University of Arkansas at Little Rock Law Review

Volume 7 | Issue 2 Article 2

1984

A Substantial Paradox: Attorney's Fees under the Equal Access to Justice Act in Social Security Appeals

James R. Cromwell

A SUBSTANTIAL PARADOX: ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT IN SOCIAL SECURITY APPEALS

*James R. Cromwell**

---

* Clinical Supervising Attorney, University of Arkansas at Little Rock School of Law. B.A. Duke University; J.D. Marshall-Wythe School of Law, College of William & Mary.

I. INTRODUCTION

With the adoption of the Equal Access to Justice Act,[1] Congress created a new exception to the American rule that requires each party to bear its own expenses for legal representation. A successful litigant is now entitled to compensation for attorney's fees incurred in a civil action against the United States, if the requirements of the Act are otherwise met.[2] In addition, fees may be recovered for representation in some administrative proceedings in which the federal government plays an adversarial role.[3]

A significant portion of the docket of the federal courts is occupied by appeals by claimants for social security benefits.[4] These claimants have been denied disability or retirement benefits in nonadversarial administrative adjudications before the Social Security Administration. They have appealed to the federal courts for review on the administrative record. In increasing numbers, the courts have been considering claims for attorney's fees under the Equal Access to Justice Act arising out of these social security appeals.[5] Because there is no *de novo*, evidentiary hearing in a social security appeal, the courts have struggled to apply the provisions of the Equal Access to Justice Act to fee claims arising out of successful appeals.

---

1. 5 U.S.C. § 504 (1982); 28 U.S.C. § 2412 (1982). While this article was awaiting publication, the Act expired pursuant to its "sunset provision." *See infra* note 15 and accompanying text. A reauthorization bill, H.R. 5479, 98th Cong., 2d Sess. (1984), containing relatively minor amendments to the Act and eliminating the sunset provision, passed the House and Senate on October 11, 1984. *See* 130 CONG. REC. H12171-74 (daily ed. Oct. 11, 1984). The bill, however, was vetoed by President Reagan on November 8, 1984. President's Memorandum of Disapproval of H.R. 5479, 20 WEEKLY COMP. PRES. DOC. 1814 (Nov. 12, 1984). The President objected to provisions in the reauthorization bill that would have required that the agency's underlying action be substantially justified before a party could be denied fees. *See generally infra* notes 159-76 and accompanying text. For a discussion of the effect of expiration of the Act on litigation pending on the sunset date, see *infra* notes 117-18 and accompanying text.

It is anticipated that a reauthorization bill again will be presented in the 97th Congress. *See* Nat'l L.J., Nov. 26, 1984, at 3, col. 1. President Reagan's message indicated that he would make permanent and retroactive reauthorization of the Act a high legislative priority. President's Memorandum of Disapproval of H.R. 5479, 20 WEEKLY COMP. PRES. DOC. 1814, 1815 (Nov. 12, 1984).

2. 28 U.S.C. §§ 2412(b), (d) (1982).

3. 5 U.S.C. § 504 (1982).

4. *See* Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 HAMLINE L. REV. 1 (1984).

5. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT ON REQUESTS FOR FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT OF 1980, OCTOBER 1, 1982 THROUGH JUNE 30, 1983 (Sept. 23, 1983); ADMINISTRATIVE OFFICE OF THE U.S. COURTS, REPORT ON REQUESTS FOR FEES AND EXPENSES UNDER THE EQUAL ACCESS TO JUSTICE ACT OF 1980, OCTOBER, 1981 THROUGH JUNE 30, 1982 (Sept. 22, 1982).

A court must reverse a decision of the Social Security Administration to deny a claimant benefits if the court ultimately finds that there is no "substantial evidence" in the administrative record to support the Agency's decision.[6] Once the court reverses, it must award fees to a litigant if no "substantial justification" for the government position is shown.[7] The similarity between these two standards lies at the heart of the difficulty facing courts seeking to apply the Equal Access to Justice Act to social security litigants. This article will identify issues that have arisen in applying the Act to successful claimants. A model by which fee claims arising from social security appeals may be analyzed will be proposed.

II. THE EQUAL ACCESS TO JUSTICE ACT

Prior to 1981, a party prevailing in a civil action against the United States could only recover court costs expended in the litigation.[8] Fees paid by the successful litigant to his attorney could not be recovered. This was in keeping with the general American rule, requiring each party to bear its own litigation costs.[9] Even the narrow exceptions to the American rule created by statute and through litigation generally were not available to a litigant against the federal government.[10]

Through the Equal Access to Justice Act, adopted as a rider to the Small Business Export Expansion Act of 1980,[11] Congress sought to open the door partially to fee awards against the federal government.

---

6. 42 U.S.C. § 405(g) (1982).

7. 28 U.S.C. § 2412(d)(1)(A) (1982).

8. Recovery of costs was pursuant to Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308, now codified at 28 U.S.C. § 2412(a) (1982).

9. The American rule contrasts to the English, under which attorney's fees are awarded to the prevailing party as an expense of litigation. *See generally* Spencer v. NLRB, 712 F.2d 539, 543-46 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1908 (1984); Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717 (1976).

10. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). A few statutory exceptions to the American rule did permit fee recoveries against the United States. *See* notes 71-73 *infra* and accompanying text.

11. Small Business Export Expansion Act, Pub. L. No. 96-481, tit. II, §§ 201-208, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504 (1982), 28 U.S.C. § 2412 (1982)). *See generally* Dods & Kennedy, *The Equal Access to Justice Act*, 50 UMKC L. REV. 48 (1981); Janes, *The Equal Access to Justice Act: When Will It Permit Recovery of Attorneys' Fees?*, 56 J. TAX'N 164 (1982); Robertson & Fowler, *Recovering Attorneys' Fees from the Government Under the Equal Access to Justice Act*, 56 TUL. L. REV. 903 (1982); Note, *The Award of Attorney's Fees Under the Equal Access to Justice Act*, 11 HOFSTRA L. REV. 307 (1982); Note, *The Equal Access to Justice Act: How to Recover Attorneys' Fees & Litigation Expenses from the United States Government*, 13 U. TOL. L. REV. 149 (1981); Note, *Attorney's Fees—Recovery of Attorney's Fees Against the United States—The Equal Access to Justice Act*, 10 FLA. ST. U.L. REV. 723 (1983).

Fees were to be awarded to successful litigants when the government would be liable under common law[12] and, in certain circumstances, when the government was shown to have advocated a position that was not "substantially justified."[13] The Act was frankly viewed as experimental.[14] To that end, the section of the Act creating a right to fees if the government position was not substantially justified contained a "sunset provision." On October 1, 1984, that section was to expire.[15] In the interim, the Administrative Office of the United States Courts was directed to prepare annual reports about claims under the Act, to permit Congress to evaluate its impact.[16]

A. *Fees Authorized by Common Law*

Unless expressly prohibited by statute, the Act permits an award of attorney's fees against the United States, its agencies, and its officials acting in their official capacity. However, the United States is only liable for the fees and expenses of the opposing party to the same extent that a party would be liable under the common law or any statute providing for such an award.[17]

Two significant common-law exceptions to the American rule have been identified. First, a party who acted in bad faith, either in the course of litigation or in the conduct that gave rise to the litigation, may be liable for fees.[18] This exception is intended to discourage bad faith conduct and to compensate the innocent litigant for his expenses resulting from the conduct. Second, a party may be entitled to attorney's fees for litigation that creates, increases, or protects a fund from which nonparties will benefit.[19] Here, the goal is to avoid unjustly enriching those who have not actively participated, at the expense of those who hired counsel to litigate. Fees have been awarded even when the benefits conferred on nonparties are not pecuniary.[20]

---

12. 28 U.S.C. § 2412(b) (1982).

13. *Id.* § 2412(d)(1)(A).

14. *See* H.R. REP. No. 1418, 96th Cong., 2d Sess. 13, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984, 4992.

15. 28 U.S.C. § 2412 note (1982). *See* 5 U.S.C. § 504 note (1982) (administrative proceedings); *see also supra* note 1.

16. 28 U.S.C. § 2412(d)(5) (1982).

17. *Id.* § 2412(b).

18. *See, e.g.*, F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974); Bell v. School Bd., 321 F.2d 494, 500 (4th Cir. 1963).

19. *See, e.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472 (1980). *See generally* Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597 (1974).

20. Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970).

B. *Fees Where the Government Position Lacks Substantial Justification*

The Equal Access to Justice Act not only permits a recovery of fees against the government where recovery would be permitted against a private litigant at common law; it also grants successful civil litigants a special right to fees against the United States, federal agencies, and officials. A prevailing party is entitled to fees and other expenses incurred in any civil action against the federal government, unless the court finds that the government position was substantially justified.[21] The court may deny fees, however, if special circumstances make an award unjust.[22]

Parties of substantial wealth are excluded from the benefits of this provision of the Act. To be eligible for fees, an individual party must have a net worth of no more than $1,000,000. Organizational parties are limited to a net worth of $5,000,000, although certain tax exempt organizations are not bound by this restriction. Organizations having more than 500 employees are also barred from recovering fees.[23]

As well as permitting awards of attorney's fees, the Act provides compensation for the reasonable expenses of expert witnesses, and for the reasonable expenses for studies and reports necessary for the preparation of the case. Compensation is based on prevailing market rates. Attorney's fees may not exceed $75 per hour, unless the court determined that an increase in the cost of living or some other special factor mandates a higher fee.[24]

The legislative history indicates that Congress intended the Equal Access to Justice Act to provide a middle ground between the virtually automatic award of fees granted to prevailing litigants in civil rights actions and the restrictive requirement of the "bad faith" standard. Not all successful litigants should be awarded fees. However, the

---

21. 28 U.S.C. § 2412(d)(1)(A) (1982).

22. *Id.*

23. 28 U.S.C. § 2412(d)(2)(B) (1982). Some uncertainty surrounds the disqualifying provisions for organizational parties. The comparable provision under the Administrative Procedures Act, 5 U.S.C. § 504(b)(1)(B) (1982), excludes from coverage organizations exceeding the net worth limit *and* those exceeding the ceiling on number of employees; 28 U.S.C. § 2412(d)(2)(B) includes those under the net worth limit *or* under the size limit. Thus, an organization having resources in excess of $5,000,000 but fewer that 500 employees is apparently eligible for fees for civil litigation, but not for fees for administrative proceedings. This is apparently a drafting error that should be resolved in favor of the language in the Administrative Procedures Act. *See* Robertson & Fowler, *supra* note 11, at 927-28.

24. 28 U.S.C. § 2412(d)(2)(A) (1982). *See* Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700, 713 (3d Cir. 1983) (granting cost of living adjustment).

award of fees to a prevailing party is not to be an extraordinary event.[25] Rule 37(a)(4) of the Federal Rules of Civil Procedure, which apportions discovery expenses, provided the model for the language chosen. The advisory committee's report accompanying rule 37 indicated that the committee chose that language to clarify that "expenses should ordinarily be awarded [to the prevailing party] unless a court finds that the losing party acted justifiably in carrying his point to court."[26] As the House report indicates, this language was adopted into the Equal Access to Justice Act to address the same concern that had prompted the revision to rule 37: the reluctance of courts to award fees.[27]

Both the statute and its legislative history indicate that the drafters of the Equal Access to Justice Act paid heed primarily to fees and expenses arising out of litigation characterized by adversary evidentiary hearings. Expenses are to be reimbursed for "expert witnesses" and for reports necessary "for the preparation of the party's case."[28] The House report suggested that certain dispositions, such as judgment on the pleadings or a directed verdict, might indicate a lack of substantial justification.[29] These dispositions, however, arise in matters to be tried by an evidentiary hearing before the court. Although coverage of the appeals of administrative adjudications was contemplated,[30] the full import of the Act on such litigation was not considered. This omission gives rise to persistant difficulties in applying the Act to social security benefit denials appealed to the federal courts.

C. *Fees in Administrative Proceedings*

The Act provides for attorney's fees awards in some administrative proceedings.[31] However, nonadversary proceedings are excluded.[32] Fees

---

25. H.R. REP. NO. 1418, *supra* note 14, at 10-11, 14, 1980 U.S. CODE CONG. & AD. NEWS at 4988-89, 4993.

26. Report of the Judicial Conference of the United States, Appendix 2, *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, Advisory Committee's Explanatory Statement Concerning Amendments of the Discovery Rules*, 48 F.R.D. 487, 540 (1970).

27. H.R. REP. NO. 1418, *supra* note 14, at 18, 1980 U.S. CODE CONG. & AD. NEWS at 4997.

28. 28 U.S.C. § 2412(d)(2)(A) (1982).

29. H.R. REP. NO. 1418, *supra* note 14, at 11, 1980 U.S. CODE CONG. & AD. NEWS at 4989-90.

30. An affirmative decision was made to include civil actions under the Social Security Act in the Equal Access to Justice Act. *See id.* at 12, 1980 U.S. CODE CONG. & AD. NEWS at 4991.

31. 5 U.S.C. § 504 (1982).

32. Watkins v. Harris, 566 F. Supp. 493, 497 (E.D. Pa. 1983); Wolverton v. Schweiker, 533 F. Supp. 420, 423 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580

can only be paid when the government is a party to the agency proceedings, and takes an adversary stance. If the government position before the Agency is substantially justified, or special circumstances make the award unjust, fees are not awardable.[33]

III. ADJUDICATING SOCIAL SECURITY CLAIMS

A. *The Administrative Process*

Only after a lengthy administrative process may a claimant for social security benefits[34] appeal his claim to the federal courts. He initiates his claim for social security disability or retirement benefits, or for supplemental security income,[35] by filing a written application with the Social Security Administration.[36] The Agency then gathers information from questionnaires completed by the claimant and from documents, including medical records, submitted to the Agency by the claimant or obtained by the Agency in its development of the claim. From this information, an agency worker grants or denies the claim. If the claim is denied, or if existing benefits are terminated, the claimant may request reconsideration of his claim. Reconsideration consists of a reexamination of the information obtained by the Agency. The file is reevaluated by a worker who did not participate in the original decision to deny the claim or to terminate benefits.[37] As is the case with the original agency decision, the decision maker is unlikely to have had a face-to-face interview with the claimant.

The critical stage in the administrative appeal process is the hearing before an administrative law judge. The hearing may be requested within sixty days of denial of a claim upon reconsideration.[38] The claimant has the right to appear in person before the administrative law judge. He may be represented by counsel. He may call witnesses in

---

(9th Cir. 1984). *See* Guthrie v. Schweiker, 718 F.2d 104, 107 (4th Cir. 1983); H.R. CONF. REP. No. 1434, 96th Cong., 2d Sess. 23 (1980), *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5003, 5012.

33. 5 U.S.C. § 504(a)(1) (1982).

34. Social security benefits are payable to retired and disabled workers. *See* 42 U.S.C. §§ 401-433 (1982); 20 C.F.R. part 404 (1984).

35. Supplemental Security Income (SSI) provides payments to elderly and disabled individuals not covered by the Social Security Act. *See* 42 U.S.C. §§ 1381-1383(c) (1982); 20 C.F.R. part 416 (1984). The claim and appeal procedures for SSI are virtually identical to those for social security. References in this article will be made, unless otherwise noted, only to statutes and regulations pertaining to social security. Generally, parallel provisions apply to SSI claimants.

36. 20 C.F.R. § 404.603 (1984).

37. *Id.* §§ 404.907-.909.

38. *Id.* §§ 404.929-.933.

his own behalf. If it appears necessary, the administrative law judge may be asked to subpoena records and witnesses.[39]

The hearing before the administrative law judge is nonadversarial.[40] It is the duty of the judge to see that the record is developed fully and fairly.[41] He may question witnesses and direct that additional evidence be procured.[42] Generally, the documents used by the Agency at the initial decision and reconsideration stages are made part of the hearing record. The administrative law judge may direct that vocational experts or medical advisors appear at the hearing to testify concerning the claim.[43]

From the record at the hearing, the administrative law judge renders a decision on the claim. The decision must be supported by findings of fact and conclusions of law derived from the record.[44] If benefits are denied by the administrative law judge, a dissatisfied claimant may perfect his final administrative appeal to the Appeals Council of the Social Security Administration.[45] Further documentary evidence may be submitted to the Appeals Council. Generally, however, there is no opportunity for the claimant to appear personally before the Appeals Council.[46] The Appeals Council is not bound by the findings of fact of the administrative law judge.[47]

B. *Appeal to the Courts*

The decision of the Appeals Council is the final administrative adjudication of the Social Security Administration on a claim for benefits. A claimant may appeal from the decision of the Appeals Council by filing an action for review in federal district court. The complaint must be filed within 60 days of the decision of the Appeals Council. With its answer, the Social Security Administration submits a copy of the ad-

---

39. *Id.* § 404.950.

40. *Id.* §§ 404.0944-.961. It has been held, however, that, at the administrative stage, the Agency carries the burden to prove certain points. *See, e.g.*, Jackson v. Schweiker, 696 F.2d 630, 631 n.1 (8th Cir. 1983) (if claimant demonstrates inability to perform previous work, burden shifts to Agency). It is unclear how the Agency can carry a burden of proof in a nonadversarial hearing. *Cf.* Heaney, *supra* note 4, at 11.

41. Coulter v. Weinberger, 527 F.2d 224, 229 (3d Cir. 1975); Dunbar v. Califano, 454 F. Supp. 1261, 1268 (W.D.N.Y. 1978).

42. 20 C.F.R. § 404.944 (1984).

43. *Id. See* 20 C.F.R. § 404.1566(e) (vocational experts); 20 C.F.R. § 404.1526(b) (medical advisors).

44. 20 C.F.R. § 404.953(a).

45. *Id.* § 404.967.

46. *See id.* § 404.976.

47. *Id.* § 404.979. *See* Combs v. Weinberger, 501 F.2d 1361, 1363 (4th Cir. 1974).

ministrative record on the claim, including a transcript of the hearing before the administrative law judge.[48]

The appeal is not *de novo*; it is a review of the agency record.[49] Because no new evidence may be considered by the court, district courts generally dispose of these appeals following cross-motions for summary judgment submitted by the claimant and by the Agency.[50] If the court finds that further evidence is necessary for resolution of the claim, it may remand to the Agency for further proceedings.[51] Otherwise, it must affirm the decision of the Social Security Administration unless it finds that the Agency erroneously applied a legal standard, or that the decision of the Agency was not supported by substantial evidence.[52]

IV. APPLYING THE EQUAL ACCESS TO JUSTICE ACT TO SOCIAL SECURITY APPEALS

Upon judicial reversal of an administrative denial of social security benefits, a claimant may seek to recover attorney's fees. But a court considering this claim is faced by a paradox. The same paradox is presented any court awarding fees under the Equal Access to Justice Act to a plaintiff who, on appeal from an administrative determination, has prevailed because the agency decision was not supported by substantial evidence.

To prevail under the substantial evidence standard, the Agency need not show that its decision was supported by the weight of the evidence presented to the Agency. It must merely show that *some* evidence of legal significance supported its decision, and that this modi-

48. 42 U.S.C. § 405(g) (1982). *See id.* § 1383(c)(3) (1982) (appeals from SSI determinations).

49. Klug v. Weinberger, 514 F.2d 423, 425 (8th Cir. 1975); Ainsworth v. Finch, 437 F.2d 446 (9th Cir. 1971).

50. Affidavits or other matters outside the pleadings may be considered through summary judgment proceedings. FED. R. CIV. P. 56. Because the district court must limit its review to the Agency record under 42 U.S.C. § 405(g) (1982), it has been suggested that a motion for affirmance, *see* Garcia v. Califano, 463 F. Supp. 1098, 1100-01 (N.D. Ill. 1979), or for judgment on the pleadings, *see* Pirone v. Flemming, 183 F. Supp. 739, 740 (S.D.N.Y. 1959), *aff'd mem.*, 278 F.2d 508 (2d Cir. 1960), would be the better tool for review under the Social Security Act. As long as review is restricted to the record, however, a motion for summary judgment may be used to resolve a social security appeal. Lovett v. Schweiker, 667 F.2d 1, 2-3 (5th Cir. 1981).

51. *See, e.g.*, Landess v. Weinberger, 490 F.2d 1187 (8th Cir. 1974).

52. Bormey v. Schweiker, 695 F.2d 164, 167-68 (5th Cir.), *cert. denied*, 103 S. Ct. 3091 (1983); Myers v. Califano, 611 F.2d 980, 982 (4th Cir. 1980); Conley v. Ribicoff, 294 F.2d 190, 194 (9th Cir. 1961).

cum of evidence was evaluated under proper legal standards.[53] If the Agency is unable to identify this minimal supporting evidence on appeal to the satisfaction of the reviewing court, it seems unreasonable to assert that the Agency was substantially justified in its position, either at the administrative level or on judicial review.[54] But if this is true, an award of attorney's fees under the Equal Access to Justice Act would flow virtually as a matter of right from a reversal of an administrative determination, such as that of the Social Security Administration, unsupported by substantial evidence. Clearly, however, such a routine award of fees was not the intent of Congress.[55]

Before a court reviewing a fee application arising from a social security appeal can reach this issue, it must resolve several preliminary matters. It has been suggested that the Equal Access to Justice Act does not apply to litigation in the federal courts under the Social Security Act.[56] The retroactivity of the Act has been questioned.[57] If the Act does apply, it must be determined if the petitioner for fees prevailed, particularly if the judicial remedy was remand, rather than reversal. Further, the claimant must show that a fee was incurred. Finally, the court must resolve whether the "position" that the government must justify is the position advocated in the final administrative determination, or is the stance taken on review by the agency litigators.

A. *Are Social Security Appeals Within the Scope of the Equal Access to Justice Act?*

1. *Administrative Proceedings*

No fee can be awarded under the Equal Access to Justice Act for time spent pursuing the administrative appeal at the agency level.

---

53. The quantum of evidence needed to comprise substantial evidence in the appeal of a denial of social security benefits has been variously described. It has been said to be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). It is more than a scintilla of evidence. Timmerman v. Weinberger, 510 F.2d 439, 441 (8th Cir. 1975). It is the quantum of evidence that would be sufficient to justify the refusal to direct a verdict if the case were tried to a jury. Proctor v. Schweiker, 526 F. Supp. 70, 73 (D. Md. 1981). It cannot be facts taken in isolation; it must be based on the record as a whole. Thomas v. Celebrezze, 331 F.2d 541, 543 (4th Cir. 1964).

54. *Cf.* Operating Eng'rs Local Union No. 3 v. Bohn, 541 F. Supp. 486, 495 (D. Utah 1982) ("It is difficult for this court to perceive how action unsupported by 'substantial' evidence could be 'substantially' justified.").

55. *See supra* notes 25-27 and accompanying text.

56. *See, e.g.*, Ocasio v. Schweiker, 540 F. Supp. 1320, 1321 (S.D.N.Y. 1982) (finding the Act applicable to social security appeals).

57. *See* Berman v. Schweiker, 713 F.2d 1290, 1303 (7th Cir. 1983) (Coffey, J., dissenting).

Awards for proceedings under the Act are limited to adversary adjudications in which the government is represented.[58] Administrative hearings before the Social Security Administration on benefit claims are nonadversarial in nature,[59] and no fee can be awarded under the Act.[60] Even when the agency proceedings are the result of a court order of remand, no fee may be awarded for time spent by the claimant's attorney at the administrative hearing ordered by the court.[61]

If the Agency takes a position in an adjudication, however, a fee award is justified.[62] Currently, the Social Security Administration is engaging in an adversary experiment in a few locales.[63] As part of the experiment, the Agency may be represented at hearings and develop the case against the claimant for a denial of fees. Although language in the House report indicates an intent specifically to exclude all administrative proceedings before the Social Security Administration,[64] hearings conducted pursuant to the adversary experiment should be susceptible to a fee award.[65]

2. *Judicial Proceedings*

It is clear from the legislative history of the Equal Access to Justice Act that, although Congress intended to deny fee awards to prevailing parties in administrative hearings before the Social Security Administration, fee awards were to be made if claims were successfully appealed to the federal courts. The bill originally passed in the Senate had been broadly written, and would have permitted fees for administrative proceedings, as well as civil actions, under the Social Security Act. The proposed House bill, however, excluded administrative proceedings, but continued to provide for fees in court actions under the

---

58. 5 U.S.C. §§ 504(a)(1), 504(b)(1)(c) (1982).

59. Wolverton v. Schweiker, 533 F. Supp. 420, 423-24 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984). *See supra* note 40.

60. Guthrie v. Schweiker, 718 F.2d 104, 107 (4th Cir. 1983); Phillips v. Heckler, 574 F. Supp. 870, 872 (W.D.N.C. 1983); Jones v. Schweiker, 565 F. Supp. 52, 54 (W.D.Mich. 1983); Wolverton v. Schweiker, 533 F. Supp. 420, 423-24 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984).

61. Cornella v. Schweiker, 728 F.2d 978, 988 (8th Cir. 1984); Watkins v. Harris, 566 F. Supp. 493, 497-98 (E.D. Pa. 1983).

62. H.R. CONF. REP. NO. 1434, *supra* note 32, at 23, 1980 U.S. CODE CONG. & AD. NEWS at 5012.

63. 20 C.F.R. § 404.965 (1983).

64. *See* H.R. REP. NO. 1418, *supra* note 14, at 12, 1980 U.S. CODE CONG. & AD. NEWS at 4991.

65. *See* Vargyas, *The Equal Access to Justice Act: Update and Analysis*, 16 CLEARINGHOUSE REV. 1110 (1983).

Social Security Act. Whether civil actions under the Social Security Act should be covered, the House report reveals, had been a subject of much discussion within the House Committee on the Judiciary. The Committee decided in favor of coverage, and no exclusion for social security cases was included in the statute as adopted.[66]

Despite this unambivalent legislative history, the Social Security Administration repeatedly has argued that the Equal Access to Justice Act does not provide coverage in social security appeals. Although this position has been adopted in a number of unreported district court decisions,[67] the reported decisions unanimously have held that attorney's fees may be awarded to successful litigants in civil actions against the Social Security Administration.[68]

The argument advanced by the Social Security Administration against coverage under the Equal Access to Justice Act is that an exclusive right to fees is contained in the Social Security Act. Under section 406 of the Social Security Act, the attorney of a successful litigant may be paid fees out of past due benefits withheld from the claimant by the Agency. The fee award cannot exceed twenty-five percent of the past due benefits. Counsel may exact no other fee from the claimant.[69] The Equal Access to Justice Act permits an award of fees to a prevailing party "[e]xcept as otherwise specifically provided by statute."[70] This exclusion, the Agency argues, limits an attorney's fee recovery to that authorized under the Social Security Act.

---

66. *See* H.R. REP. NO. 1418, *supra* note 14, at 12, 1980 U.S. CODE CONG. & AD. NEWS at 4991. That Congress intended to award fees for successful civil litigation on behalf of social security claimants is further demonstrated by comments on the House floor prior to passage. Responding to a suggestion that social security cases had not been excluded, Congressman Railsback stated that the proposed bill would "limit recovery only to actions where they went into the Federal district court. In other words, it would not apply to the administrative proceedings." 126 CONG. REC. H10220 (daily ed. Oct. 1, 1980). Extended debate concerning the impact of fees in social security litigation in the federal courts followed. *Id.* at H10220-24.

67. *See* Guthrie v. Schweiker, 718 F.2d 104, 107 n.3 (4th Cir. 1983) (citing unreported cases).

68. *E.g.*, Cornella v. Schweiker, 728 F.2d 978, 987 (8th Cir. 1984); Wolverton v. Heckler, 726 F.2d 580, 582 (9th Cir. 1984); Berman v. Schweiker, 713 F.2d 1290, 1296 (7th Cir. 1983); Guthrie v. Schweiker, 718 F.2d 104, 107 (4th Cir. 1983).

69. Whenever a court renders a judgment favorable to a claimant . . . the court may determine and allow as part of its judgment a reasonable fee for . . . representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment . . . . In case of any such judgment, no other fee may be payable . . . except as provided in this paragraph.

42 U.S.C. § 406(b)(1) (1976).

70. 28 U.S.C. § 2412(d)(1)(A) (1982) (fees for lack of substantial justification in agency position). Fees are awardable against the government as at common law "[u]nless expressly prohibited by statute." *Id.* § 2412(b).

However, the drafters of the Equal Access to Justice Act sought to preserve existing fee-shifting statutes such as the Freedom of Information Act[71] and the Civil Rights Attorney's Fees Awards Act,[72] by which fee awards against the government were already authorized.[73] The drafters did not intend to limit fee recoveries from agencies. The Social Security Act does not authorize recovery from the Agency; rather, it authorizes recovery by the attorney from proceeds otherwise rightfully payable to the claimant.[74] The limitation it imposes on any other payment of fees is intended to limit the fee imposed by attorneys on claimants. It does not proscribe the recovery of a fee from other sources.[75] Because section 406 is not a fee-shifting statute — indeed, because in some cases it may provide no award to the attorney for a successful litigant[76] — an attorney's fee properly may be awarded successful claimants in civil actions under the Social Security Act.[77]

B. *Has the Claimant Prevailed?*

1. *Remand Orders*

The appeal of an unsuccessful claim for social security benefits to the federal courts may not immediately be terminated by a simple affirmance or reversal of the agency's decision. The appeals may be remanded to the Agency for further administrative proceedings. Whether a party who obtains an order of remand can be considered a "prevailing party" for purposes of the Equal Access to Justice Act has been a matter of dispute. Some courts have granted fees following remand orders.[78] Other courts have doubted whether a remand order goes suffi-

---

71. 5 U.S.C. § 552(a)(4)(E) (1982).

72. 42 U.S.C. § 1988 (1982).

73. *See* H.R. REP. NO. 1418, *supra* note 14, at 9-10, 1980 U.S. CODE CONG. & AD. NEWS at 4987-89.

74. Muenich v. United States, 410 F. Supp. 944, 947-48 (N.D. Ind. 1976).

75. Guthrie v. Schweiker, 718 F.2d 104, 107 (4th Cir. 1983); Hornal v. Schweiker, 551 F. Supp. 612, 615 (M.D. Tenn. 1982); Ocasio v. Schweiker, 540 F. Supp. 1320, 1321-22 (S.D.N.Y. 1982); Wolverton v. Schweiker, 533 F. Supp. 420, 422-23 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984).

76. *See, e.g.*, Lonning v. Schweiker, 568 F. Supp. 1079, 1081 (E.D. Pa. 1983) (no provision for payment of attorney's fees from withheld SSI benefits); Berman v. Schweiker, 531 F. Supp. 1149, 1152-53 (N.D. Ill. 1982) (no withheld benefits from which to pay attorney's fees), *aff'd*, 713 F.2d 1290 (7th Cir. 1983).

77. *E.g.*, Guthrie v. Schweiker, 718 F.2d 104, 107 (4th Cir. 1983); Ocasio v. Schweiker, 540 F. Supp. 1320, 1321-22 (S.D.N.Y. 1982).

78. Ceglia v. Schweiker, 566 F. Supp. 118 (E.D.N.Y. 1983); Gross v. Schweiker, 563 F. Supp. 260 (N.D. Ind. 1983); Vega v. Schweiker, 558 F. Supp. 52 (S.D.N.Y. 1983), *awarding fees from* 549 F. Supp. 713 (S.D.N.Y. 1982); Ocasio v. Schweiker, 540 F. Supp. 1320 (S.D.N.Y.

ciently to the merits of a claim to justify a fee award under the Act.[79]

As expressed in the House report to accompany the Equal Access to Justice Act, the intent of the drafters of the Act was not to limit the phrase "prevailing party" only to a victor after entry of a final judgment following a full trial on the merits. The House committee wished to adopt the interpretation of a prevailing party developed under existing fee-shifting statutes. Thus, a fee was to be granted if a party "prevailed on an interim order which was central to the case," or successfully pursued an interlocutory appeal "sufficiently significant and discrete to be treated as a separate unit."[80]

Courts that have awarded fees following entry of remand orders have focused on this language in the House report. In *Ceglia v. Schweiker*,[81] for example, the House report was cited as support for an award of fees. The court had remanded a claim, directing the Agency to re-evaluate the evidence in accordance with proper legal standards. The remand order, the court held, was sufficiently central to the claimant's case to justify a fee award. The claimant's legal theory had been adopted, and significant relief granted.[82] In *Gross v. Schweiker*,[83] the court held that a failure of the administrative law judge to perform his duty necessitated remand. Because the claimant had obtained the relief requested from the court, to the extent that the court had authority to enter relief, fees were awarded.[84]

But the central issue in any appeal from a claim for social security benefits is whether the claimant is eligible for benefits. For this reason, it more appropriately has been held that fees cannot be awarded based solely on an order of remand. Particularly if the case is remanded for the purpose of obtaining additional evidence that was not presented at the administrative hearing, it is reasonable to conclude that a party has not prevailed when he has done no more than "move . . . one step

---

1982). *Cf.* Wolverton v. Heckler, 726 F.2d 580, 583 (9th Cir. 1984) (fees awarded for work in obtaining an initial order of remand, but not awarded for work in connection with second appeal that led to outright reversal).

79. Roman v. Schweiker, 559 F. Supp. 304 (E.D.N.Y. 1983); Miller v. Schweiker, 560 F. Supp. 838 (M.D. Ala. 1983). *Cf.* Chastang v. Heckler, 729 F.2d 701, 702 (11th Cir. 1983) (claimant not entitled to fees as a prevailing party when appellate court upholds dismissal of appeal by Social Security Administration from a district court order of remand).

80. H.R. REP. NO. 1418, *supra* note 14, at 11, 1980 U.S. CODE CONG. & AD. NEWS at 4990.

81. 566 F. Supp. 118 (E.D.N.Y. 1983).

82. *Id.* at 121-22.

83. 563 F. Supp. 260 (N.D. Ind. 1983).

84. *Id.* at 261-62. *See also* Knox v. Schweiker, 567 F. Supp. 959 (D. Del. 1983) (cost alone awarded on remand; no petition for fees filed).

closer to a final determination."[85] However, if the remand is the result of a misapplication of legal standards, or of the failure of the Agency to meet minimum standards of fairness in conducting the initial hearing, the remand issue goes sufficiently to the core issue of eligibility to justify an attorney's fee.[86] The underlying claim for benefits, however, ultimately should be shown to be meritorious.[87]

To provide relief for meritorious claimants who obtain remand orders, some courts have indicated that fees ultimately can be awarded if the claim is favorably decided at the administrative hearing conducted pursuant to a remand order.[88] If requested prior to the remand hearing, the fee petition is denied. In this manner, the determination of whether the claimant has prevailed is postponed until a final resolution of the claim for benefits. This presents an attractive approach for the disposition of fee claims in connection with remands. However, as the court noted in *McGill v. Secretary of Health and Human Services*,[89] if the claimant prevails on the hearing pursuant to the remand order, there will be no further judicial proceedings. It is improbable that the decision on the post-remand hearing will occur within the 30-day period following final judgment in the court action that is the statutory limitation for the filing of a fee petition.[90] If the claimant cannot file a timely petition for attorney's fees following a successful post-remand hearing, he will be left without a means to apply for the fees to which *McGill* and similar decisions deem him entitled.

The solution to this dilemma was provided by the Court of Appeals for the Fourth Circuit in *Guthrie v. Schweiker*.[91] Neither the remand order nor the Appeals Council decision on remand, the court

85. McGill v. Secretary of Health and Human Services, 712 F.2d 28, 32 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1420 (1984). However, in Fast v. School Dist., 728 F.2d 1030 (8th Cir. 1984), the Court of Appeals for the Eighth Circuit ordered fees to be awarded when a terminated school teacher won a nominal damage award and the right to a due process hearing in a civil rights action filed in a federal district court. If the right to a hearing was sufficient in *Fast* to justify a fee, arguably a fee should be awarded where a new hearing is obtained on remand in a social security appeal.

86. Vega v. Schweiker, 558 F. Supp. 52 (S.D.N.Y. 1983).

87. *See* Ceglia v. Schweiker, 566 F. Supp. 118, 122 n.3 (E.D.N.Y. 1983). *But see* Vega v. Schweiker, 558 F. Supp. 52 (S.D.N.Y. 1983) and Gross v. Schweiker, 563 F. Supp. 260 (N.D. Ind. 1983), in which no finding of the ultimate merits of the claim were made.

88. McGill v. Secretary of Health and Human Services, 712 F.2d 28, 32 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1420 (1984); Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983). A similar approach has been taken for claims under 42 U.S.C. § 406(b)(1)(1976). *See* Conner v. Gardner, 381 F.2d 497 (4th Cir. 1967).

89. 712 F.2d 28, 29-30 (2d Cir. 1983).

90. 28 U.S.C. § 2412(d)(1)(B) (1982).

91. 718 F.2d 104 (4th Cir. 1983).

held, is a final judgment. The claimant in *Guthrie*, following a successful post-remand hearing, had moved for a fee award in the district court that had granted the remand order. This, the court ruled, was premature.[92] The Social Security Act contemplates the filing of a final order in the federal court once the Agency has conducted a hearing on remand.[93] It is the docketing of this final order, the court ruled, that begins the 30-day period within which a fee petition may be filed.[94]

Once the final post-remand order as described in *Guthrie* is filed, claimants may become "prevailing parties."[95] On a fee application by the claimant, the court should determine whether there was substantial justification for the agency's opposition to the motion for remand, employing the same standards applicable to reversals of agency decisions. Merely because a claimant obtains an order of remand and prevails on the post-remand hearing, he should not be deemed entitled to attorney's fees. But if the Agency fails to offer substantial justification for its opposition to the motion to remand, attorney's fees should be paid for the time spent by the attorney pursuing the matter in the courts.[96]

2. *Partial Successes*

Outcomes other than remand may bring into question whether a claimant has prevailed. If, for example, a claimant asserts several theories for reversal, but only one is adopted, can he be said to have prevailed sufficiently to be entitled to a full award of fees? This question does not appear to have been raised in the context of attorney's fees

---

92. *Id.* at 106.

93. Pursuant to 42 U.S.C. § 405(g) (1982), the Secretary is to file modified or affirmed findings with the court following an order of remand. The court should then issue a final order. Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983).

94. Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983). *Cf.* McDonald v. Heckler, 726 F.2d 311, 315 (7th Cir. 1983) (petition timely if filed within 30 days of expiration of time to appeal or of terminating order of court of last resort). The interpretation in *Guthrie*, it should be noted, means that any action remanded prior to the effective date of the Equal Access to Justice Act on which no final judgment has been entered by the court may be subject to a petition for fees. If the Agency frequently fails to report the modified findings to the remanding court, as it apparently failed to do in *Guthrie*, the Secretary may face a substantial exposure to fees from adjudications predating the adoption of the Act.

95. On entry of a final judgment on appeal, the Social Security Act provides for a remand to the Agency for the purpose of calculating benefits. 42 U.S.C. § 405(i) (1982). A remand for this purpose follows final judgment, Ellis v. Heckler, 569 F. Supp. 792 (E.D. Pa. 1983), and should cause no postponement of the decision on a fee petition arising out of the judgment. The petition should be filed immediately following the final judgment, without awaiting the calculation of benefits by the Agency.

96. Berman v. Schweiker, 713 F.2d 1290, 1298 n.21 (7th Cir. 1983); San Filippo V. Secretary of Health and Human Services, 564 F. Supp. 173, 175 n.4 (E.D.N.Y. 1983).

claims under the Equal Access to Justice Act arising from social security appeals.

To the extent alternate theories are advanced in bad faith or appear patently frivolous, the Act contemplates a fee adjustment. The court may reduce the amount to be awarded, or deny an award if the prevailing party engaged in conduct that unreasonably protracted the resolution of the controversy.[97] The fee is to be reasonable, calculated with regard to the market rate.[98] If, however, the championing of alternate theories was not unreasonable or did not protract the litigation, there is no basis for a reduction in the fee award.[99]

A more difficult case is presented by a claimant who receives only a portion of the benefits sought. The legislative history suggests that a litigant who is only partially successful is entitled to a full fee award.[100] Decisions arising out of litigation under existing fee statutes served as a model for the view of the House committee report on this point.[101] However, recent interpretations of these statutes bring into question this sweeping interpretation of the Act.

In *Hensley v. Eckerhart*,[102] the Supreme Court held that a district court, in granting fees under the Civil Rights Attorney's Fees Awards Act, had failed to consider the relationship between the extent of success and the amount of the attorney's fee award.[103] In light of *Hensley*, a court considering an attorney's fee petition arising from a social security claim should give some weight to the scope of relief obtained.[104]

Generally, the primary issue in a social security claim will be whether the claimant was disabled. If the claimant is found eligible for benefits, benefits will be payable for an indeterminate time, until the claimant is no longer disabled. However, there may also be a dispute concerning the onset date of the disability and the amount of back benefits to be paid. If a claimant successfully appeals a disability determination, and therefore initiates an indeterminate period of eligibility for benefits, full fees should be awarded even if the claimant is not deter-

---

97. 28 U.S.C. § 2412(d)(1)(C) (1982).

98. *Id.* § 2412(d)(2)(A).

99. *Cf.* Hensley v. Eckerhart, 103 S. Ct. 1933, 1940 (1983).

100. H.R. REP. NO. 1418, *supra* note 14, at 11, 1980 U.S. CODE CONG. & AD. NEWS at 4990.

101. *E.g.*, Bradley v. School Bd., 416 U.S. 696 (1974).

102. 103 S. Ct. 1933 (1983).

103. *Id.* at 1943.

104. *Cf.* Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700, 717 (3d Cir. 1983) (Thompson, J., concurring) (award only for fees incurred in challenging unreasonable Agency position).

mined to have had as early an onset date as alleged. The importance of the assurance of regular income for an indefinite period of time greatly outweighs the small loss of some finite amount of back benefits, so that the extent of success on appeal far outweighs what is lost. Through the disability determination, the claimant achieves essentially complete relief.[105] On the other hand, if the claim is for a closed period of disability, and reversal on appeal only pertains to a portion of the period, a reduced fee award may be in order.

If, however, the test is whether the expenditure of counsel's time was reasonable in relation to the success achieved, as suggested in *Hensley*,[106] the court should consider whether significant additional time was expended in litigating the unsuccessful portion of the claim on appeal. Since social security appeals are usually litigated by cross-motions for summary judgment on briefs submitted to the court, it is difficult to extricate hours spent on unsuccessful claims from all hours spent on the litigation. Usually, the hours expended in litigation would not be reduced significantly had counsel not pursued the entire period of disability appealed. Counsel would still be required to study and address the entire record of the administrative hearing. For that reason, courts should be reluctant to reduce fees simply because complete relief is not achieved.[107]

C. *Retroactive and Prospective Coverage*

There has been extensive debate concerning the retroactivity of the Equal Access to Justice Act. In *Berman v. Schweiker*,[108] Judge Coffey, dissenting from the majority opinion of the Court of Appeals for the Seventh Circuit, argued that the Act was not retroactive. There was, he

105. *See* Hensley v. Eckerhart, 103 S. Ct. 1933, 1940 (1983).

106. *Id.* at 1941.

107. In general, the practice is to award to outright prevailing parties the actual hours spent times an hourly rate (usually at the maximum rate of $75). *See, e.g.*, Lonning v. Schweiker, 568 F. Supp. 1079, 1085 (E.D. Pa. 1983); Vega v. Schweiker, 558 F. Supp. 52, 54 (S.D.N.Y. 1983). If the court finds that counsel expended more time than would be required to handle the matter competently, fees may be reduced from the amount requested. *See* Kauffman v. Schweiker, 559 F. Supp. 372, 376-77 (M.D. Pa. 1983). Some courts have considered adjusting fees in light of factors such as those articulated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974). *See* Phillips v. Heckler, 574 F. Supp. 870, 873 (W.D.N.C. 1983); Moholland v. Schweiker, 546 F. Supp. 383, 387 (D.N.H. 1982). The $75 per hour rate may be adjusted for cost of living increases. Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700, 713 (3d Cir. 1983). A fee award may properly exceed the amount recovered by the claimant. *See* H.R. REP. NO. 1418, *supra* note 14, at 9-10, 1980 U.S. CODE CONG. & AD. NEWS at 4988 (Act created to provide remedy when cost of contesting a government order exceeds the amount at stake).

108. 713 F.2d 1290 (7th Cir. 1983).

noted, no "clear, strong and imperative" language authorizing a recovery of fees for time expended on litigation prior to the effective date of the Act. Further, the Act contained no clear waiver of sovereign immunity. Finally, an award of fees for time spent on the litigation was not consistent with the purposes of the Act. Since the attorney representing the claimant had filed the appeal prior to the effective date of the Act, he bore an ethical obligation to carry through in representation. The beneficent purpose of the Act, to assure representation for claimants otherwise unable to afford the expense of counsel, would thus be fulfilled without a fee award, Judge Coffey noted.[109]

The weight of authority, however, holds that counsel is entitled to an award of fees compensating all his efforts in the appeal since its filing in district court.[110] This generally has been held to include services rendered prior to the enactment date of the Act, if the case was then pending.[111] In reaching this result, courts have noted that the plain meaning of the statute favors retroactivity, and that retroactivity fits the broad remedial purposes of the Act.[112] The statutory language has been deemed sufficiently explicit to constitute an express waiver of sovereign immunity.[113] Indeed, the Act has been construed to permit fees when the appeal time had not run by the effective date of the Act, even though virtually all the hours to be claimed by counsel must have been incurred prior to enactment.[114] Given the generally accepted interpretation of similar fee statutes on this point,[115] this broad construction of the retroactivity of the Act is warranted.[116]

By its terms, the Act will continue to be applicable to actions filed

---

109. *Id.* at 1303-07 (Coffey, J., dissenting).

110. *See, e.g.*, Berman v. Schweiker, 713 F.2d 1290 (7th Cir. 1983); United States *ex rel.* Heydt v. Citizens State Bank, 668 F.2d 444, 446 (8th Cir. 1982); Wolverton v. Schweiker, 533 F. Supp. 420, 423-24 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984).

111. *See, e.g.*, Cornella v. Schweiker, 728 F.2d 978, 988 (8th Cir. 1984); Rawlings v. Heckler, 725 F.2d 1192, 1194 (9th Cir. 1984); Berman v. Schweiker, 713 F.2d 1290, 1299 (7th Cir. 1983); Jones v. Schweiker, 565 F. Supp. 52, 54 (W.D. Mich. 1983); Moholland v. Schweiker, 546 F. Supp. 383, 385 (D.N.H. 1982).

112. Berman v. Schweiker, 713 F.2d 1290, 1297-99 (7th Cir. 1983); Watkins v. Harris, 566 F. Supp. 493 (E.D.Pa. 1983).

113. Berman v. Schweiker, 713 F.2d 1290, 1300-01 (7th Cir. 1983); Wolverton v. Schweiker, 533 F. Supp. 420, 423 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984).

114. *E.g.*, Berman v. Schweiker, 531 F. Supp. 1149 (N.D. Ill. 1982), *aff'd*, 713 F.2d 1290 (7th Cir. 1983).

115. *See, e.g.*, Bradley v. School Bd., 416 U.S. 696, 710-16 (1974); Cuneo v. Rumsfeld, 553 F.2d 1360, 1366-67 (D.C. Cir. 1977).

116. *But see* Miller, *Retroactivity of Fee Awards Under the Equal Access to Justice Act*, 29 LOY. L. REV. 21 (1983).

in the courts before the "sunset" date of October 1, 1984. The plain language of the statute, which provides that "the provisions of [28 U.S.C. § 2412(d)] shall continue to apply through final disposition of any action commenced before the date of repeal,"[117] obviates any argument that counsel will not be entitled to compensation for time expended after the "sunset" date on such litigation. If a fee petition on an order of remand may not be made until entry of a final judgment after termination of the administrative proceedings pursuant to the remand,[118] fee petitions will be appropriate for matters before the Agency pursuant to a remand under and not actively in litigation on the "sunset" date.

D. *When is a Fee Incurred?*

Yet another issue preliminary to a determination of substantial justification for a fee award under the Equal Access to Justice Act is whether a fee has been "incurred" by the prevailing party. The fee that an attorney may collect from a client in a social security appeal is closely regulated. It must be approved by the court. Up to 25 percent of the past-due benefits withheld by the Agency, but awarded to the claimant pursuant to a successful civil action, may be paid directly to the claimant's counsel.[119] The court-approved award must be the only payment an attorney receives from his client for his services on the appeal.[120]

Although the Social Security Act does not preclude an award of fees under the Equal Access to Justice Act, the Social Security Administration has argued that no fee is "incurred" until the court has issued a fee ruling under the Social Security Act and the payment is made to the attorney from the back benefits.[121] However, in the context of the Equal Access to Justice Act, a fee is "incurred" when the claimant becomes liable for it, not when it is actually paid.[122] This interpretation is supported by the legislative history[123] and by the Act itself, which provides for recovery of fees at a reasonable market rate, rather than at

---

117. 28 U.S.C. § 2412 note (1982).

118. *See supra* notes 91-96 and accompanying text.

119. 42 U.S.C. § 406(b)(1) (1976).

120. *Id.* § 406(b)(2).

121. *See* Wolverton v. Schweiker, 533 F. Supp. 420, 423 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984).

122. 553 F. Supp. at 423.

123. H.R. REP. NO. 1418, *supra* note 14, at 15, 1980 U.S. CODE CONG. & AD. NEWS at 4994 (computation of fees should be without reference to fee arrangement between attorney and client).

the billing rate.[124] Thus, even if an attorney agrees to represent a claimant for an hourly fee significantly less than the market rate, the court, in awarding compensation for fees "incurred," may base the amount of fees awarded at the prevailing market rate.[125]

The Agency also has suggested that a fee is not "incurred" if the agreement for representation provides that the counsel will receive no compensation from the client for his services. This most often arises in representation by attorneys employed by organizations funded by the Legal Services Corporation. It may also occur if a private attorney represents a claimant *pro bono.*

An early unreported decision, *Kinne v. Schweiker*,[126] held that a law school clinic was not entitled to fees because it had not charged its client for its services, and, thus, no fees had been incurred. Although the court ultimately vacated and reversed this order,[127] the initial fee denial provided the precedent upon which at least one reported decision rested a denial of fees to a claimant represented by uncompensated counsel. In this decision, *Cornella v. Schweiker*,[128] the district court set out four reasons for denying fees. Each of these justifications, however, subsequently has been rejected by other courts considering a fee award to uncompensated counsel. Indeed, the district court in *Cornella* was reversed on review.

First, *Cornella* suggests that the plain meaning of "incurred," a term undefined in the Act, must be employed. Fees are incurred only if the plaintiff is liable for them. No fee was charged the claimant in *Cornella* for legal services representation; therefore, he had incurred no fee.[129] Although this is a fair reading of the plain meaning of "incurred,"[130] the word must be read in context.[131] Because fees are to be determined with regard to the market rate, rather than being strictly limited to the amount agreed between the attorney and the claimant, every reported decision except *Cornella* has held that the term "incurred" does not limit the recovery of fees to claimants represented by

124. 28 U.S.C. § 2412(d)(2)(A) (1982). *See* Ward v. Schweiker, 562 F. Supp. 1173, 1175 (W.D. Mo. 1983).

125. H.R. REP. NO. 1418, *supra* note 14, at 15, 1980 U.S. CODE CONG. & AD. NEWS at 4994.

126. No. 80-81 (D. Vt. June 30, 1982, *vacated*, Dec. 29, 1982).

127. Kinne v. Schweiker, No. 80-81 (D. Vt. Dec. 29, 1982).

128. 553 F. Supp. 240 (D.S.D. 1982), *rev'd*, 728 F.2d 978 (8th Cir. 1984). The fee denial due to *pro bono* representation is an alternate holding. The court found the government position to be substantially justified. 553 F. Supp. at 245.

129. *Id.* at 245.

130. *See* Chee v. Schweiker, 563 F. Supp. 1362, 1364 (D. Ariz. 1983).

131. *See, e.g.*, Jones v. Schweiker, 565 F. Supp. 52, 55 (W.D. Mich. 1983).

private counsel.[132]

Second, the court in *Cornella* asserted that the purpose of the Act was to vindicate the rights of claimants. A claimant represented by legal services need pay no fee to pursue his appeal, and therefore faces no economic deterrent to contesting government action. Indeed, the court pointed out, the claimant in *Cornella* had twice resorted to the adjudicatory process. "[H]e was not made to endure any injustice, rather he successfully contested it," the court noted.[133]

As many as three policy goals of the Equal Access to Justice Act have been identified, however. One purpose is to reduce economic deterrents to opposing unreasonable governmental action,[134] but the Act also seeks to discourage the government from taking unjustified positions.[135] Thus, it cautions an agency to carefully evaluate its case, and not to pursue one that is weak and tenuous.[136] Finally, the Act seeks to provide incentives to individuals to pursue the enforcement of their rights.[137]

The Act, then, does not only concern itself with the cost to the individual of litigation. Rather, it seeks to address unwarranted government action. The potential for financial reward may encourage a *pro bono* attorney to take action on behalf of a social security claimant. If the potential for fees will encourage *pro bono* counsel to pursue civil litigation against the government, agencies should be encouraged to evaluate more carefully the stance they take against claimants represented by uncompensated counsel. Because claimants' counsel will more readily take such matters to litigation, incentives will be provided for the enforcement of abridged rights.[138]

---

132. *E.g.*, Ceglia v. Schweiker, 566 F. Supp. 118, 123 (E.D.N.Y. 1983); Chee v. Schweiker, 563 F. Supp. 1362, 1364 (D. Ariz. 1983); Ward v. Schweiker, 562 F. Supp. 1173, 1174-75 (W.D. Mo. 1983); Hornal v. Schweiker, 551 F. Supp. 612, 616-17 (M.D. Tenn. 1982).

133. 553 F. Supp. at 246.

134. *Id.* at 247. *See also* McGill v. Secretary of HHS, 712 F.2d 28, 30 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1420 (1984); Lonning v. Schweiker, 568 F. Supp. 1079, 1980-81 (E.D. Pa. 1983); Phillips v. Heckler, 574 F. Supp. 870, 871 (W.D.N.C. 1983); H.R. REP. NO. 1418, *supra* note 14, at 12, 1980 U.S. CODE CONG. & AD. NEWS at 4991.

135. Berman v. Schweiker, 713 F.2d 1290, 1296 (7th Cir. 1983); Jones v. Schweiker, 565 F. Supp. 52, 55 (W.D.Mich. 1983).

136. San Filippo v. Secretary of HHS, 564 F. Supp. 173, 174 (E.D.N.Y. 1983); McDonald v. Schweiker, 551 F. Supp. 327, 333 (N.D. Ind. 1982), *rev'd*, 726 F.2d 311 (7th Cir. 1983). *Cf.*, Ceglia v. Schweiker, 566 F. Supp. 118, 125 n.7 (E.D.N.Y. 1983) (government should evaluate more carefully when to litigate social security appeals).

137. Berman v. Schweiker, 713 F.2d 1290, 1296 (7th Cir. 1983); Hornal v. Schweiker, 551 F. Supp. 612, 614-15 (M.D. Tenn. 1982); H.R. REP. NO. 1418, *supra* note 14, at 5-6, 1980 U.S. CODE CONG. & AD. NEWS at 4984.

138. *See* Cornella v. Schweiker, 728 F.2d 978, 986-87 (8th Cir. 1984); Jones v. Schweiker,

Cornella suggests that only a claimant who has hired a private sector attorney is economically deterred from pursuing his rights under the Social Security Act.[139] However, significant economic considerations are present when a legal services attorney decides to provide representation to a social security claimant.[140] Arguably, public interest law associations are more in need of remuneration than private attorneys.[141] A fee award for successful litigation can be used to increase the limited manpower and financial resources of a legal aid office.[142] In addition, the potential for fees may encourage the office to divert a larger portion of its limited resources to challenging unwarranted government activity, thus permitting more claimants to seek redress in the courts. In this manner, the rights of more claimants will be vindicated if fees are awarded to *pro bono* and legal services counsel.

A third justification for denial of fees to *pro bono* attorneys cited in *Cornella* was derived from a review of other fee-shifting statutes. Although other statutes had been interpreted to permit fee awards to legal services attorneys and other uncompensated counsel, the court in *Cornella* asserted that these statutes did not require that fees be "incurred." In those other statutes, *Cornella* suggests, the fee is an integral part of the remedy; in the Equal Access to Justice Act, the fee serves a separate purpose in curbing unreasonable government action.[143]

This same purpose has been cited for other fee-shifting statutes, however. The purpose is vindicated by permitting an award of fees to *pro bono* counsel.[144] Nonetheless, the textual difference in the use of "incurred" upon which *Cornella* relies may be significant. One other fee-shifting statute, the Freedom of Information Act, requires that fees be "incurred" before an award of attorney's fees is permitted.[145] In dicta, it has been suggested that *pro bono* counsel may receive fees

---

565 F. Supp. 52, 55 (W.D.Mich. 1983); Watkins v. Harris, 566 F. Supp. 493, 499 (E.D. Pa. 1983).

139. 553 F. Supp. at 246.

140. Jones v. Schweiker, 565 F. Supp. 52, 55 (W.D. Mich. 1983); San Filippo v. Secretary of Health and Human Services, 564 F. Supp. 173, 176-77 (E.D.N.Y. 1983).

141. Lonning v. Schweiker, 568 F. Supp. 1079, 1082 (E.D.Pa. 1983).

142. Watkins v. Harris, 566 F. Supp. 493, 499 (E.D. Pa. 1983).

143. 553 F. Supp. at 246-47.

144. *See, e.g.*, Rodriguez v. Taylor, 569 F.2d 1231, 1244-46 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978) (Age Discrimination in Employment Act attorney's fee provision promotes enforcement of underlying rights; fee available to *pro bono* counsel).

145. "The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E) (1982).

under that act.[146] But the requirement that an attorney's fee be incurred has caused courts to deny *pro se* litigants attorney's fee awards.[147] Courts that have granted *pro se* litigants fees under the Freedom of Information Act have construed the act not to require that fees be incurred.[148] In rejecting *Cornella* and granting attorney's fees to social security litigants who were represented by legal services counsel, courts have in part relied on the favorable dicta in cases interpreting the Freedom of Information Act.[149] However, whether that act requires that fees be incurred is determinative of fee awards to *pro se* litigants. Squarely confronted with the issue, courts should find that the same logic applies to fee awards for the work of *pro bono* counsel: if "incurred" modifies "attorney's fees," no fee can be awarded *pro bono* counsel. That same analysis, applied to the Equal Access to Justice Act, would preclude fee awards to uncompensated counsel.

Finally, *Cornella* asserts that because financial eligibility requirements for a party requesting fees are set out in the Equal Access to Justice Act,[150] a fee award should be denied if there is no economic deterrent to pursuing litigation because of a party's wealth. Because the claimant in *Cornella* was represented by a legal services attorney, the court held he was not economically deterred and was not intended to be covered by the Act.[151]

This reading of the purpose of the statute as applied to claimants represented by legal services counsel has been rejected.[152] The restrictions on eligibility of parties for a fee award, however, present other potential difficulties for *pro bono* counsel. Generally, it has been agreed that the "prevailing party" to whom a fee may be awarded is the claimant, not his attorney.[153] The financial restrictions of the Equal Access to Justice Act, applied to claimants, would bar few fee awards. For individuals, only a net worth of more than $1,000,000 is disqualifying.[154] However, because the fee awarded pursuant to *pro bono* repre-

146. Cunningham v. FBI, 664 F.2d 383, 385 nn.1&2 (3d Cir. 1981); Crooker v. U.S. Dep't of the Treasury, 634 F.2d 48, 49 n.1 (2d Cir. 1980).

147. *See* Cunningham v. FBI, 664 F.2d 383, 384-87 (3d Cir. 1981); Crooker v. United States Dep't of Justice, 632 F.2d 916, 921 (1st Cir. 1980).

148. *See, e.g.*, Cuneo v. Rumsfeld, 553 F.2d 1360, 1366 (D.C. Cir. 1977) ("incurred" does not modify "reasonable attorney fees"; fees awarded to *pro se* litigant).

149. *See, e.g.*, San Filippo v. Secretary of Health and Human Services, 564 F. Supp. 173, 176 (E.D.N.Y. 1983); Hornal v. Schweiker, 551 F. Supp. 612, 616 (M.D. Tenn. 1982).

150. 28 U.S.C. § 2412(d)(2)(B) (1982). *See supra* note 23 and accompanying text.

151. 553 F. Supp. at 248.

152. *See supra* notes 134-42 and accompanying text.

153. *E.g.*, Kauffman v. Schweiker, 559 F. Supp. 372, 374 n.1 (M.D. Pa. 1983).

154. 28 U.S.C. § 2412(d)(2)(B)(i) (1982).

sentation is payable directly to the representative, it has been suggested that the *pro bono* counsel or the organization of which he is a staff member may petition in its own name for fees.[155] Indeed, a legal aid organization has been treated as a "party" under the Act.[156] This presents little difficulty for legal aid offices, which are generally qualified as section 503(c)(3) tax-exempt organizations under the Internal Revenue Code, and therefore are not disqualified from receiving fees regardless of net worth.[157] However, this interpretation could disqualify members of large or well-to-do private firms representing a claimant, whether *pro bono* or for an agreed fee.

These difficulties will be averted if the claimant is recognized as the "party." Although the fee award may be directly payable to *pro bono* counsel,[158] the petition should be brought in the name of the claimant, and the qualification restrictions for parties should be applied to claimants, not their counsel. Indigent claimants should not be dissuaded from seeking to have successful private counsel vindicate their rights, if the counsel is willing to undertake such representation. For the same reasons, despite its requirement that fees be incurred, the Act should be interpreted to encourage legal services organizations to represent clients seeking to challenge unwarranted government activity.

E. *What Position Must Be Justified?*

Before determining whether the government position was substantially justified,[159] a court reviewing a petition for attorney's fees must determine what "position" is to be examined. Three views have emerged. Some courts have examined the agency determination giving rise to the appeal.[160] Other courts have indicated that "position" means litigation position.[161] The third view has been to consider the position of the Agency both before and during litigation.[162]

The first view looks to the facts giving rise to the litigation. The underlying position of the Agency, not its trial posture, is the relevant issue. The Agency must justify the action that made it necessary for

155. Ceglia v. Schweiker, 566 F. Supp. 118, 120 n.1 (E.D.N.Y. 1983).

156. Ocasio v. Schweiker, 540 F. Supp. 1320, 1323 (S.D.N.Y. 1982).

157. 28 U.S.C. § 2412(d)(2)(B)(ii) (1982).

158. Ceglia v. Schweiker, 566 F. Supp. 118, 120 (E.D.N.Y. 1983).

159. A fee is to be awarded to a prevailing party "unless the court finds that the position of the United States was substantially justified." 28 U.S.C. § 2412(d)(1)(A) (1982).

160. Lonning v. Schweiker, 568 F. Supp. 1079, 1082 (E.D. Pa. 1983).

161. Smith v. Schweiker, 563 F. Supp. 891, 892 (E.D.N.Y. 1982), *aff'd*, 729 F.2d 1442 (2d Cir. 1983).

162. *E.g.*, Washington v. Heckler, 573 F. Supp. 1567, 1571 (E.D. Pa. 1983).

the claimant to file suit. Under this view, the Equal Access to Justice Act seeks to control the actions of administrative agencies, not those of Justice Department litigators.[163]

The facts giving rise to the litigation, in the context of a social security appeal, however, comprise the administrative record subject to review. This record provides the basis for the government position. Therefore, it has been suggested that a lack of substantial evidence in the record to support the agency determination must mean that the Agency lacked substantial justification for that determination.[164] This interpretation of "position" leads to an automatic fee award in the appeal of administrative decisions.[165] This was not the intent of Congress.[166]

The second view examines the position of the Agency before the court. Trial conduct becomes relevant.[167] A preliminary decision to defend the agency position may be justifiable, but the agency position becomes unjustifiable if the government adopts an unreasonable position at a later stage in the litigation.[168] If, however, the Agency capitulates shortly after filing an answer, when it determines its position to be without legal justification, it may be held to have acted reasonably.

Consideration of the litigation position offers a workable approach to analysis in the context of social security appeals. At the time an attorney for the Agency prepares an answer to a complaint appealing a denial of benefits, he will not have the benefit of the agency record before him. The record is required to be filed at the time of the agency's answer[169]; it may not be available before then. At the time the answer is filed, the agency attorney may not have had the opportunity to study the record to determine the strength of the agency position. If the litigation position is the determinative factor in assessing a fee

---

163. Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700, 707 (3d Cir. 1983). *See* Rawlings v. Heckler, 725 F.2d 1192, 1195-96 (9th Cir. 1984).

164. *See* Operating Eng'rs Local Union No. 3 v. Bohn, 541 F. Supp. 486, 495 (D. Utah 1982).

165. Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700, 719 (3d Cir. 1983) (Hunter, J., dissenting).

166. *See supra* notes 25-27 and accompanying text.

167. *See* McDonald v. Schweiker, 551 F. Supp. 327, 333 (N.D. Ind. 1982), *rev'd*, 726 F.2d 311 (7th Cir. 1983). Misconduct in the handling of a social security appeal, conducted entirely on written motions and briefs, will often only make the work of the opposing party less difficult. *See* McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1984) (government failure to file timely brief held not to be factor in setting fee).

168. *Cf.* Tyler Business Servs., Inc. v. NLRB, 695 F.2d 73, 75-76 (4th Cir. 1982) (administrative proceedings).

169. 42 U.S.C. § 405(g) (1982).

award, the Agency could avoid exposure to an award by examining the record once it was prepared, analyzing the strength of its case, and confessing error if error appears in the record. If this examination were made without unreasonable delay, the Agency would advance a reasonable litigation position at all times, even if there had been no justification for the final agency determination on the claim.[170]

If reasonable justification is determined by the litigation position of the Agency, however, there is no deterrent for unreasonable agency action. To implement this objective of the Act, some consideration must be given to the underlying agency position.[171] Otherwise, the Agency can deny benefits to a claimant without justification, forcing the claimant to seek judicial review. This puts the claimant to the expense of commencing appeal, as well as to the delays inherent in appeal, without a penalty being assessed against the Agency. The Agency merely has to confess error once the transcript is submitted, perhaps several months after filing of the complaint.

To control agency conduct, a third definition of position has been proposed. In *Moholland v. Schweiker*,[172] the court noted that the "substantial justification" language of the Act had derived from rule 37(a)(4) of the Federal Rules of Civil Procedure. This rule was enacted to deter parties from forcing a discovery battle to court when there was no genuine dispute. The court in *Moholland* therefore adopted a position followed by several other courts,[173] that both the underlying position of the Agency and trial conduct should be considered in evaluating the position of the Agency pursuant to a fee application.[174]

This approach creates little deterrence for an agency, however. In a normal case, there will be few hours of an attorney's time on which to claim fees if the government confesses error shortly after filing an answer. A complaint in a social security disability appeal can be a form pleading, alleging a final administrative decision and the lack of substantial justification to support the decision. Little time is required for

---

170. *Cf.* Operating Eng'rs Local Union No. 3 v. Bohn, 541 F. Supp. 486, 495-96 (D. Utah 1982) (government substantially justified when it capitulated within 9 days of filing of complaint against it). As has been noted, however, the position of the Social Security Administration has been to litigate even weak claims. *See* Zimmerman v. Schweiker, 575 F. Supp. 1436, 1441 (E.D.N.Y. 1983); Ceglia v. Schweiker, 566 F. Supp. 118, 125 n.7 (E.D.N.Y. 1983).

171. *See* Moholland v. Schweiker, 546 F. Supp. 383, 385-86 (D.N.H. 1982).

172. 546 F. Supp. 383 (D.N.H. 1982).

173. *E.g.*, Washington v. Heckler, 573 F. Supp. 1567, 1571 (E.D. Pa. 1983); Watkins v. Harris, 566 F. Supp. 493, 498 (E.D. Pa. 1983); Gross v. Schweiker, 563 F. Supp. 260, 262 (N.D. Ind. 1983).

174. 546 F. Supp. at 385-86. *See also* Cornella v. Schweiker, 728 F.2d 978, 983 (8th Cir. 1984).

its preparation. Usually, the plaintiff's attorney cannot prepare and brief a motion for summary judgment or pursue other remedies for the claimant until after the record is submitted by the Agency. If the Agency confesses judgment upon preparation of the record, the claimant's counsel typically will have few billable hours to claim. A fee award based on these hours is hardly an effective deterrent to unjustified agency action.

Furthermore, claims may not be made for an attorney's fees incurred in administrative proceedings.[175] A claimant is barred from seeking fees if he wins at the agency level, even if the initial agency position is unjustified. This being the case, it is illogical that hours spent before the Agency opposing an unjustified position should provide a basis for a fee award on appeal if the claimant loses at the agency level. The claimant is only entitled to compensation for attorney's fees incurred in the federal court proceedings; it is the behavior of the Agency in court that should be examined. The Agency should be encouraged to recognize its error at the administrative stage, confess error, and cease unreasonable litigation. But because administrative proceedings before the Social Security Administration are excluded from the Equal Access to Justice Act, the underlying agency determination should not be considered the position to be justified under the Act.

In reality, the distinction between litigation position and agency position underlying the litigation is of little moment. Ultimately, the government litigator will have to determine whether he can offer a reasonable defense for the agency determination of the claimant's ineligibility for benefits. The litigator must decide if the record adduced before the Agency supports the denial of benefits. Once he makes the decision to proceed, he effectively adopts the agency position below as the litigation position of the Agency.[176] Therefore, it is only as to a claim for the hours expended in interviewing the claimant and preparing the complaint that the distinction is relevant. Because fees for nonadversarial agency proceedings are not contemplated by the Equal Access to Justice Act, however, "position" is most reasonably interpretated as the litigation position of the Agency, once the decision to litigate is made.

---

175. *See supra* notes 58-61 and accompanying text.

176. *See* Cornella v. Schweiker, 728 F.2d 978, 983 (8th Cir. 1984); Spencer v. NLRB, 712 F.2d 539, 551 & n.45, 553-54 & n.53 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984).

F. *Substantial Justification*

Since enactment of the Equal Access to Justice Act, federal district courts and courts of appeals repeatedly have examined whether the Social Security Administration was "substantially justified" in unsuccessful efforts to defend its final administrative adjudication on appeal to the federal courts. A few courts have indicated that a fee award is allowed as a matter of course when summary judgment is granted.[177] A variety of other standards have been proposed to award or deny attorney's fees to social security claimants who obtained reversal of adverse administrative decisions on their claims for benefits.

One approach is to evaluate the evidence present in the record tending to show that the claimant was not eligible for benefits. Courts have held that a fee award is appropriate because the agency's decision to deny benefits was supported by no evidence,[178] or by "absolutely no evidence,"[179] or had been made "without considering the evidence."[180] Using this approach, courts have denied fee awards because there was "some evidence" supporting the Agency.[181] However, a litigant has received fees under similar circumstances on a finding that there was "essentially no evidence" to provide a foundation for denial of his social security benefits.[182]

Other decisions look to the reasonableness of the position of the Social Security Administration. The position of the Agency on appeal from a denial of social security benefits is deemed substantially justified if the position of the Agency is "reasonable."[183] Other courts have indicated that the standard must be "slightly above one based on reasonableness."[184] It has been suggested that fees should be denied when the stance of the Agency is "arguably defensible,"[185] even if the court has ruled against the Agency on the underlying appeal from the denial of benefits. When "reasonable minds could disagree"[186] on the merits of the claim, fees have been denied. The most intricate analysis has re-

177. *E.g.*, McDonald v. Schweiker, 551 F. Supp. 327, 333 (N.D. Ind. 1982), *rev'd*, 726 F.2d 311 (7th Cir. 1983).

178. Moholland v. Schweiker, 546 F. Supp. 383, 386 (D.N.H. 1982).

179. Lonning v. Schweiker, 568 F. Supp. 1079, 1085 (E.D. Pa. 1983).

180. Phillips v. Heckler, 574 F. Supp. 870, 872 (W.D.N.C. 1983) (emphasis omitted).

181. Washington v. Heckler, 573 F. Supp. 1567, 1571 (E.D. Pa. 1983).

182. Hornal v. Schweiker, 551 F. Supp. 612, 617 (M.D. Tenn. 1982).

183. Jones v. Schweiker, 565 F. Supp. 52, 55 (W.D. Mich. 1983).

184. Wolverton v. Schweiker, 533 F. Supp. 420, 424 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984).

185. Guthrie v. Schweiker, 718 F.2d 104, 108 (4th Cir. 1983).

186. Washington v. Heckler, 573 F. Supp. 1567, 1571 (E.D. Pa. 1983).

quired a three-part examination of reasonableness of fact, law, and the application of the facts to the law.[187]

None of the standards suggested, however, address the paradox posed by the application of the Equal Access to Justice Act to successful appeals from administrative adjudications: How can substantial justification be found for a government position that, by definition, was not supported by substantial evidence presented to the Agency? An examination of each of the existing standards demonstrates that they are inadequate tools to determine the merits of fee claims in cases reviewed in the federal courts under the Social Security Act. By considering the justification for the legal theory underlying the agency position on appeal, however, fee petitions can be properly analyzed.

1. *Attorney's Fees as a Matter of Course*

A few courts have suggested a standard for the award of attorney's fees in social security appeals that would award fees virtually as a matter of course to claimants who pursue successful appeals. For these courts, resolution of the appeal without a hearing through a motion for summary judgment creates a presumption that the agency position on appeal lacked substantial justification. In *Berman v. Schweiker*,[188] for example, the district court cited the disposition of the appeal by summary judgment as one justification for an award of fees; the government had been found, as a matter of law, to be defending an erroneous position.[189]

Berman, however, concerned the interpretation of the tax status of a claimant. The facts were uncontested. No credibility determination or weighing of evidence underlay the agency decision. When evidentiary evaluations by the Agency provide the basis for the administrative determination, the suggestion that reversal of the Agency on summary judgment creates a presumption that the Agency acted without substantial justification must be rejected.[190]

If a lack of substantial justification could be presumed from the mode of disposition of appeals from adverse claims for social security benefits, fees would be awarded as a matter of course. Since the district

187. Lonning v. Schweiker, 568 F. Supp. 1079, 1083 (E.D. Pa. 1983), *citing Dougherty v. Lehman*, 711 F.2d 555, 564 (3d Cir. 1983).

188. 531 F. Supp. 1149 (N.D. Ill. 1982), *aff'd*, 713 F.2d 1290 (7th Cir. 1983).

189. *Id.* at 1154. *Cf.* Moholland v. Schweiker, 546 F. Supp. 383, 386 (D.N.H. 1982) (ruling against government creates presumption that fees are awardable).

190. *See, e.g.*, Washington v. Heckler, 573 F. Supp. 1567, 1570 (E.D. Pa. 1983); Bennett v. Schweiker, 543 F. Supp. 897, 898 (D.D.C. 1982).

court hears no evidence, but only reviews the administrative record, these appeals are, as a matter of routine, disposed of by cross-motions for summary judgment. Unless the Equal Access to Justice Act was intended to award fees to all claimants who prevail on the appeal of their claim to federal court, a summary judgment must create no presumption in favor of fees.[191]

2. *The "No Evidence" Standard*

Courts seeking a clearly definable standard by which to determine eligibility for a fee award under the Equal Access to Justice Act frequently have questioned whether any evidence was presented at the administrative hearing that might have supported the Agency on the appeal of the denial of a claim. These courts have held that the presence of no such evidence, or of essentially no evidence, indicates that the Agency was without substantial justification in defending the position of the appeals council before the district court on review.

In *Wolverton v. Schweiker*,[192] for example, the denial of disability benefits by the Agency was predicated on evidence that work was available for a claimant who retained a residual function capacity to perform light or sedentary work. On appeal from the agency determination, the district court first remanded the claim, finding no evidence that the claimant could, in fact, perform work at this exertion level. At a hearing pursuant to the remand order, no evidence to show the claimant's residual functional capacity was elicited; nonetheless, the Agency again denied benefits. On this second review, the court reversed outright. The court adhered to the principle that a finding that the Secretary's decision was not supported by substantial evidence did not necessitate a finding of lack of substantial justification for the Secretary's position. Nonetheless, it found that there was no evidence to support the decision of the Agency. Attorney's fees were awarded.[193]

When, as in *Wolverton*, there is no evidence to support an essential element of the denial of disability that was appealed, a fee award is easily justified.[194] The more difficult case is presented by those decisions in which some evidence was present to support the agency's denial

---

191. *See supra* notes 164-66 and accompanying text.

192. 533 F. Supp. 420 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984).

193. *Id.* at 426.

194. *See also* Moholland v. Schweiker, 546 F. Supp. 383 (D.N.H. 1982). However, a fee award may be rejected if the lack of evidence to support the Agency's decision is the result of the actions of the claimant. *See* Wolverton v. Heckler, 726 F.2d 580, 583 (9th Cir. 1984).

of benefits.

Thus, in *Hornal v. Schweiker*,[195] fees were awarded because there was "essentially no evidence" to support the denial of benefits by the Agency. The court noted that, in its decision on the merits of the appeal, it had found that the only medical evidence in support of the government position was that of a doctor who had performed a single, cursory examination. The court contrasted his examination to the far more thorough examination of another doctor who had found evidence of disability. Had the two physicians been equally qualified, the court indicated, or had they examined the claimant for the same period of time or given similar tests, they might have reached different conclusions. In that case, the court indicated, there would have been substantial justification for the government's position even if the court had found a lack of substantial evidence to support the Agency.[196]

This reasoning seems facially persuasive: If the reversal was merely a matter of the court reaching a different conclusion than the Agency concerning the significance of the evidence, fees should be denied. The example the court presents for a denial of fees, however, can never arise. If the court had found that the physicians' reports were equally valid, it could not have reversed the Agency on the merits. It is the function of the Agency, not of the court, to weigh the evidence. The court may only review to determine whether the agency's position was supported by substantial evidence. Had the reports of both doctors in *Hornal* constituted substantial evidence, and had the Agency accepted as more credible a report indicating an absence of a disabling condition, the court would have been obligated to affirm the denial of benefits.[197] No fee question would have arisen.

Implicitly, then, the court in *Hornal* indicated that if no substantial evidence supports the Agency, the court must find that there was a lack of substantial justification for the agency's position. The threshold it suggests for denial of fees, a rough balance of the evidence, cannot occur if the court ruled correctly on the underlying appeal. In any case where the claimant prevails on appeal there cannot be evidence of legal significance in the record that persuasively supports the agency's position. That evidence would constitute substantial evidence and preclude reversal. If the Agency is reversed on appeal, the balance of the evidence must resemble that present in *Hornal* or *Wolverton*: an utter

195. 551 F. Supp. 612 (M.D. Tenn. 1982).

196. *Id.* at 617-18. *See also* Kauffman v. Schweiker, 559 F. Supp. 372, 375-76 (M.D. Pa. 1983) (adopting reasoning of *Hornal*).

197. *See supra* notes 49-52 and accompanying text.

failure of proof on the part of the Agency.

In several reported decisions, claimants seeking compensation under the Equal Access to Justice Act have been denied fees because "some evidence" was present to support the agency's denial of benefits. In these decisions, either the decision of the court on the merits of the appeal or on the denial of attorney's fees may be questioned.

One example of the difficulty presented by application of a "some evidence" standard is *Jones v. Schweiker*.[198] Although paying homage to a standard of "reasonableness," the court applied a stricter test:

> [T]he court believes that rarely will a plaintiff in a social security case be able to meet the EAJA standard. Unless the government has no authority for its position, or the record reveals no evidence to support the ALJ's findings, the government generally will be justified in defending an appeal to the district court.[199]

Under this standard, the court denied an award of fees. It noted that it had reversed the agency's decision to deny social security benefits because, although the administrative law judge had placed great weight on the conclusions of an agency doctor, the court found his conclusions to conflict with "overall conclusions to be drawn from the record."[200] The issue on appeal, the court held, was an "analysis of the record as a whole and the weight to be given certain evidence."[201] The court reversed the Agency on appeal, but there had been some support for the agency's position. No fee was justified, the court held.[202]

The role of the court, however, is not to weigh evidence on an administrative appeal. The appeal is not *de novo*. If any weight was to be given to the report on which the Agency ruled, the court should not have reversed the Agency in the first instance. The court in *Jones* apparently conceded that it stepped beyond that role, and weighed evidence on appeal. If it erred in this manner on the initial review of the administrative decision, substantial justification for the agency's position is present not because some evidence supported an erroneous decision, but rather because the Agency was erroneously reversed on appeal.

Application of a standard that would deny attorney's fees because "some evidence" was present can lead to tenuous results even when the court did not reweigh evidence on the underlying appeal. In *Cornella v.*

198. 565 F. Supp. 52 (W.D. Mich. 1983).
199. *Id.* at 56.
200. *Id.*
201. *Id.*
202. *Id. See also* Kerr v. Heckler, 575 F. Supp. 455, 458 (S.D. Ohio 1983).

Schweiker,[203] the district court denied benefits because it found that some evidence of the claimant's ability to work had been present.[204] This decision was reversed on appeal to the Court of Appeals for the Eighth Circuit. The district court on the underlying appeal from a denial of social security benefits found that this work activity evidence was not substantial when compared to the whole record.[205] In its fee decision, the district court distinguished *Wolverton*, in which "no" evidence had been present.[206] However, the reported decision of the underlying appeal indicates that the critical omission from the administrative record in *Cornella* was virtually indistinguishable from that in *Wolverton*. In both cases, reversal was mandated because a denial of benefits arose from testimony by a vocational expert predicated on an assumed exertional capacity. Insufficient evidence was present in each case to support the vocational expert's assumptions concerning the claimant's exertional capacity.[207] While *Wolverton* focused on this lack of evidence in support of a critical element of proof of nondisability,[208] the decision on fees by the district court in *Cornella* looked to evidence unrelated to the vocational expert's testimony to find justification for the position of the Agency.[209]

The government carries the burden of proof. Once it is shown that the claimant cannot return to his previous occupation,[210] and if its proof fails on any element, the presence of "some evidence" to prove an unrelated issue cannot be relevant to a fee petition. Evidence virtually always will be present to support some elements of the agency's benefit denial.[211] If the "no evidence" standard is as strictly applied as suggested by the district court in *Cornella*, fees will only be awarded if the Agency acted in utter disregard of uncontroverted proof of disability. This is not the result intended by Congress.[212]

---

203. 553 F. Supp. 240 (D.S.D. 1982), *rev'd*, 728 F.2d 978 (8th Cir. 1984).

204. *Id.* at 244.

205. Cornella v. Schweiker, 545 F. Supp. 918 (D.S.D. 1982).

206. 553 F. Supp. at 244.

207. Wolverton, 533 F. Supp. at 425; Cornella, 545 F. Supp. at 930-32.

208. 533 F. Supp. at 425.

209. 553 F. Supp. at 244. On appeal, the court of appeals held that the Agency did not act reasonably if it relied on isolated evidence and ignored the overwhelming evidence of disability in denying the claim. Cornella v. Schweiker, 728 F.2d 978, 984 (8th Cir. 1984).

210. *See supra* note 40.

211. *Cf.* 20 C.F.R. § 404.1520 (1983) (sequential evaluation of disability claims).

212. *See* Cornella, 553 F. Supp. at 243 (substantial justification standard a "middle ground" between automatic award and award for governmental bad faith). *Compare* Jones v. Schweiker, 565 F. Supp. 52, 56 (W.D. Mich. 1983), *and* Wolverton v. Schweiker, 533 F. Supp. 420, 425 n.14 (D. Idaho 1982) (awards under the Equal Access to Justice Act would be rare), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984), *with* Zimmerman v. Schweiker, 575 F.

3. *The "Reasonableness" Standard*

Not only have courts asked if any evidence were present in the record to justify a denial of fees. They have sought to evaluate "substantial justification" for the position of the Social Security Administration on appeal from administrative determinations by examining the reasonableness of the agency's position. For example, in *Vega v. Schweiker*,[213] an attorney's fee was awarded under the Equal Access to Justice Act to a claimant who obtained remand to the Agency for a further evidentiary hearing. The claimant was non-English speaking, essentially uneducated, and unrepresented. The record, the court held, "clearly established" the need for remand. Even if a mere "reasonableness" standard were applied, the court held, a fee would be awarded.[214]

"Reasonable," as applied in *Vega*, is adherence to established law of the controlling federal circuit court by the Social Security Administration in decisions from administrative hearings.[215] The unreasonable behavior of the Agency in failing to apply applicable law repeatedly has resulted in attorney's fee awards following reversal or remand of agency adjudications.[216] These decisions have relied on an inability to justify the legal basis for the agency's action, rather than a failure of the proof presented to the Agency.

A test of reasonableness, however, has been applied not only to the legal standard advocated by the Agency, but to the quantum of evidence in the agency record.[217] That the government position is "arguably defensible,"[218] or that resolution of a genuine factual dispute is a

---

Supp. 1436, 1440 (E.D.N.Y. 1983) ("If successful claimants' fees were denied simply because some elements of the government's position were genuine, there would be few awards and little additional incentive for those claimants who might otherwise not contest an adverse determination.").

213. 558 F. Supp. 52 (S.D.N.Y. 1983).

214. *Id.* at 54.

215. *See* Vega v. Schweiker, 549 F. Supp. 713 (S.D.N.Y. 1982) (decision on the merits of the appeal for social security benefits).

216. *E.g.*, Phillips v. Heckler, 574 F. Supp. 870 (W.D.N.C. 1983) (failure to follow mandate of court on remand); Ceglia v. Schweiker, 566 F. Supp. 118 (E.D.N.Y. 1983) (failure to weigh medical evidence properly). *See* Cornella v. Schweiker, 728 F.2d 978, 983-85 (8th Cir. 1984) ("reasonable basis in fact and law" lacking to support Agency decision).

217. Washington v. Heckler, 573 F. Supp. 1567, 1571-73 (E.D. Pa. 1983). Courts frequently have required that the government show reasonableness in both law and fact. *E.g.*, Ceglia v. Schweiker, 566 F. Supp. 118, 123 (E.D.N.Y. 1983); Hornal v. Schweiker, 551 F. Supp. 612, 617 (M.D. Tenn. 1982). It has also been suggested that the test is whether there is a reasonable basis in law *or* fact for the government position. Chee v. Schweiker, 563 F. Supp. 1362, 1364 (D. Ariz. 1983).

218. Guthrie v. Schweiker, 718 F.2d 104, 108 (4th Cir. 1983).

"close call,"[219] however, are not standards susceptible of easy determination. Such labels offer no guide by which the propriety of a fee award may be measured.

To articulate the factors justifying the government position, the Court of Appeals for the Third Circuit, in *Dougherty v. Lehman*,[220] set out a three-part test of reasonableness. Under this analysis, the court first must determine that a reasonable basis in truth existed for the allegations of the pleadings; then that a reasonable basis in law existed for the legal theory advanced to support the government position; and finally that the facts alleged supported the theory presented. Only if the government proved each of these requirements was its position substantially justified.[221]

This analysis was applied to the review of a social security claim in *Lonning v. Schweiker*.[222] Conceding that it had some difficulty strictly applying this three-part test to administrative appeals, the court in *Lonning* granted a fee award. The evidence, the court held, did not provide a reasonable basis in truth for termination of benefits. The facts that existed did not support a legal finding of no disability.[223]

As with courts applying a "no evidence" test, however, the court in *Lonning* stepped outside its proper role. It reweighed the evidence. To reverse the termination of disability benefits, it had rejected credibility findings concerning the reports of examining physicians. These reports indicated no disability was present. Because "corroborating, occupation related evidence" was not in the record, the court found that the first prong of the *Dougherty* test had not been met.[224] This analysis is indistinguishable from the quantum of evidence analysis suggested by courts using the "no evidence" standard. A "reasonable basis in truth" under this analysis is coextensive with the presence of evidence to support the denial of benefits. As did the court in *Wolverton*, the court in *Lonning* demanded some evidence of each element that the government has the

---

219. Ulrich v. Schweiker, 548 F. Supp. 63, 66 (D. Idaho 1982). In Zimmerman v. Schweiker, 575 F. Supp. 1436, 1439-40 (E.D.N.Y. 1983), the court cast a "reasonableness" inquiry in terms of whether reasonable private counsel would have advised his client to proceed, after evaluating the merits of the case. This approach should achieve similar results to the analysis suggested below: fees will not be awarded if the government presents a creditable legal theory supported by substantial evidence.

220. 711 F.2d 555 (3d Cir. 1983).

221. *Id.* at 564. *See* United States v. Kungys, 575 F. Supp. 1208 (D.N.J. 1983) (*Dougherty* test applied to court proceeding involving evidentiary hearing).

222. 568 F. Supp. 1079 (E.D. Pa. 1983).

223. *Id.* at 1083-85.

224. *Id.* at 1084.

burden to prove.[225]

Applying the third prong of the *Dougherty* test, the court in *Lonning* held that, even if a reasonable basis in truth for the facts contained in the administrative record was presupposed, the facts did not "support a legal finding of no disability."[226] If, however, it is on this arm of *Dougherty* that fees are awarded in appeals from the Social Security Administration, then all successful appeals from adverse administrative decisions must give rise to a fee award. If there is no substantial evidence to support the Agency's decision, there must not have been facts in the Agency record to support any valid theory for denial of benefits.

The first prong of the *Dougherty* test presumes that allegations of fact will appear in the pleadings. The pleadings in a social security appeal merely consist of allegations of the existence of administrative proceedings, and conclusory statements as to the legal significance of the evidence adduced in those proceedings. *Lonning* strives to apply the first prong of *Dougherty* by seeking a reasonable basis of truth for the agency decision to terminate benefits, but concedes that this becomes a mixed question of fact and law, not strictly a question of fact.[227] But if the first prong is inapplicable, and the third prong makes reversal of the underlying claim a virtual predicate for a fee award, the *Dougherty* analysis, like other tests of reasonableness, fails when applied to administrative appeals under the Social Security Act.[228]

4. *Creditable Legal Theories Supported by Substantial Evidence*

Dougherty v. Lehman provides an attractive analysis for most fee claims under the Equal Access to Justice Act. Can it be better applied

---

225. *See supra* notes 192-94, 201-07 and accompanying text.

226. 568 F. Supp. at 1084 n.5.

227. *Id.*

228. In Washington v. Heckler, 573 F. Supp. 1567, 1570-71 (E.D. Pa. 1983), the court noted the difficulties in applying *Dougherty* to administrative proceedings. In such proceedings, the court must decide if reasonable minds could disagree whether the Agency conduct was supported by substantial evidence.

> If, after considering the original agency determination and its relationship to the law as it then existed, the court is convinced that the government was unreasonable in proceeding to litigation, an award of attorney's fees is warranted. If, on the other hand, the court . . . determines that, by a narrow margin, the agency's decision lacked a substantial basis, such an award would be improper.

Id. at 1571. This effectively dispenses with the three-part analysis of *Dougherty*; the test is one of reasonableness of the Agency's decision. The court in *Washington* found the Agency had a reasonable basis in fact for a denial of benefits. In so doing, it implicitly conceded to reweighing the evidence in reversing the decision to deny benefits. *Id.* at 1571-73.

to social security appeals than *Lonning* suggests? The three-part *Dougherty* standard cannot be applied to administrative appeals. But *Dougherty* provides a framework by which a court may consider a claim for attorney's fees arising out of a social security claim.

This first hurdle that the government must meet under *Dougherty* is to show that there is a reasonable basis in truth for the facts alleged in its pleadings. This hurdle simply is inapplicable to an appeal from an administrative record. The facts advanced in the pleadings will be only that administrative proceedings took place. It is the legal significance of the evidence taken in the course of these proceedings that is the focus of the litigation arising out of the complaint for administrative review. The complaint and answer will assert differing conclusions of law to be drawn from the evidence presented to the Agency, but there will be no factual dispute in the pleadings.

Nor can the first step of the *Dougherty* test be applied to the evidence adduced in the agency proceedings. Although some of this evidence may have been developed at the behest of the agency, it does not constitute facts adopted or advanced by the agency. The evidence consists of medical reports, vocational reports, and testimony of witnesses at the administrative hearing.[229] Some evidence will favor a finding in favor of the claimant; other evidence will militate against it. By itself, this body of evidence cannot be analogized to facts asserted in pleadings.

It has been suggested that the decision of the administrative law judge represents the facts described in the first part of the *Dougherty* test.[230] In deciding the claim, the administrative law judge makes findings of fact from the evidence. Arguably, by choosing to litigate, the Agency adopts the administrative law judge's findings and asserts their reasonable basis in fact.

To ask whether the findings of the judge have such a reasonable basis, however, is only to reinquire as to whether substantial evidence supported the Agency decision denying benefits. If there is substantial evidence to support the findings of the administrative law judge, the findings have a reasonable basis. If there is no substantial evidence, there can be no reasonable basis in fact to support these findings.[231]

The second inquiry *Dougherty* recommends to a court considering

229. *See supra* notes 34-43 and accompanying text.

230. *See* Washington v. Heckler, 573 F. Supp. 1567, 1571 (E.D. Pa. 1983).

231. *See* Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700, 719 (3d Cir. 1983) (Hunter, J., dissenting); Washington v. Heckler, 573 F. Supp. 1567, 1570-71 (E.D. Pa. 1983); Operating Eng'rs Local Union No. 3 v. Bohn, 541 F. Supp. 486, 495 (D. Utah 1982).

a fee award is whether there was a reasonable basis in law for the legal theory advanced by the government. It is here that the analysis of a claim for attorney's fees under the Equal Access to Justice Act in social security litigation must begin. If the government advocates an unreasonable legal theory, fees should be awarded to a prevailing party.[232] If, conversely, the legal theory advanced is creditable, the court should proceed to examine the facts supporting the Agency decision.[233]

When does the Agency advance an unreasonable theory of law? With one notable exception,[234] courts have agreed that fees should be awarded under the Equal Access to Justice Act when the government advances a theory that patently is contrary to controlling precedent.[235] Fee awards rendered because the Agency position was "unreasonable" or "made without evidence" may better be understood if consideration is given to the authority supporting the legal theory advanced by the Agency on appeal.[236]

Concern has been expressed with the policy of nonacquiesence adopted by the Social Security Administration.[237] By this policy, the Agency applies its own interpretation of the Social Security Act to all claimants, even if the district or circuit court having jurisdiction over an appeal from denial of a claimant's social security benefits has adopted a contrary interpretation of the law.[238] If the controlling court[239] has recently and definitively spoken on an issue, there can be

---

232. *See, e.g.*, Phillips v. Heckler, 574 F. Supp. 870, 872 (W.D.N.C. 1983) (failure to follow order of court on remand).

233. *See, e.g.*, Cornella v. Schweiker, 553 F. Supp. 240, 244 (D.S.D. 1982) (evidence would support nondisability finding under analysis used in other circuits), *rev'd*, 728 F.2d 978 (8th Cir. 1984).

234. Wyandotte Savings Bank v. NLRB, 682 F.2d 119, 120 (6th Cir. 1982) ("a reasonable attempt to reopen a closed question").

235. *See* Cornella v. Schweiker, 728 F.2d 978, 984-85 (8th Cir. 1984); Ceglia v. Schweiker, 566 F. Supp. 118, 124 (E.D.N.Y. 1983); San Filippo v. Secretary of Health and Human Services, 564 F. Supp. 173, 175 (E.D.N.Y. 1983); Chee v. Schweiker, 563 F. Supp. 1362, 1365 (D. Ariz. 1983). *Cf.* Spencer v. NLRB, 712 F.2d 539, 559 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984) (consider strength of government's argument that *extant* law permits result in its favor).

236. *See supra* notes 215-16 and accompanying text.

237. Hillhouse v. Harris, 715 F.2d 428, 430 (8th Cir. 1983); Lopez v. Heckler, 572 F. Supp. 26, 30 (C.D. Cal.), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *application to vacate partial stay denied*, 104 S. Ct. 221 (1983).

238. *See* Lopez v. Heckler, 572 F. Supp. 26, 28 & n.7 (C.D. Cal.), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *application to vacate partial stay denied*, 104 S. Ct. 221 (1983); Chee v. Schweiker, 563 F. Supp. 1362, 1365 (D. Ariz. 1983).

239. "Controlling court" refers to the federal district court in which a social security appeal is docketed, the federal court of appeals to which appeal from that district would run, and the United States Supreme Court.

no reasonable basis for opposing the court's interpretation of law.

Claimants whose benefits have been denied because of the refusal of the Social Security Administration to accept the interpretation of social security law adopted by the claimant's circuit are precisely the victims of unreasonable government action that the Equal Access to Justice Act was designed to aid. Conversely, the policy of nonacquiesence, suggested to be contumacious by at least one circuit judge,[240] is the type of government conduct that the Act seeks to deter. Certainly, the government should be deterred from defending such behavior on appeal to the district courts.[241] If the government does litigate, fees should be awarded to prevailing claimants.[242]

A closer question is presented when there is no settled law in the controlling court. The government should not be dissuaded from advancing novel, well-founded legal theories.[243] If precedent exists for the Agency's position in other circuits, there is a reasonable basis for the government position.[244] Similarly, the Agency may reasonably advocate a theory if no circuit has spoken on the theory and it is advanced in good faith. In these cases, no attorney's fee should be awarded under the Equal Access to Justice Act. If the Agency advocates a theory adverse to settled law in other courts, however, it cannot be said that there was substantial justification for the government position.[245] The government may wish to encourage the adoption of the unprecedented position in the court, but it cannot reasonably require the claimant to bear his own counsel fees when it fails to convince the court to adopt its interpretation of the law.[246]

---

240. Hillhouse v. Harris, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring).

241. *See supra* notes 134-37 and accompanying text. It has been suggested that nonacquiescence justifies an award of attorney's fees under the "bad faith" standard of common law, as permitted by 28 U.S.C. § 2412(c)(2) (Supp. V 1981). *See* Chee v. Schweiker, 563 F. Supp. 1362, 1365 (D. Ariz. 1983).

242. Chee v. Schweiker, 563 F. Supp. 1362, 1365 (D. Ariz. 1983); San Filippo v. Secretary of Health and Human Services, 564 F. Supp. 173, 175 (E.D.N.Y. 1983). *But see* Kirkland v. Railroad Retirement Bd., 706 F.2d 99, 104-05 (2d Cir. 1983) (agency position supported by decision in several other circuits, fee award denied). A fee may not be appropriate if the parties were unaware of the error of law underlying the Agency position. *See* Bennett v. Schweiker, 543 F. Supp. 897, 898-99 (D.D.C. 1982) (relying on prelitigation position of Agency).

243. McDonald v. Schweiker, 551 F. Supp. 327, 333 (N.D. Ind. 1982), *rev'd*, 726 F.2d 311 (7th Cir. 1984); Moholland v. Schweiker, 546 F. Supp. 383, 386 (D.N.H. 1982). In McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983), the court indicated that the government must have a "solid though not necessarily correct basis in fact and law" to avoid fee liability.

244. Kirkland v. Railroad Retirement Bd., 706 F.2d 99, 104-05 (2d Cir. 1983); Cornella v. Schweiker, 553 F. Supp. 240, 244 (D.S.D. 1982), *rev'd*, 728 F.2d 978 (8th Cir. 1984).

245. *See* Ceglia v. Schweiker, 566 F. Supp. 118, 124 (E.D.N.Y. 1983).

246. *See* Spencer v. NLRB, 712 F.2d 539, 559 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984).

Thus, when the federal district court in which a social security appeal is docketed has previously rejected the legal theory upon which the agency relies for affirmance, an award of attorney's fees is appropriate if the claimant prevails.[247] Similarly, a fee is mandated if the Agency unsuccessfully relies on a legal theory previously rejected by the controlling circuit, by the Supreme Court, or by the great weight of authority outside of the controlling circuit.[248] But if the controlling court has not spoken on the issue, and a strong argument can be made for the legal theory advocated by the Agency, a fee should not be awarded without further examination.[249] This should particularly be true when precedent from other courts supports the Agency. In these cases, the government advances a reasonable legal position.

If the government is found to have advocated a legal theory having a reasonable basis in law, the final step in the *Dougherty* analysis is to inquire whether the facts alleged reasonably support the legal theory advanced. In an administrative appeal, the "facts alleged" may reasonably be analogized to the facts adduced in the course of the Agency proceedings.[250] The issue in applying *Dougherty* to administrative proceedings is whether the evidence of legal significance in the Agency record can support the legal standard advanced by the Agency on appeal. Thus, if there is some evidence to support the legal theory of the government, and the court finds that there was a reasonable basis in law for the Agency to advocate that theory, a fee award should be denied. If the evidence fails under controlling case law or any other creditable legal theory, however, the administrative record cannot provide a reasonable basis in fact for the legal theory.

For example, the facts adduced cannot reasonably support the legal theory advanced when the reviewing court imposes a legal standard on the Agency and remands the claim with instruction to reevaluate the evidence in light of that standard, but the Agency fails to do so. In effect, the Agency rejects the law of the case. If it fails to obtain evidence relevant to the interpretation of law made by the reviewing court, and the denial of benefits ultimately is reversed for lack of substantial evidence to support a finding under applicable law, there cannot be a reasonable basis in fact to support the legal conclusions drawn

247. *See* Wolverton v. Schweiker, 533 F. Supp. 420, 425 (D. Idaho 1982) (failure to follow instructions on remand), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984).

248. *See* Underwood v. Pierce, 547 F. Supp. 256, 261-62 (C.D. Cal. 1982).

249. *See* Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387, 1392 (Fed. Cir. 1982).

250. *See* Lonning v. Schweiker, 568 F. Supp. 1079, 1084 n.5 (E.D. Pa. 1983).

by the Agency.[251]

The failure of the record to support the Agency's position on the law may stem from the refusal of the Agency to acquiesce to court rulings concerning the significance of evidence. Some circuits have held, for example, that reports of "one-shot doctors," physicians who only make one brief examination of the claimant, cannot be substantial evidence in the face of contrary findings by treating physicians.[252] If the Agency relies on the findings of the examining physician to support its legal theory, it fails to meet the final test of justification. The evidence on which it relies, lacking legal significance, cannot support the Agency's position.[253]

To show that the facts alleged reasonably support the legal theory advanced, the Agency must show substantial evidence to support its interpretation of the Social Security Act. Once it is established that the legal theory of the Agency was reasonably advanced, then the Agency must show that it would have been entitled to an affirmance of its administrative determination if the court had accepted its interpretation of the law. If the Agency cannot muster from the record the substantial evidence needed to support its administrative decision, the Agency did not reasonably defend its action on appeal.[254]

G. *Common-Law Exceptions*

To date, only a single decision of a federal district court[255] has awarded a fee after invoking section 2412(b) of the Equal Access to

---

251. *See* Moholland v. Schweiker, 546 F. Supp. 383 (D.N.H. 1982); Wolverton v. Schweiker, 533 F. Supp. 420 (D. Idaho 1982), *rev'd in part sub nom.* Wolverton v. Heckler, 726 F.2d 580 (9th Cir. 1984).

252. *See, e.g.*, McGhee v. Harris, 683 F.2d 256, 259 (8th Cir. 1982); Allen v. Weinberger, 552 F.2d 781, 786 (7th Cir. 1977).

253. *See* Ceglia v. Schweiker, 566 F. Supp. 118 (E.D.N.Y. 1983). The Agency decision is based on evidence not accorded the significance mandated by the prior interpretations of the controlling courts. Presumably, a court that awarded attorney's fees only if "no evidence" supported the Agency would deny fees in such a case. *See* Jones v. Schweiker, 565 F. Supp. 52 (W.D. Mich. 1983). But the Social Security Administration is equally unreasonable when it defends on appeal Agency determinations that fail to apply evidentiary rules adopted by the controlling courts as when it defends determinations that fail to apply substantive interpretations of social security law adopted by those same courts. Fees should be awardable in both cases.

254. *See supra* notes 164-66 and accompanying text. Under the analysis suggested here, however, a fee award will not be required whenever the Agency is reversed on appeal. Consideration first is given to the legal theory advanced by the Agency. The court will reverse the Agency if there is not substantial evidence to support the Agency determination under the legal analysis adopted by the court. But if there is evidence to support a creditable alternate legal theory advanced by the Agency, fees will be denied.

255. Chee v. Schweiker, 563 F. Supp. 1362, 1365 (D. Ariz. 1983).

Justice Act.[256] Under this section, fees may be awarded against the United States to the same extent that a private party would be liable.[257] The award is discretionary.[258] Insofar as section 2412(b) creates a right to fees if the government litigates in "bad faith,"[259] it is eclipsed by the provisions of the Act that permit fees if the government is unable to show that its position is substantially justified.[260] But because it is not subject to the sunset provision of the remainder of the Act,[261] and because it may authorize a fee even if the government position is substantially justified,[262] section 2412(b) has independent significance.

Although the government propounded a creditable legal theory, fees may be awarded under the common benefit or common fund exception to the American rule.[263] This exception, however, is of little use to a litigant appealing from the denial of social security benefits. Adoption of the interpretation of law that the claimant urges on appeal may benefit large numbers of claimants,[264] but the beneficiaries are not an identifiable class.[265] Only through the processing of individual claims

---

256. 28 U.S.C. § 2412(b) (1982).

257. *See supra* notes 17-20 and accompanying text.

258. "Unless expressly prohibited by statute, a court *may* award reasonable fees and expenses of attorneys . . . ." 28 U.S.C. § 2412(b) (Supp. V 1981) (emphasis added). *See* Premachandra v. Mitts, 727 F.2d 717, 723-24 (8th Cir. 1984).

259. *See supra* note 18 and accompanying text.

260. 28 U.S.C. § 2412(d) (Supp. V 1981). *See* H.R. REP. NO. 1418, *supra* note 14, at 14, 1980 U.S. CODE CONG. & AD. NEWS at 4993 (substantial justification a middle ground between automatic fee award and an award if government action "arbitrary, frivolous, unreasonable, or groundless"); *cf.* Bennett v. Schweiker, 543 F. Supp. 897 (D.D.C. 1982) (neither lack of substantial justification nor bad faith shown).

261. 28 U.S.C. § 2412 note (1982).

262. Fees may be paid as at common law to a prevailing party. There is no provision under section 2412(b) by which the government may avoid liability for fees if its position was justified. Fees paid are to be "reasonable," with no stated limitation on the hourly rate used to calculate the fee. A claim for fees may be made within a reasonable time from final judgment; the 30 day limitation from final judgment of section 2412(d) does not apply. McQuiston v. Marsh, 707 F.2d 1082, 1085 (9th Cir. 1983).

263. *See supra* notes 19-20 and accompanying text.

264. In Ocasio v. Schweiker, 540 F. Supp. 1320, 1321 (S.D.N.Y. 1982), for example, the Agency revised an interpretation of widow's insurance benefits, 42 U.S.C. § 402(e) (1982), by stipulation in the course of the appeal. In Chee v. Schweiker, 563 F. Supp. 1362, 1363 (D. Ariz. 1983), the claimant sought to require that the Agency show improvement in his condition prior to terminating benefits, as mandated by Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1981). Some 34,000 individuals affected by the Agency nonacquiesence in *Finnegan* had received notice as class members in litigation concerning the same issue. *See* Heckler v. Lopez, 104 S. Ct. 10, 11 (Rehnquist, Circuit Justice) (granting partial application for stay), *application to vacate partial stay denied*, 104 S. Ct. 221 (1983).

265. *See* Stevens v. Municipal Court, 603 F.2d 111, 112-13 (9th Cir. 1979) (fees denied under common benefit exception due to lack of showing of identity and number of a class of indigents denied counsel in a municipal court).

are the beneficiaries ascertainable. Furthermore, the claimant's litigation will not have created or augmented a common fund.[266] Individual claimants may be able to claim social security benefits that would not otherwise be available to them, but the fund from which these benefits are to be drawn will only be increased through legislative action. In any event, an award of fees to a successful litigant will not effectively shift the burden of fees to the nonlitigating beneficiaries, as is the goal of the common benefit or common fund exception.[267] Rather, the expenses of the fee will be born equally by all claimants, benefited or not, as a cost of administering social security.[268]

The bad faith exception of the American rule, however, can be triggered in social security appeals. In *Chee v. Schweiker*,[269] the court suggested that the Agency policy of nonacquiesence exhibits bad faith and creates a right to fees. Of course, the Agency may in good faith attempt to modify existing law. But if it is Agency policy, in the face of a settled interpretation of law that would compel a finding of disability, to force claimants to litigate appeals from benefit denials, the Agency exhibits bad faith. This is particularly true if the Agency repeatedly has declined to appeal the interpretation of law to an ultimate resolution, as when it will not seek Supreme Court review of adverse decisions from the court of appeals of a circuit that has adopted a position contrary to the Agency's interpretation of the law.[270]

Fees should also be awarded if the Agency is obdurate in following the orders of a reviewing court. If the Agency declines to appeal from an order of remand,[271] but refuses to apply the interpretation of law adopted by the court in the remand order,[272] it exhibits bad faith. Similarly, it acts in bad faith when payment of fees pursuant to the reversal of an Agency decision is only obtained following repeated litigation.[273]

---

266. *See* Spencer v. NLRB, 712 F.2d 539, 543 & n.13 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 1908 (1984); McQuiston v. Marsh, 707 F.2d 1082, 1085 (9th Cir. 1983).

267. *See* Mills v. Elec. Auto-Lite Co., 396 U.S. 375, 392-94 (1970).

268. 28 U.S.C. § 2412(d)(4)(A) (1982).

269. 563 F. Supp. 1362, 1365 (D. Ariz. 1983).

270. *Cf.* Lopez v. Heckler, 572 F. Supp. 26 (C.D. Cal.), *stay denied*, 713 F.2d 1432 (9th Cir.), *partial stay granted*, 104 S. Ct. 10 (Rehnquist, Circuit Justice), *application to vacate partial stay denied*, 104 S. Ct. 221 (1983); Hillhouse v. Harris, 547 F. Supp. 88, 92 (W.D. Ark. 1982), *aff'd*, 715 F.2d 428 (8th Cir. 1983).

271. A remand order involving an interpretation of law is appealable. *See* Gold v. Weinberger, 473 F.2d 1376 (5th Cir. 1973); Cohen v. Perales, 412 F.2d 44, 48 (5th Cir. 1969), *rev'd on other grounds sub nom.* Richardson v. Perales, 402 U.S. 389 (1971).

272. *See, e.g.*, Moholland v. Schweiker, 546 F. Supp. 383 (D.N.H. 1982).

273. Webb v. Harris, 88 F.R.D. 170 (N.D. Ill. 1980) (awarding fees as penalty at common law). *Webb* predates the Equal Access to Justice Act. The Act clarifies the right to an award of fees against the government in such a situation.

If contempt proceedings are taken against the Agency in connection with the appeal of a claim, a fee clearly is warranted.[274]

V. CONCLUSION

Petitions for attorney's fees under the Equal Access to Justice Act arising from social security appeals can be evaluated using a two-step analysis. This analysis provides a meaningful tool for controlling unreasonable actions by the Social Security Administration. First, the court should consider whether a creditable legal theory was advanced on appeal by the Agency. If there is no such theory, a fee award is mandated. If there was a reasonable legal theory advanced for affirmance of the Agency, the court must then determine whether there was substantial evidence of legal significance in the record to support that theory. Fees should be awarded if no such evidence is present.

The Act must be applied to the position of the Agency in civil litigation in the courts, not its actions during the administrative process. No fees, therefore, should accrue merely because the government answers the complaint that initiates a social security appeal. Once the Agency obtains the transcript of the Agency proceedings, however, it must determine if it can reasonably defend the Agency's determination on review. If it cannot, it should expeditiously confess error. If it fails to do so, and needlessly requires the claimant to litigate his appeal, attorney's fees should be awarded under the Act.

The claimant must have prevailed before a fee can be awarded. If his appeal is remanded to the Agency, he should only be eligible for fees is he ultimately prevails on his claim. Once he does so, he may petition for fees for all of his work in the district court. Those fees should be awarded employing the same standard used upon outright reversal of the Social Security Administration.

Applying this analysis, courts can vindicate the purposes of the Act in administrative appeals such as those arising under the Social Security Act. Mere reversal of the Agency will not give rise to a fee award. But the government will be required to show that its position on the appeal was substantially justified in law and fact. If it chooses to litigate a position against settled authority or unsupported by evidence in the record, it will bear the expense of the claimant's counsel.

---

274. *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); *cf.* Hillhouse v. Harris, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring).