UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-4984

(Summary Calendar)

LUCY N. TANNER,

Plaintiff-Appellant,

VERSUS

DONNA E. SHALALA, Secretary,
Health & Human Services

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(CV-89-2641)

(June 22, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Pursuant to 42 U.S.C. § 405(g) (1988), Lucy Tanner sought judicial review of a final decision of the Secretary of Health and Human Services ("the Secretary") denying Tanner disability benefits. After prevailing in her § 405(g) action, Tanner moved for attorney's fees and expenses under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1988), contending that the Secretary's

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* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

legal position in the § 405(g) action had not been substantially justified. The district court denied Tanner's motion, finding that the Secretary's position was substantially justified, and Tanner appeals. Because Tanner has not demonstrated that the district court abused its discretion, we affirm.

I

A

In the course of the administrative proceedings concerning Tanner's claim for disability benefits, Tanner appeared at a hearing before an administrative law judge ("ALJ"). About two weeks later))without notifying Tanner))the ALJ forwarded Tanner's vocational report to a vocational expert and asked, "Are there jobs existing in the national economy which [Tanner] could reasonably be expected to perform?" The expert responded that there were approximately 6,000 such jobs in the State of Louisiana.

The ALJ then forwarded the vocational expert's report to Tanner's counsel with a letter stating:

> Enclosed is a copy of the vocational expert's report I received from Jay H. Kallenbach and a copy of our letter to him. I propose to include this report as an exhibit in Ms. Tanner's record.
>
> Please review the enclosed report and submit any written comments or objections to this office within ten days from the date of this letter. If I have not received a response from you within this time frame, I will assume that you have no objections and will consider this report when rendering my decision in this case.

Administrative Record at 216. Tanner's counsel timely objected to the way the ALJ had described Tanner's work experience to the

vocational expert.[1] "Otherwise," counsel stated, "I have no objections to Mr. Kallenbach's qualifications or his opinions with regard to the interrogatories actually put to him. *It is only the interrogatories themselves which would give rise to an objection on Ms. Tanner's part* . . . ." *Id.* at 217 (emphasis added). Without responding to counsel's objection, the ALJ determined that Tanner was not disabled and denied her application for benefits. Thereafter the ALJ's decision became the final decision of the Secretary.

Tanner sought judicial review in the district court under 42 U.S.C. § 405(g), arguing that she had been denied the opportunity to cross examine the vocational expert, in violation of her right to due process of law.[2] The Secretary argued that no due process violation was shown because "the Secretary's decision . . . was reached only after a thorough assessment of [Tanner's] medical condition, based on subjective and objective evidence," and because "procedural perfection in administrative proceedings was not required as long as the claimant's substantive rights were kept intact." Record on Appeal at 51. The district court granted summary judgment for the Secretary, and Tanner appealed to this Court.

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[1] In a letter to the ALJ counsel argued that the ALJ, by describing Tanner's prior jobs as "academic instructor" and "community organization worker," had exaggerated the level of skill required by Tanner's prior jobs, which chiefly involved driving and janitorial and food service duties.

[2] *See* Record on Appeal at 29-34 (Tanner's motion for summary judgment).

Roughly two weeks after judgment was entered in the district court, we held in *Lidy v. Sullivan,* 911 F.2d 1075 (5th Cir. 1990), *cert. denied,* ___ U.S. ___, 111 S. Ct. 2274, 114 L. Ed. 2d 725 (1991), that due process entitles a disability claimant to cross examine individuals whose reports are considered as evidence in the disability determination.[3] Thereafter, on appeal, the Secretary no longer asserted that Tanner's right to due process of law had not been violated. The Secretary argued only that Tanner had waived her right to cross examine the expert by failing to assert that right before the ALJ.[4]

We rejected the Secretary's waiver argument because (1) "Tanner never expressed . . . a desire to forego confronting" the vocational expert; and (2) by objecting to the interrogatories submitted to the vocational expert, Tanner's counsel "laid the predicate to assert the right to cross-examine [the vocational expert], failing a decision by the ALJ to recast the questions." *Tanner v. Secretary of Health & Human Serv.*, 932 F.2d 1110, 1113 (5th Cir. 1991). We held that "[w]hen the ALJ denied [counsel's] objection *sub silentio,* he deprived [counsel] of the timely

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[3] *See Lidy,* 911 F.2d at 1077 (quoting *Coffin v. Sullivan,* 895 F.2d 1206, 1212 (8th Cir. 1990); *Wallace v. Bowen,* 869 F.2d 187, 192 (3d Cir. 1989)), *cited in Tanner v. Secretary of Health & Human Serv.*, 932 F.2d 1110, 1112 (5th Cir. 1991).

[4] *See Tanner,* 932 F.2d at 1112 ("We have previously held that benefits claimants enjoy due process guarantees, not the least of which is the right to question report drafters such as Kallenbach. *Lidy v. Sullivan,* 911 F.2d 1075, 1077 (5th Cir. 1990). Realizing this, the Secretary sets up as his sole line of defense the contention that Tanner waived her constitutional privilege by not expressly asking to cross-examine Kallenbach." (citations omitted)).

opportunity to assert, specifically, Tanner's right of cross-examination," and "[u]nder such circumstances, we cannot infer a waiver from [counsel's] failure to make an express demand for cross-examination." *Id.*

B

Subsequently, Tanner moved for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), alleging that the Secretary's position in the § 405(g) action had not been substantially justified. In response the Secretary argued that it was reasonable for her to contend on appeal that Tanner had waived her right to cross examine the vocational expert by failing to request cross examination.[5] According to the Secretary, our rejection of her waiver argument on appeal "was not preordained, nor was it foreshadowed in any of this Court's prior opinions." In his report and recommendation the magistrate found that the Secretary's waiver argument had been substantially justified, and that Tanner's motion for attorney's fees should therefore be denied.[6] The district court adopted the magistrate's report and recommendation, and denied Tanner's motion for attorney's fees.

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[5] The Secretary failed to argue that her position in the district court))that Tanner's right to due process was not violated))had been substantially justified. *See* Record on Appeal at 152-54 (Defendant's Response to Plaintiff's Motion for Award of Attorney's Fees and Expenses Under the Equal Access to Justice Act).

[6] The magistrate failed to decide whether the Secretary's position before the district court had been substantially justified. *See id.* at 156-62 (Report and Recommendation).

Tanner appeals, arguing that the Secretary's position in the § 405(g) action was not substantially justified. Specifically, Tanner contends that there was no basis in law or fact for the Secretary's arguments (a) in the district court)to the effect that denial of an opportunity to cross examine the vocational expert did not violate Tanner's right to due process; and (b) before this Court)to the effect that Tanner waived her right to cross examine the vocational expert by failing to request cross examination.[7]

II

28 U.S.C. § 2412(d)(1)(A) provides:

> [A] court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action . . . including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Once the party seeking attorney's fees establishes that she is a prevailing party, "the government must pay . . . unless it is able to prove that its position was substantially justified or special circumstances make an award unjust." *Baker v. Bowen,* 839 F.2d 1075, 1080 (5th Cir. 1988).

In this case it is undisputed that Tanner is a prevailing party, and the Secretary does not contend that special circumstances make an award of attorney's fees unjust.

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[7] Although Tanner's argument touches on additional matters, *see* Brief for Tanner at 11-13 (discussing errors committed by the ALJ), Tanner does not explicitly allege that the district court erred in respects other than the foregoing (a) and (b). *See id.* at 1 ("Statement of Issues"), 13-16.

Consequently, we need only decide whether the district court erred by holding that the Secretary's position was substantially justified. We review that holding for abuse of discretion. *See Pierce v. Underwood,* 487 U.S. 552, 559, 108 S. Ct. 2541, 2547, 101 L. Ed. 2d 490 (1988).

The Supreme Court explains that the "connotation[] . . . most naturally conveyed by the phrase ["substantially justified"] is not `justified to a high degree,' but rather `justified in substance or in the main'))that is, justified to a degree that could satisfy a reasonable person." *Id.* at 565, 108 S. Ct. at 2550. "[T]he government has the burden of showing that its position in every stage of the proceedings was substantially justified by demonstrating that its actions had a reasonable basis both in law and fact." *Baker,* 839 F.2d at 1080.

A

Tanner contends the Secretary's argument before the district court))that no due process violation occurred))was not substantially justified. At the outset we note that neither the magistrate nor the district court explicitly held that the Secretary's argument before the district court was substantially justified.[8] Nevertheless, we construe the district court's denial of Tanner's motion to hold implicitly that the Secretary's position before the

[8] Neither did the Secretary argue that her position before the district court had been reasonable, even though she bore the burden of proving substantial justification. *See* Record on Appeal at 152-54 (Defendant's Response to Plaintiff's Motion for Award of Attorney's Fees and Expenses Under the Equal Access to Justice Act).

district court was substantially justified. Tanner consistently argued that the position taken by the Secretary was not substantially justified, and in her objections to the magistrate's report and recommendation Tanner specifically drew attention to the Secretary's assertion before the district court that no due process violation had occurred.[9] The district court then denied Tanner's motion for attorney's fees "after an independent review of the record[,] a *de novo* determination of the issues, *and consideration of any objections filed therein*." Record on Appeal at 171 (Judgment) (emphasis added). We conclude that the district court considered))and rejected, albeit tacitly))Tanner's argument that the Secretary's position before the district court was not substantially justified.

We also conclude that Tanner has not shown that ruling to be an abuse of discretion. Tanner does not contend that the law, prior to our decision in *Lidy,*[10] clearly entitled her to an opportunity to cross examine the vocational expert. Tanner merely asserts that no reasonable person would consider the ALJ's conduct to be fundamentally fair, and *Richardson v. Perales,* 402 U.S. 389,

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[9] *See id.* at 166 (Objections to Report and Recommendation) (arguing that magistrate's report and recommendation "misstates . . . the position of the Secretary actually defended," and that "[t]he Secretary, in the district court, did take issue with the due process right of plaintiff to cross-examine the vocational expert").

[10] Following our holding in *Lidy*))that a disability claimant is entitled to cross examine individuals whose reports are considered in the disability determination))the Secretary abandoned the argument that due process had not been violated. *See supra* part I.A.

91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971), upon which Tanner relies, does not support that assertion. In *Richardson* the Supreme Court held that

> a written report by a licensed physician . . . may be received as evidence in a disability hearing and, despite . . . an absence of cross-examination . . . may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant, when the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician.

Id. at 402, 91 S. Ct. at 1428. Although we eventually held that Tanner had not waived her right to cross examine the vocational expert, *see Tanner,* 932 F.2d at 1113, prior to that holding it would have been reasonable to argue that (1) Tanner "ha[d] not exercised [her] right to subpoena the [vocational expert] and thereby provide [her]self with the opportunity for cross-examination," *Richardson,* 402 U.S. at 402, 91 S. Ct. at 1428; and (2) therefore under *Richardson* due process was not violated by the ALJ's consideration of the testimony of the vocational expert. *Richardson* therefore does not support Tanner's argument that the Secretary's position before the district court was not substantially justified,[11] and Tanner has not demonstrated that the district court abused its discretion.[12]

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[11] The other case cited by Tanner))*Schweiker v. McClure,* 456 U.S. 188, 102 S. Ct. 1665, 72 L. Ed. 2d 1 (1982)))is distinguishable on its facts because the issue there was the impartiality *vel non* of hearing officers under the Medicare program.

[12] Tanner also contends that the Secretary's reliance on *Morris v. Bowen,* 864 F.2d 333 (5th Cir. 1988), "was clearly misplaced." We disagree. *Morris* is factually distinguishable from this case, but the Secretary did not argue otherwise. The

B

Tanner also contends that the Secretary's waiver argument on appeal was not substantially justified. The Secretary supported that argument by citing *Coffin v. Sullivan,* 895 F.2d 1206 (8th Cir. 1990), a disability case in which the Eighth Circuit stated that "if the claimant's attorney fails to object to the post-hearing reports or remains silent when the opportunity to request cross-examination arises, the right to cross-examination is waived." *Id.* at 1212. The Secretary also cited *Hudson v. Heckler,* 755 F.2d 781 (11th Cir. 1985), in which the Eleventh Circuit held that a disability claimant's "representative's failure to cross-examine constituted a waiver of the right, and thus no due process violation occurred." *Id.* at 785. We held that those decisions were distinguishable, and did not support a finding of a waiver by Tanner, because counsel for the claimants in *Coffin* and *Hudson* failed to make any objection at all, whereas Tanner's counsel objected to the ALJ's description of Tanner's work experience.

In denying Tanner's motion for attorney's fees, the district court held that

> the Secretary was not unreasonable in relying upon the *Coffin* and *Hudson* decisions as authority for [the] position that Tanner had waived her right to cross examine the vocational expert because her attorney had not requested the right to cross examine the expert. The Fifth Circuit . . . distinguished *Coffin* and *Hudson* on their facts because, in neither case, had the representative replied to the ALJ's letters. It was not

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Secretary merely accurately cited *Morris* for the holding that "procedural perfection in administrative proceedings [is] not required." Record on Appeal at 51 (Memorandum in Response to Plaintiff's Brief) (citing *Morris,* 864 F.2d at 335).

> at all clear that this was a material factual distinction until the Fifth Circuit's decision in the present case.

Record on Appeal at 161 (Report and Recommendation).

Tanner takes issue with the district court's holding, arguing that our opinion on appeal "made it clear that the Secretary's reliance on these decisions [*Coffin* and *Hudson*] had no basis in fact." Tanner is mistaken. Although we distinguished *Coffin* and *Hudson* on their facts, we did not hold that the Secretary's reliance on those cases had no basis in fact, *see Tanner,* 932 F.2d at 1113, and we are not of that opinion now. Although Tanner's counsel objected to the ALJ's description of Tanner's work experience, counsel never mentioned cross examination and explicitly stated that Tanner had no further objections. Those facts provided a reasonable)) if ultimately unpersuasive)) basis for the Secretary's waiver argument. Tanner has not established that the district court abused its discretion by holding that the Secretary's position was substantially justified.

III

For the foregoing reasons, we **AFFIRM** the district court's denial of Tanner's motion for attorney's fees under the Equal Access to Justice Act.