

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4721
Summary Calendar

HESTER JACKSON,

Plaintiff-Appellant,

versus

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

Defendant-Appellee.

Appeal from the United States District Court for the
Western District of Louisiana
(CA-88-3046)

(March 4, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I

Hester Jackson filed a complaint in district court for disability benefits. The district court granted the motion for summary judgment filed by the Secretary of Health and Human Services (Secretary) and dismissed Jackson's claims for benefits. While an appeal was pending in this court, the Secretary moved to

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

remand the case to the district court for further administrative proceedings. This court granted that motion. After a supplemental hearing, the Secretary awarded benefits to Jackson. The district court then issued a new judgment.

On December 18, 1991, Jackson filed in the district court a petition for attorney fees and litigation expenses under the Equal Access to Justice Act (EAJA). In the petition, Jackson requested \$3172 for attorney fees, paralegal fees, and litigation expenses. Jackson calculated that sum based on an hourly compensation rate of \$118 for her attorney's services and \$95 for work done by the paralegal.

Jackson also petitioned for EAJA fees in this court. An affidavit from Jackson's attorney provides that the value of his services for work done on appeal equaled \$708. The paralegal also prepared an affidavit, which reflects that the value of his services for work done on appeal amounted to \$8098.75. The paralegal calculated this amount based on an hourly rate of \$95.

On January 16, 1992, this court awarded Jackson a flat award of \$600 for her attorney's fees and \$6393.75 for her paralegal's fees. This court, however, did not specify an hourly rate.

On March 11, 1992, pursuant to EAJA, the magistrate judge recommended awarding Jackson her attorney's fees based on an hourly rate of \$100 and her paralegal's fees based on an hourly rate of \$40. Jackson objected to this award on the ground that it allegedly conflicts with this court's January 16, 1992, order. The

district court, however, upheld the magistrate judge's ruling. Jackson now complains of the district court's order.

II

The EAJA authorizes awards of attorney's fees and expenses to a prevailing party in certain civil actions brought by or against the government. See Dole v. Phoenix Roofing, Inc., 922 F.2d 1202, 1205 (5th Cir. 1991). Even though an appellate court may have jurisdiction to decide an EAJA application, "rarely will the district court not be the appropriate tribunal" to make the initial determination on the EAJA application. U.S. v. 329.73 Acres of Land, 704 F.2d 800, 811-12 (5th Cir. 1983) (en banc); see Rose v. United States Postal Service, 774 F.2d 1355, 1363-64 (9th Cir. 1984) (EAJA application requires a ruling from the district court in the first instance); see also Ashton v. Pierce, 580 F.Supp. 440, 441 (D.D.C. 1984) (EAJA application for costs and expenses incurred in both district court and court of appeals decided by district court). The rationale behind these decisions is that the district court, as fact finder, is in a better position to evaluate a request for attorney's fees than an appellate court. Dole, 922 F.2d at 1209.

A district court's EAJA award is reviewed for abuse of discretion. Pierce v. Underwood, 487 U.S. 552, 571, 108 S.Ct. 2541, 101 L. Ed. 2d 490 (1988). Jackson alleges that this court and the district court used different hourly rates to calculate the paralegal's fees. According to Jackson, the "law of the case"

doctrine and res judicata precluded the district court from setting a fee of \$40 per hour for services performed by the paralegal because, as she alleges, this court had earlier set a higher rate. This court, therefore, must determine whether the district court abused its discretion in calculating the paralegal's fees based on an hourly rate of \$40.

Under the "law of the case" doctrine, a lower court is bound by the mandate of the court of appeals as to all matters actually decided by the higher court. Quern v. Jordan, 440 U.S. 332, 347 n.18, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979); Adams-Lundy v. Ass'n of Pro. Flight Attendants, 844 F.2d 245, 247-48 (5th Cir. 1988). If the mandate is silent as to an issue, this doctrine applies only if the appellate court decided the question by "necessary implication." Carpa, Inc. v. Ward Foods, Inc., 567 F.2d 1316, 1320 (5th Cir. 1978), overruled on other grounds, Copper Liquor, Inc. v. Adolph Coors Co., 701 F.2d 542 (5th Cir. 1983) (en banc). This doctrine, however, is not an "inexorable command." Williams v. City of New Orleans, 763 F.2d 667, 669 (5th Cir. 1985). It is simply "an expression of good sense and wise judicial practice." Carpa, Inc., 567 F.2d at 1320.

This court ruled on Jackson's EAJA application before the district court did so. Unlike the district court, we did not specify an hourly rate for the attorney and paralegal fees. The record, therefore, does not reflect a direct conflict between the orders from this court and the district court. Jackson argues,

nonetheless, that based on the amount of the paralegal's fees this court awarded her, one can determine that this court relied on an hourly compensation rate of \$75. Jackson's suggestion, therefore, is that this court "impliedly" ruled on the issue of the paralegal's hourly rate of compensation.

No statutory provision or case law dictates whether a district court and appellate court must reach the same conclusion regarding EAJA fees if a successful litigant requests fees at both levels. The EAJA provides that attorney's fees "shall be based upon prevailing market rates for the kind and quality of the services furnished," but "shall not be awarded in excess of \$75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A). The Supreme Court has held that the phrase "limited availability of qualified attorneys for the proceedings" refers to attorneys having some distinctive knowledge or specialized skill needful for the litigation in question. Pierce v. Underwood, 487 U.S. at 572. Because appellate and trial practice concern different types of proceedings, and different types of skills, different hourly rates may be rationally justified at the appellate and district-court levels. We do not think that the law of the case principles are applicable in this case.

For example, in Mental Health Ass'n of Minnesota v. Heckler, 620 F.Supp. 261 (D.C. Minn. 1985), the district and appellate

courts disagreed on the award of legal fees. There, the defendant asserted that the appellate court's order denying the plaintiff's request for legal fees for work done on appeal precluded the district court from awarding fees for work done at the trial level. Id. at 268. The district court ruled that it could consider awarding fees for work done at the trial level because the court of appeals's one-sentence order did not express an opinion as to "the reasonableness of the underlying facts or factual litigation position." Id. at 268-69. The Heckler court concluded that the "law of the case" doctrine did not apply. Id. at 269.

Jackson does not attack the \$40/hour finding except on the ground that it allegedly conflicts with this court's order. The orders, however, do not expressly conflict. Even if one could read an implicit conflict between the two orders, a careful reading of Pierce v. Underwood and 28 U.S.C. § 2412 indicates that each court could issue its own order. A conflict, therefore, would not amount to error. Accordingly, Jackson has failed to show that the district court abused its discretion in the manner it assessed the recoverable fees.

The district court's judgment is therefore,

A F F I R M E D.