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What triggers the time period for applying for attorney's fees under the EAJA in Social Security benefits cases?

by Jay E. Grenig

**Donna H. Shalala, Secretary of Health
and Human Services,**

v.

Richard H. Schaefer
(Docket No. 92-311)

Argument Date: March 31, 1993

ISSUE

In an action for judicial review of the denial of a claim for Social Security disability benefits, the district court reversed the decision of the Secretary of Health and Human Services and remanded the case for further proceedings. The Supreme Court is asked to determine whether the district court's remand order was a final judgment that triggered the 30-day period for filing an application for attorney's fees under the Equal Access to Justice Act.

FACTS

In June 1986 Richard Schaefer filed an application for disability insurance benefits under Title II of the Social Security Act. After his application was denied at all levels of the administrative appeals process, he sought judicial review. In an order dated April 4, 1989, the U.S. District Court for the District of Minnesota reversed the decision of the Secretary for Health and Human Services and remanded the case for further consideration in accordance with sentence four of 42 U.S.C. § 405(g). The order became "not appealable" 60 days later on June 3, 1989, when the Secretary did not appeal the court's decision.

Following the remand, an administrative law judge in a decision dated January 31, 1990, found the respondent disabled. That decision became final 60 days later. On July 18, 1990, Schaefer filed an application in the district court for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d).

The EAJA provides that a party seeking an award of fees and other expenses must submit the fee application to the court within 30 days of "final judgment" in the action. The fee application must show that the party is the "prevailing party."

In an unreported opinion, the district court rejected the

Secretary's argument that the fee application in this case was untimely because it had not been filed within 30 days of June 3, 1989 (*i.e.*, July 3, 1989). The court ruled that the timeliness issue was controlled by the Eighth Circuit's decision in *Welter v. Sullivan*, 941 F.2d 674 (8th Cir. 1991), and that, under *Welter's* analysis, no final judgment had been entered and that Schaefer's application was timely.

Concluding that the United States was not substantially justified in taking the position that Schaefer was not entitled to Social Security benefits, the district court awarded Schaefer \$1,372.50 in attorney's fees and \$120 in costs under the EAJA. On appeal to the U.S. Court of Appeals for the Eighth Circuit, a panel of the Eighth Circuit upheld the district court's decision, again in an unreported opinion.

BACKGROUND AND SIGNIFICANCE

Under the Social Security Act, a claimant dissatisfied with the administrative decision of the Secretary of Health and Human Services on a claim for benefits may seek district court review under 42 U.S.C. § 405(g). Under sentence four of Section 405(g), the court may reverse or modify the Secretary's decision and remand the matter to the Secretary for further proceedings. A remand under sentence four of Section 405(g) is appealable by the Secretary.

A Social Security case may also be remanded under sentence six of Section 405(g), but that occurs only when the Secretary requests a remand before filing his or her answer, or when the court finds there was good cause for the claimant's failure to produce newly discovered, material evidence. The Secretary may not appeal a sentence-six remand. The district court reviews the post-remand administrative proceedings conducted pursuant to a sentence-six remand.

The Supreme Court has had occasion to consider three Social Security cases since 1989 relating to the issue of attorney's fees. In *Sullivan v. Hudson*, 490 U.S. 877 (1989), the court held that a district court has authority under 42 U.S.C. § 405(g) to retain jurisdiction and enter a post-remand judgment.

In *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), the Supreme Court identified two kinds of remands under 42 U.S.C. § 405(g): remands pursuant to the fourth sentence and remands pursuant to the sixth sentence. The Court held that remand under sentence four is a "final judgment" that may be appealed by the Secretary. The Court did not consider the specific question of whether a remand under sentence four is a "final judgment" for purposes of triggering the time period for applying for attorney's fees under the EAJA.

In *Melkonyan v. Sullivan*, 111 S.Ct. 2157 (1991), the

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Supreme Court stated that, in cases remanded to the Secretary of Health and Human Services pursuant to the fourth sentence of 42 U.S.C. § 405 (g), the 30-day filing period under the EAJA “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.” The Court held that the term “final judgment” in the EAJA refers only to court orders and, therefore, decisions of administrative agencies may not trigger the 30-day limitations period. Left unclear in *Melkonyan* is the question of whether a district court must enter judgment simultaneously with its issuance of a sentence-four remand in cases where the claimant’s entitlement to benefits has yet to be determined.

In *Welter v. Sullivan*, 941 F.2d 674 (8th Cir. 1991), decided 17 days after *Melkonyan*, the U.S. Court of Appeals for the Eighth Circuit held that remands to the Secretary of Health and Human Services pursuant to the fourth sentence of 42 U.S.C. § 405(g) were not final judgments modifying or reversing the decisions of the Secretary within the meaning of that sentence. Instead, the Eighth Circuit reasoned that the district court retained jurisdiction of the claimants’ cases and planned to enter dispositive judgments after the Secretary reevaluated the claimants’ applications for benefits. Because the parties did not report to the district court after the Secretary had awarded benefits to the claimants on remand, the Eighth Circuit concluded that no final judgments had been entered and the EAJA applications were timely.

The First and Tenth Circuits have rendered decisions in agreement with the Eighth Circuit. The issue has also been raised in cases pending in the Sixth, Ninth, and Eleventh Circuits. The Fifth Circuit’s decision in *Luna v. Department of Health and Human Services*, 948 F.2d 169 (5th Cir. 1991), held that every sentence-four remand under Section 405(g) is a final judgment for purposes of the EAJA and that the 30-day time period begins running at the point at which that final judgment has been entered and the period for appeal has run.

It is estimated that more than 4,000 Social Security cases were remanded by the district courts for further administrative proceedings in 1990, and that more than 2,500 were remanded in 1991. Schaefer suggests that a decision upholding the Secretary’s construction of section 405(g) obliterates the distinction between sentence-four and sentence-six remands, while the Secretary argues that this construction will assure that applications for EAJA attorney’s fees are filed promptly.

ARGUMENTS

For Donna E. Shalala, Secretary of Health and Human Services (Counsel of Record, Kenneth W. Starr, Solicitor General, Department of Justice, Washington, DC 20530; telephone (202) 514-2217):

1. The EAJA requires a fee application to be filed within 30 days of the “final judgment” in a civil action, which is defined to mean a judgment that is “final and not appealable.”
2. The district court’s order, reversing the Secretary’s decision of April 4, 1989, to deny benefits and remanding for a rehearing, was an appealable “final judgment” that became “not appealable” 60 days later on June 3, 1989, when the time for taking an appeal expired.
3. A district court cannot permit circumvention of the 30-day filing requirement by purporting to remand the case under sentence four without entering a final judgment, and instead retaining jurisdiction to enter a final judgment after proceedings on remand are completed.
4. Departure from the text of 42 U.S.C. § 405(g) and the EAJA is not justified by the fact that a claimant does not become a fully prevailing party following a sentence-four remand unless he or she is awarded benefits on remand.

For Richard H. Schaefer (Counsel of Record, Randall J. Fuller; Babcock, Locher, Neilson & Mannella, 118 Main Street, Anoka, MN 55303; telephone (612) 421-5151):

1. The EAJA’s limitation period can only be triggered by a district court judgment issued after the claimant has won his or her claim for benefits.
2. A case is not “final” for attorney’s fees purposes until it can be determined whether the claimant has prevailed, which, in Social Security cases remanded to the Secretary for further proceedings, does not occur until after the results of those proceedings are known.
3. If the Supreme Court reverses the Eighth Circuit’s ruling, the decision should be applied prospectively only, because at the time the Secretary says Schaefer should have filed his fee application such a filing would have been considered premature under all then-existing precedent and the Secretary’s own policies.