first impression in the Fourth Circuit. Because of the paucity of decisions in this area and importance of the issue addressed in the opinion to the agency, we hope that you will favorably consider this request.

Very truly yours,

HENRY E. HUDSON
UNITED STATES ATTORNEY

By:


Debra J. Prillaman
Assistant United States Attorney

DJP/gca

cc: Charles H. Cuthbert, Jr., Esquire
220 Sycamore Street
Petersburg, VA 23803

Robert S. Drum, Esquire
Assistant Regional Counsel
Department of Health & Human Services
Office of General Counsel, Region III
P. O. Box 13716, Room 9100
Philadelphia, PA 19101

DIST.	OFF.	DOCKET		FILING DATE			J	N/S	O	D	R	\$ DEMAND	JUDGE/ MAG. NO.	COUNTY	JURY DEM.	DOCKET	
		YR.	NUMBER	MO	DAY	YEAR										YR.	NUMBER
422	3	87	0458-R	07	01	87	2	863	1			Nearest \$1,000	J 2214 M	51183		87	0458-R

PLAINTIFFS

DEFENDANTS

~~SCOTT, IRENE P.~~ Substituted 1/20/88
 CARL H. SCOTT, Executor of the Estate of
 Irene P. Scott

SECRETARY, DEPARTMENT OF HEALTH & HUMAN
 SERVICES

LGE Down

JUDGE DOWNS

CASE CLOSED

CAUSE

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE
 IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

42 U.S.C. Section 405 (g)

ATTORNEYS

Charles H. Cuthbert, Jr., Esquire
 CHARLES H. CUTHBERT, JR., P.C.
 220 North Sycamore Street
 Petersburg, VA 23803

AUSA Robert W. Jaspens
 Debra J. Prillaman, Esq.
 Assistant U.S. Attorney

(804) 861-3321

Case set:	_____
On Merits:	_____
IPTC	_____
Status	_____
On Motion:	_____
FPYC	_____

CHECK HERE	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
CASE WAS ED IN RMA IPERIS	7-6-87	FF 125.00	955165-23	JS-5	8-1-87
				JS-6	09 MAR 1989