07-4009-cv

To Be Argued By:
ANN M. NEVINS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-4009-cv

SANDRA L. ERICKSSON,
Plaintiff-Appellant,

-vs-

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The United States District Court for the District of Connecticut (Alan H. Nevas, S.J.) had subject matter jurisdiction over Sandra L. Ericksson's appeal from a final decision of the Social Security Administration ("SSA") pursuant to 42 U.S.C. § 405(g). Judgment entered on November 10, 2003, reversing and remanding the case to SSA for rehearing. That judgment was vacated on March 27, 2006. After a fully favorable decision from SSA on remand, the district court entered judgment on November 9, 2006. (JA[1] 354, 388)[2]

On December 8, 2006, Ericksson timely filed a post-judgment motion seeking allowance of attorney's fees pursuant to the Equal Access to Justice Act. On July 19, 2007, the district court (Holly B. Fitzsimmons, M.J.) entered a ruling, denying Ericksson's motion. Ericksson filed a timely notice of appeal with respect to that ruling

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[1] Ericksson filed the record in this case in two volumes, the "Joint Appendix" and the "Administrative Record of Social Security Decision." Citations to the former will be noted as "JA [page number]". Citations to the latter will be noted as "AR [page number]".

[2] Ericksson erroneously states that a ruling entered on September 17, 2007, remanding the case to SSA under 42 U.S.C. § 495(g), sentence six. *Appellant's Brief, p.2.* Rather, the district court entered a ruling reversing and remanding the case to SSA on November 10, 2003. That ruling became final and appealable on November 9, 2006, when the district court entered a judgment for the plaintiff after remand.

within the 60 days permitted by Fed. R. App. P. 4(a), on September 14, 2007. (JA 8) This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court abuse its discretion when it determined that the government was substantially justified in its defense of the termination of Ericksson's disability benefits, and that Ericksson was therefore not entitled to an award of attorneys fees pursuant to the Equal Access to Justice Act?

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Plaintiff- Appellant,

-vs-

MICHAEL J. ASTRUE,
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Preliminary Statement

This is an appeal from a ruling on a post-judgment motion for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), in a social security disability appeal.

The appellant, Sandra L. Ericksson, received disability benefits for approximately four years, from 1994 until 1998, at which time her benefits were terminated based on SSA's determination that Ericksson's prior disabling illness, non-Hodgkins lymphoma, was in complete remission. After exhausting her administrative remedies, Ericksson appealed the termination of her benefits to the district court. The court, having found that Ericksson presented new evidence to the court that had not been presented to SSA, remanded the case to the agency for reconsideration.

On remand, SSA found Ericksson to be disabled due to a back condition and awarded her benefits. Given SSA's action, the district court entered judgment in Ericksson's favor. Ericksson moved for attorney's fees thereafter under the EAJA. The district court denied the motion, finding that the government was substantially justified in its defense of the prior termination of benefits, as Ericksson previously had failed to provide SSA with the necessary evidentiary support to prove her disability.

Ericksson now appeals the denial of her motion for attorney's fees, asserting that the district court abused its discretion.

Statement of the Case

In 1993, Ericksson applied for disability insurance benefits due to her diagnosis of Stage III, non-Hodgkins lymphoma. (AR 75-78) In May 1994, SSA granted Ericksson's application in a fully favorable decision. (AR 68-74)

In January 1998, SSA determined that Ericksson's lymphoma was in complete remission, allowing her to work in some capacity, and that her disability benefits would terminate. (AR 141-143) Ericksson requested reconsideration of the termination, claiming that she suffered from joint disease and back pain, and this request was denied on May 14, 1998. (AR 188-190) On October 28, 1998, Ericksson received a hearing before an Administrative Law Judge ("ALJ"). (AR 259-262) Based on the hearing and the medical records made available to him, the ALJ held that the lymphoma was in remission and that Ericksson's allegation of a disabling back condition lacked evidentiary medical support. (AR 15-25) Accordingly, the ALJ ruled that Ericksson's period of disability ended on January 1, 1998 due to medical improvement, and her disability benefits were terminated as of March 1, 1998. (AR 25)

Ericksson requested administrative review of the ALJ's decision, but the Appeals Council denied the request on March 3, 2000. (AR 8-10) That denial made the ALJ's decision the final decision of SSA and ripe for review by the district court.

Ericksson, proceeding *pro se,* sought an extension of time in which to commence a civil action. (AR 5-7) SSA granted the requested extension to and through November 17, 2000. (AR 4) Ericksson timely filed a complaint in the district court on November 17, 2000. (JA 2) She filed an amended complaint on November 20, 2000. (JA 3, 29-32)

The district court appointed *pro bono* counsel for Ericksson in 2002. (JA 5) After new evidence was presented to the court regarding Ericksson's back condition, the district court remanded the claim to SSA for a second hearing before an ALJ in light of new evidence. (JA 6, 152-178)

On remand, after Ericksson submitted new medical records to SSA, including a substantial number of medical records resulting from treatment after SSA's 1999 termination of benefits, a second ALJ awarded Ericksson disability benefits for the claims stemming from her back problems. (JA 203-212) Ericksson, a prevailing party within the meaning of EAJA, filed a motion on December 8, 2006 seeking attorney's fees, arguing that the government was not substantially justified in its position when it terminated her disability benefits and then defended its denial. (JA 8)[3]

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[3] The motion for EAJA fees at issue in this appeal was the third motion filed by Ericksson's counsel. Although not relevant here, there were two prior motions filed and denied as untimely, because they were filed too early. (JA 6-7)

On July 19, 2007, the district court (Holly B. Fitzsimmons, M.J.) denied Ericksson's motion, finding that the government was substantially justified in its initial termination of Ericksson's benefits based on the record before SSA at that time. (JA 8, 180-189)

On September 14, 2007, Ericksson filed a timely notice of appeal of the denial of her motion for attorney's fees. (JA 1, 8)

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Initial proceedings before SSA

On October 19, 2003, Ericksson filed an application for disability benefits with SSA, alleging her inability to engage in gainful activity since March of that year due to her diagnosis of and treatment for non-Hodgkins lymphoma. (AR 71-79) SSA found that Ericksson met the disability requirements due to her illness and fatigue resulting from chemotherapy. (AR 72-74) The treatment Ericksson received was effective; a series of scans from 1994 through April of 1998 showed no evidence of active cancer, and she was found to be in complete remission. (AR 197-200, 215, 231-240, 271, 278)

On January 30, 1998, SSA provided Ericksson with notice of its intent to terminate benefits. (AR 141-143) The notice referenced a number of medical records which showed an improvement in Ericksson's health and led SSA to conclude that she was no longer disabled. In her

request for reconsideration, filed on February 25, 1998, Ericksson noted that her "condition ha[d] gotten better" but she identified "degenerated [sic] joint disease, back problems, and fevers" as her current disabling condition. (AR 144)

In an administrative proceeding before a hearing officer on April 27, 1998, Ericksson provided anecdotal, historical information concerning her condition and referenced certain medical professionals she had consulted – Dr. Simkovitz and Backe for treatment of cancer and St. Vincent's Medical Center for treatment of her disability. (AR 156-157) The hearing officer made the following observations:

> Claimant sat for almost 2 hours with no perceived problems:
> 1) She did not shift around in chair
> 2) She did not stand or interrupt hearing to change position
> 3) She lifted up foot to show me her shoe – lifted it almost over desk top in doing so
> 4) bent to side, to next chair over to take out medical reports bent over and rifled thru (sic) bag.

(JA 163)

On May 12, 1998, the hearing officer issued her report. (AR 166-177) The officer found that Ericksson was no longer disabled and referenced the medical records on which she relied to make her assessment. (AR 167, 171)

According to the hearing officer's findings, the medical reports indicated certain back problems that had improved dramatically with manipulation and for which doctors had prescribed routine stretching exercises and abdominal strengthening. (AR 171)

Thereafter, Ericksson sought and received a hearing before an ALJ, which took place on October 28, 1998. At that hearing, the ALJ repeatedly advised Ericksson that she had the right to be represented by counsel, stating that her case and the Social Security Act were "complicated." (AR 28, 44) The ALJ heard from Ericksson at length. She stated that lymphoma was "no longer the problem" and emphasized problems with her back. (AR 48) The ALJ spent significant time trying to determine what medical professionals Ericksson had seen, noting that the medical records he had reviewed provided little support for her claim of a disabling back condition. (AR 44-45, 49, 52-53) Ericksson testified that she had been told that she would not need back surgery (AR 33), and that a stretching program had been recommended. (AR 34) Ericksson identified Dr. Backe as the only doctor she had seen about her back (AR 45, 63) and noted that she "couldn't go to doctors" because of an inability to get referrals. (AR 49) The ALJ identified the reports he had received (AR 49) and asked that Ericksson review all the reports in SSA's possession and alert him of any additional places where she had been examined or treated. (AR 52-53, 61-64) He told Ericksson that he would contact the doctors she identified to obtain any medical records they had. (AR 56, 61, 64) At the conclusion of the hearing, the ALJ told Ericksson that he would give her additional time

to provide medical support for her disability claim. If she failed to do so, he would close the hearing. (AR 66-67)

Nearly six months later on April 14, 1999, the ALJ issued his findings. He reviewed the medical evidence before him, noting mention in the records of Ericksson's back pain and some evidence of degenerative disc disease, but no findings of significant abnormalities. (AR 19-20) The report from her physical therapist indicated significant improvement after Ericksson engaged in an exercise program, leading to decreased pain and increased mobility. (AR 20) Based on the record before him, the ALJ upheld the denial of benefits, finding that Ericksson's lymphoma had improved and her allegation of disabling back pain lacked evidentiary support. (AR 23)

Ericksson requested administrative review of the ALJ's decision, noting that she was "seeing different doctors not listed in her last appeal." (AR 8-10) The Appeals Council denied administrative review. (AR 8-9) That denial made the ALJ's decision the final decision of SSA and thus ripe for judicial review in the district court. *See* 42 U.S.C. § 405(g). Ericksson sought an extension of time to file a complaint, and SSA agreed to a 30-day extension. (AR 4)

B. Proceedings in the district court

Pursuant to 42 U.S.C. 405(g), Ericksson sought review of the final decision denying her claims. In her amended complaint filed on November 20, 2000, Ericksson alleged that the decision of the ALJ was wrong because of "new and material evidence" and because the decision was

"contrary to the evidence currently of record." (JA 29-31) On January 4, 2002, the Commissioner of SSA moved to have the agency's decision affirmed. (JA 4) The district court appointed Attorney Charles Pirro on November 6, 2002 as *pro bono* counsel for Ericksson. (JA 5) Erickssson, through counsel, filed a motion for an order reversing and remanding the case to SSA for rehearing. (JA 5) In her motion, Ericksson alleged that the ALJ had committed several errors – basing the decision on medical records that were not part of the transcript, failing to assist Ericksson in obtaining medical records in support of her claim, making factual errors and misstatements of evidence, and applying incorrect legal standards in evaluating Ericksson's claims. (JA 59-80) The Commissioner renewed the motion for a judgment affrming the agency's final decision. (JA 6)

On August 23, 2003, Magistrate Judge Fitzsimmons issued a Recommended Ruling which denied the Commissioner's motion and granted, in part, Ericksson's motion to remand for a rehearing before the ALJ. (JA 6, 152-178) No objection to the Recommended Ruling was filed, (JA 6), and on September 17, 2003, the district court entered an endorsement order adopting and approving the Recommended Ruling. (JA 6, 152)

The district court's decision made several findings as to the justification for remand. First, the district court found that the ALJ made attempts to determine if there were additional medical records to support Ericksson's claims and to advise Ericksson that she might seek representation by an attorney. (JA 168-169) The court

noted that Ericksson had failed to produce additional medical records to support her claim of debilitating back pain but found that her failure may have been caused by her mental difficulties (*i.e.*, her claim that her brain "wasn't working properly") (JA 169-170) and by Ericksson's lack of access to treatment. (JA 168-169) In response to Ericksson's claim that the ALJ had failed to assist her in obtaining records, the district court found that the ALJ had repeatedly inquired about the existence and location of additional, supportive documents if they did in fact exist. (JA 168) The district court therefore rejected Ericksson's claim that the ALJ had failed to fulfill his heightened duty to develop the medical record for a *pro se* claimant. (JA 171)

Second, the district court found that Ericksson was "incapable of fully understanding and/or fulfilling her burden of providing medical evidence to support her claim." (JA 170) This finding provided good cause to remand the case to SSA to hear new evidence. The district court noted that it,

> may remand where 'new, material evidence is adduced that was for good cause not presented before the agency.' *Shalala v. Schaefer*, 509 U.S. 292, 297 n.2 (1993). The 'new' requirement means the evidence cannot just be cumulative of evidence already in the record . . . . 'Material' in this context means that evidence must be probative and relevant to the time period for which benefits were denied. (JA 170-171)

The district court ruled that new medical records attached to Ericksson's complaint were material and not in existence at the time of the hearing before the ALJ. (JA 171) The existence of these new and previously unavailable records provided good cause to remand the case under 42 U.S.C. § 405(g), sentence six, so that an ALJ could review the claim with "all the evidence now in existence relating to Ericksson's back condition for the relevant period." (JA 174)

On remand, Ericksson's claim for disability benefits was assigned to a different ALJ who was provided new medical records relating to Ericksson's claim of a disabling back condition. (JA 206-212) In a fully favorable ruling on September 12, 2005, the second ALJ concluded that Ericksson was disabled by the back ailment, that her disability had not ended in January 1998, and that Ericksson was entitled to continue receiving disability benefits. (JA 206-209)

After SSA's decision in Ericksson's favor on remand, the district court entered judgment in favor of Ericksson on November 9, 2006.

C. The motion for EAJA fees

On December 16, 2005, and again on January 25, 2006, Ericksson filed motions as a prevailing party for attorneys fees and costs pursuant to the EAJA. (JA 6)[4] Both of these motions were denied without prejudice as untimely.

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[4] 28 U.S.C. § 2412 (d)(1)(A).

(JA 7) After judgment was entered in her favor, Ericksson renewed the motion for allowance of EAJA fees. The magistrate judge denied Ericksson's motion on July 19, 2007. (JA 8, 152-178).

In denying relief, the district court concluded that the SSA was substantially justified in terminating the continuation of Ericksson's disability benefits. Specifically, the district court rejected Ericksson's argument that the ALJ failed to meet the heightened obligation to assist a *pro se* claimant in the development of the record. (JA 188) Furthermore, the district court found that the ALJ did not err in failing to obtain testimony from a vocational expert. (JA 189)

The district court concluded that the first ALJ had encouraged Ericksson to obtain counsel and had repeatedly asked Ericksson for additional documents to support her claims of disability. The court found that Ericksson's lack of access to treatment, inability to understand the requests of the ALJ, and the fact that she did not receive new medical treatment until after the first ALJ hearing were not indicative of any failure by the ALJ to develop the medical history. (JA 188-189)

The ALJ also noted that Ericksson had received no medical treatment for her back pain. (AR 20) Because the record as a whole was inadequate to support a claim of disability, the district court found that the ALJ's position, that the record was inadequate to support Ericksson's claim of disability, was substantially justified. (JA 188-189)

SUMMARY OF ARGUMENT

The Equal Access to Justice Act authorizes fees for prevailing parties in civil suits against the government provided the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(A). Here, the district court did not abuse its discretion by denying Ericksson's motion for attorney's fees pursuant to the EAJA. There was a reasonable basis in both fact and law for the agency's decision to terminate Ericksson's disability benefits in 1999.

The district court did not abuse its discretion in determining that the Government's position was substantially justified because it found that (a) the first ALJ met his burden to develop the record in a case with a *pro se* claimant; and (b) in her initial administrative proceedings, Ericksson failed to meet her burden to show that she suffered from a continuing disability or that she had a second medical condition which rendered her disabled.

Thus, the district court properly found the government was substantially justified in its initial position that Ericksson was not entitled to a continuation of disability benefits as the medical condition which formed the basis for the initial finding of disability (lymphoma) had resolved itself as of January 1, 1998, and the claimant failed to produce medical evidence sufficient to substantiate her claim of a second disabling condition (a serious back condition). Much of the medical evidence that was considered by SSA on remand, when Ericksson

was deemed disabled, was not in existence at the time of the initial proceedings before the agency.

ARGUMENT

I. The district court did not abuse its discretion in concluding that the government was substantially justified in terminating the continuation of Ericksson's disability benefits

A. Relevant facts

The facts relevant to the argument can be found in the Statement of Facts above.

B. Governing law and standard of review

The EAJA allows courts to award attorney's fees and other litigation expenses to a prevailing party in a civil action against the United States, provided that the court finds that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(A); *Healey v. Leavitt*, 485 F.3d 63, 67 (2d Cir. 2007); *Rosado v. Bowen*, 823 F.2d 40, 42 (2d Cir. 1987).

A district court's determination that the government's position was substantially justified so that the award of attorneys fees is inappropriate is reviewed for abuse of discretion. *Pierce v. Underwood,* 487 U.S. 552, 559 (1988); *Healey v. Leavitt*, 485 F.3d at 67; *Smith by Smith v. Bowen*, 867 F.2d 731, 735 (2d Cir. 1989). The government's position "can be justified even though it is not correct." *Pierce*, 487 U.S. at 566, n.2. The issue is

whether the government agency had a reasonable basis in fact or law to take the position that it did at the time the agency made the decision at issue. *Sotelo-Aquije v. Slattery*, 62 F.3d 54, 58 (2d Cir. 1995).

The Supreme Court has defined "substantially justified" to mean "justified in substance or in the main - that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. at 565. In this Circuit, the test for determining whether the government's position is "substantially justified" is one of reasonableness. *Rosado v. Bowen*, 823 F.2d at 42. The burden is on the government to prove its position was substantially justified. *Envtl. Defense Fund, Inc. v. Watt*, 722 F. 2d 1081, 1085 (2d Cir. 1983).

By statute, SSA can discontinue disability benefits if the agency finds that the impairment that led to the disability has ceased, does not exist, or is not a disability. The agency's findings must be supported by substantial evidence. *See* 42 U.S.C. § 423(f). A social security case will be reversed on appeal if a court finds that the agency's position was not supported by substantial evidence. As this Court has noted, the practical effect of reversing a SSA decision as unsupported by substantial evidence could be an automatic award of attorney's fees to the claimant if the "substantial evidence" standard was deemed to be synonymous with the "substantially justified" standard under the EAJA. *Cohen v. Bowen*, 837 F.2d 582, 586 (2d Cir. 1988). This Court has held, however, that such a result would be "contrary to the clearly expressed intent of Congress that fees under the

EAJA not be awarded automatically whenever the plaintiff prevails against the Government." *Id.*

An ALJ, unlike a judge in a trial, must himself affirmatively develop the record. *See Echevarria v. Secretary of Health & Human Servs*., 685 F.2d 751, 755 (2d Cir. 1982). When a claimant is unrepresented by counsel, the ALJ is under a heightened duty "to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts." *Hankerson v. Harris*, 636 F.2d 893, 895 (2d Cir. 1980). If the ALJ fails to develop the pro se claimant's record fully, he does not fulfill that duty and the claimant, consequently, is deprived of a full and fair hearing. *See Lopez v. Secretary of Dept. of Health & Human Servs.*, 728 F.2d 148, 150 (2d Cir. 1984).

C. Discussion

When granting Ericksson's motion for remand, the district court made a number of findings. First, the court found that the ALJ had attempted to determine if additional medical records existed to support Ericksson's claim of a disabling back condition. (JA 168) Second, the court found that Ericksson was unable to provide support for her disability claim because of her lack of access to treatment and due to her inability to fully understand her burden to provide records to the ALJ. (JA 168-170) The record before SSA at the time of the initial proceedings was therefore incomplete. Finally, the district court held that Ericksson provided new evidence to the court that had not been provided to the ALJ, including evidence that had

not existed at the time of the proceedings before the ALJ. (JA 171-172) Such new evidence provided good cause to remand the matter back to the agency.

The district court's findings were consistent with the administrative record and with Ericksson's amended complaint which cited "new and material" evidence as a basis for overturning SSA's termination of benefits. (AR, generally; JA 29-55, 152-178) Further, Ericksson did not object to the findings made by the court. (JA 6)

The district court's rejection of Ericksson's motion for attorney's fees was consistent with its prior decision to remand the case. Based on the record before the ALJ at the time of the initial proceedings, his decision to terminate Ericksson's disability benefits was substantially justified: the record did not support her claim of disability and the ALJ had fulfilled his duty to assist her.

In her claim before this Court, Ericksson appears to recognize that the record before the first ALJ did not support her disability claim but she attempts to lay the blame at the agency's feet. She asserts that the ALJ could have and should have developed the record further, given her *pro se* status. But the record supports the district court's conclusion that the ALJ fulfilled his duty in this regard. The ALJ questioned Ericksson at length about any and all examination and treatment she received for her back problem, alerting her that, in his opinion, the record as it stood did not support her claim. He pressed Ericksson to identify the doctors she had seen and urged her to review the records the ALJ had to determine if

anything was missing. (AR 52-53) Ericksson's response was that Dr. Backe, the only doctor she had seen about her back problem (AR 45), "did not do much." (AR 43) When the ALJ suggested that Ericksson's review of the medical records might lead to her identifying other doctors with information about her claim, Ericksson responded, "There aren't [others]. There aren't." (AR 63)[5] The ALJ gave Ericksson additional time after the hearing to provide medical documentation to support her claim, but she did not do so. (AR 64) Given these circumstances, the district court's decision that the ALJ met his duty to the plaintiff to probe and explore for the relevant facts was not an abuse of discretion.

Next, Ericksson asserts on appeal that the ALJ could have reviewed the "entire record" and contacted all the medical professionals named in that record, suggesting that these professionals would have provided evidence to support Ericksson's claim of a disabling back condition. Ericksson's assertion is based on the list of medical reports referenced in the report of the District Hearing Officer (AR 167), which includes records from three health care providers that Ericksson alleges were not before the ALJ. The administrative record does not support Ericksson's allegation, however.

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[5] Significantly, most of the medical records Ericksson provided to the district court in support of her complaint were dated after the proceedings before the first ALJ. (JA 38-55, 210-212)

The medical records listed in the hearing officer's report are included in the Administrative Record filed with this Court and were before the ALJ in 1998 with minor exceptions. The only items not readily identifiable in the Administrative Record are: (1) records from Yale New Haven Hospital dated April 1996; and (2) a May 10, 1996 report of Dr. Lewis Bader of Church Street South Diagnostic Laboratory. (AR 167 (*list of medical records before DHO*))(*compare*: 51, 52, 197-216, 217-223, 224-225, 231-232, 234-235, 242-254, 226-230, 233, 236-237, 238, 258, 269-271, 240-241, 257, 277-279, 255-256). The record demonstrates, however, that these records would not have supported Ericksson's claim of disability.

As to the records from Yale New Haven Hospital ("YNHH"), Ericksson testified before the ALJ about her treatment there. She was highly critical of the attitude of the doctors, characterizing them as "rude." (AR 65-66) Her testimony was that she had been told by a group of doctors at YNHH that they believed she "was afraid the cancer had come back, and that this was a very phantom pain, and [she] should be on anti-depressants." (AR 49) There was no indication she had undergone any course of treatment at YNHH. (AR 49) In fact, she testified that she did not see them again, preferring to drive 25 miles to find a different doctor. (AR 65-66) Given her testimony, there was no basis for the ALJ to believe records from YNHH would be supportive of Ericksson's claim.

With respect to the May 10, 1996 report of Dr. Lewis Bader of Church Street South Diagnostic Laboratory, Ericksson does not claim that she was treated by Dr. Bader

for degenerative disc disease, or any other ailment. Indeed, Ericksson did not submit any record from Dr. Bader to the second ALJ on remand. (JA 210-212) Ericksson has provided no basis for any finding that Dr. Bader's records would have supported Ericksson's claim of debilitating degenerative disc disease.[6]

Ericksson next asserts that the SSA Appeals Council failed to develop the record by failing to contact six health care providers which Ericksson mentioned in her appeal from the ALJ decision. But there is no basis to believe that reports from these doctors would have had bearing on Ericksson's disability claim. First, Ericksson named Dr. Simkovitz, but his records were before the ALJ. (JA 13, 240-241, 257) Second, she named Dr. Duda, an oncologist who presumably treated Ericksson relating to her lymphoma diagnosis. That diagnosis had been resolved by the time of the ALJ hearing, and Ericksson did not claim to the ALJ that lymphoma was a continuing basis for her disability. (JA 12) Moreover, Ericksson did not submit any records from Dr. Duda to SSA on remand;

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[6] There is no evidence in the record to support's Ericksson's assertion that SSA intentionally destroyed or negligently lost essential medical records which had been before the Disability Hearing Officer. *Appellant's Brief,* pp. 3, 4, 5, 9, 22. As discussed above, nearly every report referenced by the Hearing Officer is in the administrative record, and there is no basis to believe that the reports not found were in any way "essential" to Ericksson's claim.

thus, there is every reason to believe his records, to the extent they exist, were not probative of her disability claim. (JA 210-212)

Ericksson also named a dermatologist, a Dr. O'Brien of Physical Medicine & Rehabilitation Associates, a Dr. Lang, with an undefined specialty, and Dr. Belchner of Orthopaedic Specialty Group, P.C. (JA 12-13) Notably, Ericksson did not submit records from any of these doctors to the ALJ upon remand. (JA 210-212) She has provided nothing to this Court that would demonstrate that these records, had they been provided to SSA, would have supported her claim of a disabling back condition in 1998 and 1999. The majority of the medical evidence Ericksson presented to the ALJ on remand was dated after 1999 when her administrative remedies had been exhausted. (JA 210-212).[7]

Ericksson finally argues, for the first time on appeal to this Court, that SSA's first ALJ could have taken testimony from an independent medical expert. *Appellant's Brief,* p. 26-27. Ericksson explains that independent medical experts may testify at a hearing before an ALJ and, "explain[] the difficult concepts, and

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[7] While Ericksson alleges before this Court that she had a "severe mental or cognitive impairment" at the time of her hearing before the ALJ, the record is devoid of any indication of such a condition. No medical records before the first ALJ suggested that Ericksson was impaired in this way, and she provided nothing to the second ALJ that would support such an assertion. (JA 210-212)

offer[] opinions about the medical records and what they show." *Appellant's Brief,* p. 27. Here, however, the problem was not that the medical records before the first ALJ were difficult to understand, but rather that the records that did exist did not show any disabling back impairment suffered by Ericksson. Indeed, they primarily addressed lymphoma issues which Ericksson did not press as a basis for disability. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990) (where medical findings suggest that a claimant has little in the way of physical impairments, and no physician renders an opinion about her functional capacity, ALJ can render commonsense judgment); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 17 (1st Cir. 1996) (same).

Once Ericksson submitted corroborating medical evidence after the district court's remand directing that the new medical evidence submitted to the court be considered, the agency's second ALJ did call a medical expert. But given the absence of medical records at the time of proceedings before the first ALJ, the lack of such an expert does not indicate that the agency's action was unjustified.

In sum, Ericksson brought this matter before the district court, claiming that she had "new and material" evidence that would support her disability claim and seeking the chance to present this new evidence to SSA on remand. The district court agreed, noting that this new evidence, which had not been seen by the agency before, provided good cause for a remand. In making this call, the

district court also found, with good reason, that the agency had acted reasonably when evaluating Ericksson's claim the first time. That finding by the district court – to which Ericksson made no objection – was the basis for the district court's decision that SSA was substantially justified in its initial decision to terminate Ericksson's benefits. That finding, and the district court's resulting denial of Ericksson's motion for attorney's fees, was well within the district court's discretion and thus should be upheld.

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: February 29, 2008

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

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ADDENDUM

28 U.S.C. § 2412. Costs and fees

. . .

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

42 U.S.C. § 405. Evidence, procedure, and certification for payments

. . .

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who

was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall

survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

(h) Finality of Commissioner's decision

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

ANTI-VIRUS CERTIFICATION

Case Name: Ericksson v. Astrue

Docket Number: 07-4009-cv

I, Karen Wrightson, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 2/29/2008) and found to be VIRUS FREE.

/s/ Karen Wrightson
Karen Wrightson
Record Press, Inc.

Dated: February 29, 2008