Fordham Law Review

Volume 58 | Issue 6 Article 3

1990

EAJA: An Analysis of the Final Judgment Requirement as Applied to Social Security Disability Cases

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EAJA: AN ANALYSIS OF THE FINAL JUDGMENT REQUIREMENT AS APPLIED TO SOCIAL SECURITY DISABILITY CASES

INTRODUCTION

In 1980 Congress passed the Equal Access to Justice Act ("EAJA").[1] EAJA allows a private party to recover attorney's fees and costs[2] from the United States if the party prevails[3] in a civil action against the United States unless the court finds that the government's position in the action[4] was substantially justified.[5] EAJA requires that a prevailing party file his petition for attorney's fees with the court within thirty days of "final judgment in the action."[6]

Since its enactment, several key terms of EAJA have been the subject of both litigation and commentary.[7] Although it has engendered tremendous confusion, the term "final judgment"[8] has received little attention in legal literature and is only recently receiving attention in the courts.

This Note examines the final judgment requirement of EAJA and its application to Social Security disability cases. There is substantial disagreement as to what constitutes the requisite final judgment in Social Security disability cases that, after being appealed to a district court, are remanded to the Social Security Administration where a new disability determination is made.[9] Part I of this Note discusses the history of EAJA and the final judgment requirement. Part II examines the Social

1. *See* Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2321, 2325-30 (1980) (codified at 5 U.S.C. § 504 (1982); 28 U.S.C. § 2412 (1982)).

2. *See* 28 U.S.C. § 2412(d)(1)(A) (1982 & Supp. V 1987).

3. *See id.*

4. *See id.*

5. *See id.*

6. *See id.* § 2412(d)(1)(B).

7. *See, e.g.*, Edwards v. McMahon, 834 F.2d 796, 802 (9th Cir. 1987) (discussing various interpretations among circuit courts as to meaning of "substantial justification"); Brown v. Secretary of Dep't of Health & Hum. Servs., 747 F.2d 878, 882-83 (3d Cir. 1984) (discussing interpretations among circuits as to meaning of "prevailing party"); Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 Ariz. St. L.J. 229, 241-43 (1987) (discussing "substantial justification"); Wheeler & Lavan, *The Equal Access to Justice Act: The "American Rule" Revisited*, 15 Pub. Cont. L.J. 60, 64-68 (1984) (discussing terms "prevailing party," "position of the United States," and "substantially justified"); Note, *Institutionalizing an Experiment: The Extension of the Equal Access to Justice Act—Questions Resolved, Questions Remaining*, 14 Fla. St. U.L. Rev. 925, 930-35 (1987) (discussing court's construction of "prevailing party" and "position of the United States").

8. 28 U.S.C. § 2412(d)(1)(B) (1982 & Supp. V 1987).

9. *Compare* Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983) (final judgment where case remanded is court order affirming, reversing or modifying new decision on remand) *with* Melkonyan v. Heckler, 878 F.2d 1183, 1186 (9th Cir. 1989) (final judgment where case remanded is administrative determination concerning amount of benefits due claimant) (on file at Fordham Law Review), *withdrawn*, 895 F.2d 556 (1990) *and* Melkonyan v. Heckler, 895 F.2d 556, 559 (9th Cir. 1990) (final judgment where case remanded is Secretary's new decision on remand).

Security disability program and its interaction with EAJA. Part III discusses and analyzes the various applications of the final judgment requirement to disability cases. This Note concludes that the approach adopted by the Ninth Circuit in *Melkonyan v. Heckler*,[10] which considers a final non-appealable administrative decision made on remand to be a final judgment, should be adopted and applied throughout the circuits.

I. THE EQUAL ACCESS TO JUSTICE ACT AND THE FINAL JUDGMENT REQUIREMENT

Recognizing that the expense of hiring an attorney deters individuals from engaging in litigation against the government,[11] Congress passed EAJA.[12] The primary purpose of EAJA is "to ensure that certain individuals . . . will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights."[13] Congress recognized that citizens' access to justice would improve if parties who prevail in litigation against the government could recover the reasonable expenses of the litigation.[14]

Broken down into its components, EAJA[15] permits a federal court to

10. 895 F.2d 556 (9th Cir. 1990).

11. *See* H.R. Rep. No. 1418, 96th Cong., 2d Sess. 12, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4984, 4991 [hereinafter *House Report I*].

12. Pub. L. No. 96-481, §§ 201-08, 94 Stat. 2325 (1980) (codified at 5 U.S.C. § 504 (1982); 28 U.S.C. § 2412 (1982)).

Congress originally promulgated EAJA in 1980 with an October 1, 1981 effective date. The Act, however, contained a "sunset" provision providing for automatic repeal on October 1, 1984, three years after implementation. Whether this provision automatically repealed EAJA is a topic of debate. *Compare* Jean v. Nelson, 863 F.2d 759, 773 (11th Cir. 1988) (suggesting repealed and later reenacted), *cert. granted*, 110 S. Ct. 862 (1990) *and* Garcia v. Schweiker, 829 F.2d 396, 401 (3d Cir. 1987) (same) *and* Note, *Determining Fees for Fees Under the Equal Access to Justice Act: Accomplishing the Act's Goals*, 9 Cardozo L. Rev. 1091, 1091 n. 2 (1988) (same) *with* United States v. 6.93 Acres of Land, 852 F.2d 633, 634-36 (1st Cir. 1988) (suggesting amended) *and* Hill, *supra* note 7, at 229 n.3 (same). This debate is irrelevant here, because this Note is concerned with the present version of EAJA as it was "reenacted" or "amended" in 1985.

13. H.R. Rep. No. 120, 99th Cong., 1st Sess., pt. I, at 4, *reprinted in* 1985 U.S. Code Cong. & Admin. News 132, 132-33 [hereinafter *House Report II*].

14. *See id.* at 136. "Providing an award of fees to a prevailing party represents one way to improve citizen access to courts. . . . When there is an opportunity to recover costs, a party does not have to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment." *House Report I*, *supra* note 11, at 4991; *see also* Ewing v. Rodgers, 826 F.2d 967, 970 (10th Cir. 1987) ("EAJA . . . was designed primarily to provide financial incentives for contesting unreasonable governmental action"); Rodriguez v. Bowen, 678 F. Supp. 1456, 1458 (E.D. Cal. 1988) (purpose of EAJA is "to reduce the chance that the expense of litigation would deter an aggrieved party from asserting his or her rights against the government").

15. The Act provides, in relevant part:

> Except as otherwise specifically provided by statute, 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

(1) award "fees and other expenses"[16] to (2) a "prevailing party"[17] in a civil action unless the court finds that (3) the "position of the United States"[18] was (4) "substantially justified",[19] and provided that (5) the ap-

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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.

28 U.S.C. § 2412(d)(1)(A) (1982 & Supp. V 1987).

16. *Id.* Included in the "fees and other expenses" that may be awarded are "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." *Id.* § 2412(d)(2)(A). EAJA requires that the amount of fees awarded be based upon prevailing market rates for the particular services furnished. *See id.* In addition, the Act provides that "attorney fees 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." *Id.* § 2412 (d)(2)(A)(ii). Fee awards in excess of $75 per hour are not uncommon. *See, e.g.*, Bowker v. Bowen, 706 F. Supp. 88, 90 (D. Me. 1989) (awarded $110 per hour); Farmers Coop. Dairy, Inc. v. Block, 703 F. Supp. 379, 382 (E.D. Pa. 1989) (awarded $90 per hour); Wilson v. Bowen, 691 F. Supp. 1257, 1262 (D. Ariz. 1988) (awarded $125 per hour); Tepper v. Bowen, 687 F. Supp. 428, 431 (N.D. Ill. 1988) (awarded $125 per hour); Perez v. Secretary of Health & Hum. Servs., 675 F. Supp. 93, 94 (E.D.N.Y. 1987) (awarded $90 per hour). According to one court, the ability of a district court to award a fee in excess of the $75 per hour cap under an inflation rationale provides a disincentive for agencies to prolong litigation. *See* Natural Resources Defense Council, Inc. v. EPA, 703 F.2d 700, 713 (3d Cir. 1983).

17. 28 U.S.C. § 2412(d)(1)(A) (1982 & Supp. V 1987). To be eligible for a fee award under EAJA, the party seeking the award must have prevailed against the United States. *See id.* The legislative history sheds little light upon the meaning of the term "prevailing party." *See House Report I, supra* note 11, at 4990-91. In particular, the legislative history states that:

> the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits. A party may be deemed prevailing if he obtains a favorable settlement of his case; if the plaintiff has sought voluntary dismissal of a groundless complaint; or even if he does not ultimately prevail on all issues.

Id. (citations omitted). The Supreme Court, however, has recently ruled on the issue. In Sullivan v. Hudson, 109 S. Ct. 2248 (1989), the Court stated "in order to be considered a prevailing party, a plaintiff must achieve some of the benefit sought in bringing the action." *Id.* at 2255.

18. 28 U.S.C. §§ 2412(d)(1)(A), 2412(d)(2)(D) (1982 & Supp. V 1987). Once it is established that a claimant is a prevailing party, the United States is liable for fee awards unless the court finds that the "position of the United States" was substantially justified. *Id.* Prior to the 1985 amendment of EAJA, courts disagreed as to whether "position" referred solely to the government's litigation position, *see* Blitz v. Donovan, 740 F.2d 1241, 1244 (D.C. Cir. 1984); White v. United States, 740 F.2d 836, 842 (11th Cir. 1984); Amidon v. Lehman, 730 F.2d 949, 952 (4th Cir.), *cert. denied*, 469 U.S. 1034 (1984); United States v. 2,116 Boxes of Boned Beef, 726 F.2d 1481, 1487 (10th Cir.), *cert. denied*, 469 U.S. 825 (1984), or whether "position" referred both to the litigation and to the government's action or inaction which led to the underlying conflict. *See* Miller v. United States, 753 F.2d 270, 274 (3d Cir. 1985); Iowa Express Distribution, Inc. v. NLRB, 739 F.2d 1305, 1309 (8th Cir.), *cert. denied*, 469 U.S. 1088 (1984); Rawlings v. Heckler, 725 F.2d 1192, 1195-96 (9th Cir. 1984). That is, some courts required only that the government's litigation position be substantially justified while other courts required *both* that the government's litigation position and the government's action or inaction which led to the underlying conflict be substantially justified. Aware of different interpre-

plication for fees was submitted within thirty days of "final judgment."[20]

The 1980 version of EAJA did not contain any explanatory language regarding the meaning of "final judgment."[21] In 1985, Congress added language to EAJA to clarify the final judgment requirement.[22] The Act now defines final judgment as "a judgment that is final and not appealable, and includes an order of settlement."[23] Congress added this section in an effort to resolve disagreement as to whether a decision was considered final when made, or whether it was not final either until all appellate proceedings were completed or until the time to appeal expired.[24] Con-

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tations among the circuits, Congress included clarifying language in the 1985 version of EAJA. *See* 28 U.S.C. § 2412(d)(2)(D) (Supp. V 1987). This section provides that: " 'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." *Id.* This language clarifies the Congressional intent that "position of the United States" include not only the government's position in the litigation, but its actions and omissions forming the basis of the court action. *See House Report II, supra* note 13, at 139-40. If position means litigation position only, the incentive for careful agency action would be weakened, because regardless of the agency's conduct, the government could avoid any fee liability simply by adopting a reasonable position at trial. *See id.*

19. 28 U.S.C. § 2412(d)(1)(A) (1982 & Supp. V 1987). The government bears the burden of proving that its position was substantially justified. *See* Jackson v. Bowen, 807 F.2d 127, 128 (8th Cir. 1986); Spencer v. NLRB, 712 F.2d 539, 557 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984); Sherman v. Bowen, 647 F. Supp. 700, 703 (D. Me. 1986).

Following the inception of the original EAJA, many courts applied a standard of reasonableness to the substantial justification question. *See* Bazaldua v. INS, 776 F.2d 1266, 1269 (5th Cir. 1985); United States v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985); United States v. Community Bank & Trust Co., 768 F.2d 311, 314 (10th Cir. 1985); Cornella v. Schweiker, 741 F.2d 170, 171 (8th Cir. 1984). Other courts, however, concluded that substantial justification required slightly more than reasonable justification. *See* Massachusetts Fair Share v. Law Enforcement Assistance Admin., 776 F.2d 1066, 1068 (D.C. Cir. 1985); Phillips v. Heckler, 574 F. Supp. 870, 872 (W.D.N.C. 1983).

In 1988, in Pierce v. Underwood, 487 U.S. 552 (1988), the Supreme Court concluded that substantially justified means "justified to a degree that could satisfy a reasonable person." *Id.* at 565. According to the Court, this is the same as the traditional "reasonable basis both in law and fact." *Id.* In reaching its conclusion, the Court rejected the following language contained in the 1985 House Committee Report pertaining to the "reenactment" of EAJA: "[S]everal courts have held correctly that 'substantial justification' means more than merely reasonable. . . . [T]he test [in determining whether something is substantially justified] must be more than mere reasonableness." *House Report II, supra* note 13, at 138 (footnote omitted). The Court rejected this language in the 1985 legislative history because it was an explanation of a phrase ("substantially justified") that was not drafted by the 1985 committee: only the legislative history of the Congress that created the substantial justification standard (the 96th Congress) is relevant. *See Pierce*, 108 S. Ct. at 566. The Court did, however, follow the legislative history of the 96th Congress, which states "[t]he test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact, no award will be made." *House Report I, supra* note 11, at 4989.

20. 28 U.S.C. § 2412(d)(1)(B) (1982 & Supp. V 1987).

21. *See* 28 U.S.C. § 2412(d)(1)(B) (1982).

22. *See* Pub. L. No. 99-80, 99 Stat. 183 (1985) (codified at 28 U.S.C. § 2412(d)(2)(G) (Supp. V 1987)).

23. 28 U.S.C. § 2412(d)(2)(G) (1982 & Supp. V 1987).

24. *See House Report II, supra* note 13, at 135.

gress adopted the latter view that a judgment is final when either all appellate proceedings are completed or the time to appeal has run.[25]

While EAJA's legislative history states that the final judgment requirement "should not be used as a trap for the unwary resulting in the unwarranted denial of fees,"[26] the final judgment requirement is jurisdictional.[27] A litigant's failure to file a timely fee application deprives the court of subject matter jurisdiction, and deprives the disabled individual of his opportunity to obtain much-needed fees. Complying with the final judgment requirement is thus a crucial step in obtaining attorney's fees under EAJA.

The interpretational problem posed by the final judgment requirement lies in identifying the relevant judgment that is final and not appealable. Neither the Act nor the legislative history explain what constitutes a "judgment" under EAJA. Some decisions have suggested that a judgment occurs upon final disposition of the case on the merits.[28] This interpretation of the term "judgment" implies that where a case is initiated in an administrative agency, later appealed to a district court, and eventually decided on remand by the agency, the decision of the agency on the merits would be the requisite judgment that must be final. Other decisions, however, interpret EAJA to require a formal judicial judgment or order.[29]

The question of what constitutes a final judgment under EAJA arises frequently in Social Security disability cases. When a district court considering an appeal of a disability case remands the case to the Social Security Administration for further administrative proceedings and the Administration, on remand, issues a new decision finding the claimant disabled, there is confusion as to which decision constitutes a final judgment for EAJA purposes. Resolving this question and adopting a uniform final judgment standard in the disability context is important because EAJA potentially could be employed by tens of thousands of disabled individuals nationwide.[30]

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25. *See id.* at 146.

26. *Id.* at 146 n.26.

27. *See* United States v. J.H.T. Inc., 872 F.2d 373, 375 (11th Cir. 1989); MacDonald Miller Co. v. NLRB, 856 F.2d 1423, 1424 (9th Cir. 1988); Long Island Radio Co. v. NLRB, 841 F.2d 474, 477-78 (2d Cir. 1988); Olson v. Norman, 830 F.2d 811, 821 (8th Cir. 1987); J.M.T. Mach. Co. v. United States, 826 F.2d 1042, 1046-47 (D.C. Cir. 1987); Clifton v. Heckler, 755 F.2d 1138, 1144-45 (5th Cir. 1985).

28. *See* Allen v. Secretary of Health & Hum. Servs., 781 F.2d 92, 94 (6th Cir. 1986); American Academy of Pediatrics v. Heckler, 580 F. Supp. 436, 438 (D.D.C.), *modified*, 594 F. Supp. 69 (1984).

29. *See* Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983); Warner v. Bowen, 648 F. Supp. 1409, 1411 (S.D. Fla. 1986); Alexander v. Heckler, 612 F. Supp. 272, 274 (D.R.I. 1985).

30. From June 1984 to June 1985, 18,747 disability cases were filed in the district courts throughout the United States. *See* S. Mezey, No Longer Disabled: The Federal Courts and the Politics of Social Security Disability 123 (1988).

II. SOCIAL SECURITY DISABILITY BENEFITS

The Social Security Act established several programs which provide financial assistance to individuals.[31] This Note will address disability insurance and the procedure for handling such claims under the Social Security Act.[32] Created in the mid-1950s,[33] the Social Security disability insurance program provides financial support for members of the labor force who, due to a disability,[34] are totally unable to work.[35]

A. *The Administrative Process*

A claimant must file his application for disability benefits with the Social Security Administration ("SSA").[36] Once the application is filed, it is turned over to a state disability determination service for evaluation.[37] An initial determination is made by the state agency, and a written notice of this determination is mailed to the claimant.[38]

If the claimant is dissatisfied with the initial determination he may request a reconsideration.[39] The claimant has a statutory right to a reconsideration as long as he submits his written request for reconsideration within sixty days of receiving notice of the initial determination.[40]

A claimant who is dissatisfied with the reconsidered determination[41]

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31. Programs administered under the Act include: old-age assistance, old age survivors', and disability insurance benefits, maternal, child health and crippled children services, and supplemental security income for the aged, blind or disabled. *See* 42 U.S.C. §§ 301-306, 401-433, 701-716, 1381-1383 (1982).

32. *See generally* 20 C.F.R. Part 404 (1988).

33. *See* S. Mezey, *supra* note 30, at 1.

34. *See* 20 C.F.R. § 404.1505 (1988).

35. *See* 42 U.S.C. §§ 401-433 (1982). To receive benefits, a claimant must have earned a minimum amount of wages within a specified period preceeding his application for benefits, and he must be totally disabled. That is, due to a medical or physical impairment he must be unable to perform any meaningful job in the national economy. *See* S. Mezey, *supra* note 30, at 28-29. The program functions as an income maintenance scheme, attempting to replace all or part of the income lost due to the disability. *See id.* at 1.

The amount of benefits awarded is related to the pre-disability income of the claimant. *See* R. Francis, Social Security Disability Claims: Practice and Procedure § 1:21, at 22 (1983). In 1985, the United States paid an average of $1,285,386,000.00 a month to 2,656,500 disabled workers. *See* S. Mezey, *supra* note 30, at 38. This amount increases when the benefits awarded to the spouse and children of the disabled worker are considered. *See id*; 20 C.F.R. §§ 404.330, .350 (1988).

36. *See* 20 C.F.R. § 404.610(b) (1988). The SSA is that part of the Department of Health and Human Services which has administrative responsibilities under the Social Security Act. *See id.* § 404.110 (1988).

37. *See* 20 C.F.R. § 404.1503 (1988). State agencies generally make the initial disability determination for the Department of Health and Human Services. States do, however, have the option of turning the disability determination function over to the federal government if they so choose. *See id.*

38. *See* 20 C.F.R. §§ 404.902, 404.904 (1988).

39. *See id.* §§ 404.907-909 (1988).

40. *See id.*; H. McCormick, Social Security Claims and Procedure § 538, at 57 (1983).

41. In 1980, 14.7 percent of the claims that were reconsidered were reversed. *See* S. Mezey, *supra* note 30, at 62-63.

may, within 60 days, request a hearing before an Administrative Law Judge ("ALJ").[42] The claimant has a right to an ALJ hearing provided he files a written request subsequent to the reconsidered determination.[43] The ALJ acts as both a non-partisan fact-finder[44] and decision maker.[45] It is the ALJ's responsibility to develop the case fully and to make a new determination as to claimant's disability.[46]

A claimant who receives an unfavorable decision from the ALJ may request review by the Appeals Council.[47] This is the last level of administrative review,[48] and a claimant must request Appeals Council review before he can initiate judicial review in a federal court.[49] Unlike the reconsideration and ALJ hearing, the claimant does not have a right to Appeals Council review.[50] After receiving a request for review, the Appeals Council may either dismiss or deny the request,[51] or grant the request and make a final determination.[52] If the request is dismissed or denied, the ALJ decision becomes the final, binding decision of the Secretary of the Department of Health and Human Services and is not subject to further administrative review.[53] If the Appeals Council grants review, its decision following review becomes the final and binding decision of the Secretary.[54]

B. *The Appellate Process*

The final decision of the Secretary is subject to judicial review and may be appealed to a district court pursuant to section 405(g) of title 42.[55] As

42. *See* 20 C.F.R. § 404.929 (1988).

43. *See id.* § 404.930 (1988).

44. *See* R. Francis, *supra* note 35, § 8:19, at 19-22; H. McCormick, *supra* note 40, at 75.

45. *See* D. Keenan & C. Ashman, Social Security Disability Claims: Practice and Procedure § 3-6, at 78; H. McCormick, *supra* note 40, at 75.

46. *See* R. Francis, *supra* note 35, § 8:19, at 20 n.3. The ALJ is required to make a full record of the hearing, which is usually taped. *See* D. Keenan & C. Ashman, *supra* note 45, § 3-6, at 78-80. In 1980, ALJs reversed the initial determination of the Administration in approximately 59.1 percent of the cases they reviewed. *See* S. Mezey, *supra* note 30, at 62-63. This high reversal rate suggests that braving the administrative appeals process is beneficial to disabled claimants.

47. *See* 20 C.F.R. § 404.967 (1988). The Appeals Council was established by the Secretary to review decisions of the ALJs. *See* H. McCormick, *supra* note 40, § 599, at 120. The "Secretary" is the head of the Department of Health and Human Services. *See* 20 C.F.R. § 404.1502 (1988).

48. *See* D. Keenan & C. Ashman, *supra* note 45, at 89.

49. *See* 20 C.F.R. § 404.981 (1988); D. Keenan & C. Ashman, *supra* note 45, § 3-10, at 88-89.

50. *See* 20 C.F.R. §§ 404.967, 404.981 (1988).

51. *See id.* § 404.967 (1988).

52. *See id.*

53. *See id.* § 404.981 (1988).

54. *See id.*

55. This section provides in part: "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within 60 days after the mailing to him of notice of such decision . . . ." 42 U.S.C. § 405(g) (1982).

with reconsideration and ALJ review, the claimant has a statutory right to judicial review.[56] The entire administrative process—from filing an application with the SSA to filing a civil action contesting the Secretary's final determination in a district court—often takes more than eighteen months.[57]

The scope of review by a district court in disability cases is narrow, and is limited to determining whether the decision of the Secretary is supported by substantial evidence in the record.[58] After a review of the record, the judge can (1) affirm the decision of the Secretary;[59] (2) reverse the decision of the Secretary and remand solely for a calculation of benefits;[60] or (3) remand the case back to the Secretary for further administra-

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56. *See id.*

57. *See, e.g.*, Melkonyan v. Heckler, 895 F.2d 556, 556-57 (9th Cir. 1990) (application filed May 28, 1982; district court action commenced June 8, 1984); Jankovich v. Bowen, 868 F.2d 867, 868 (6th Cir. 1989) (application filed August 22, 1984; Appeals Council denied review January 18, 1986); Papazian v. Bowen, 856 F.2d 1455, 1455 (9th Cir. 1988) (application filed November 29, 1984; district court action commenced April 7, 1986); Paige v. Sullivan, 717 F. Supp. 626, 627 (N.D. Ill. 1989) (application filed November 1983; district court action November 1987); Lynn v. Bowen, 702 F. Supp. 768, 770 (W.D. Mo. 1988) (application filed August 1984; Appeals Council denial November 1985). *But see* Lopez v. Sullivan, 882 F.2d 1533, 1534 (10th Cir. 1989) (application filed February 28, 1984; district court action commenced November 13, 1984).

In 1985, 18,747 disability cases were filed in the district courts. *See* S. Mezey, *supra* note 30, at 123.

58. *See* 42 U.S.C. § 405(g) (1982); *see also* Richardson v. Perales, 402 U.S. 389, 410 (1971) (district court duty is to determine whether Secretary's findings are supported by substantial evidence).

59. *See* Kelley v. Sullivan, 890 F.2d 961, 964-65 (7th Cir. 1989); Haywood v. Sullivan, 888 F.2d 1463, 1466 (5th Cir. 1989).

When the district court affirms the Secretary's decision, the claimant is not a "prevailing party" and therefore, EAJA may not be used. *See* Kemp v. Heckler, 777 F.2d 414, 414 (8th Cir. 1985). It is settled that a claimant becomes a "prevailing party" under EAJA when it is determined, either by the district court on direct appeal or by the Secretary on remand, that he is disabled and entitled to benefits. *See* Swedberg v. Bowen, 804 F.2d 432, 434 (8th Cir. 1986); Tressler v. Heckler, 748 F.2d 146, 148-49 (3d Cir. 1985); McGill v. Secretary of Health & Hum. Servs., 712 F.2d 28, 31-32 (2d Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); Hall v. Bowen, 672 F. Supp. 667, 669-70 (E.D.N.Y. 1987); Childress v. Heckler, 616 F. Supp. 563, 564-65 (E.D. La. 1985).

60. *See* Pribek v. Secretary of Health & Hum. Servs., 717 F. Supp. 73, 74 (W.D.N.Y. 1989); Coup v. Heckler, 706 F. Supp. 405, 407 (W.D. Pa. 1989); Carmel v. Bowen, 700 F. Supp. 794, 795 (S.D.N.Y. 1988).

When a district court outright reverses the Secretary's decision and awards benefits to the claimant, the claimant becomes a prevailing party in a civil action against the government. *See* McGill v. Secretary of Health & Hum. Servs., 712 F.2d 28, 31-32 (2d Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984); *see also* R. Francis, *supra* note 35, § 5:29, at 32 ("A claimant is clearly a prevailing party when a court finds that the claimant is entitled to benefits and reverses the Secretary's denial, remanding solely for calculation and payment of benefits."). The claimant may be able to obtain attorney's fees under EAJA provided that he submits his application for fees within thirty days of final judgment in the action. Because the government may appeal an adverse decision by the district court, final judgment does not occur until the government's time to appeal has expired. EAJA specifically defines a final judgment as one that is "final and not appealable." Thus the district court reversal is not final, and EAJA's thirty-day filing period does not begin to run, until the Secretary's time to appeal the district court's decision has expired. *See*

tive proceedings.[61]

The question of what constitutes the requisite final judgment becomes especially difficult when a district court remands the case back to the Secretary for further administrative proceedings and, on remand, the Secretary finds the claimant to be disabled. A district court generally will remand the case back to the Secretary for further proceedings if it decides that additional proceedings can remedy defects in the record of original proceedings.[62] It is generally accepted that the court order remanding the claim for further administrative proceedings is not a final judgment in the action.[63]

On remand, the Secretary further develops the record as the court directs and reevaluates claimant's application.[64] It is not uncommon for

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House Report II, supra note 13, at 146 n.26; *see also* Martindale v. Sullivan, 890 F.2d 410, 413 & n.5 (11th Cir. 1989) (time limit for applying for attorney fees terminated thirty days after time to appeal district court's reversal expired); Taylor v. United States, 749 F.2d 171, 174 (3d Cir. 1984) (" 'final judgment' arises and the thirty day cut-off for EAJA petitions begins when the government's right to appeal the order has lapsed"); Najor v. Secretary of Health & Hum. Servs., 675 F. Supp. 379, 381 (E.D. Mich. 1987) (district court judgment reversing and remanding solely for calculation of benefits becomes final after time to appeal expires); Ellis v. Heckler, 569 F. Supp. 792, 793 n.2 (E.D. Pa. 1983) (same). *But see* Reynolds v. Secretary of Health & Hum. Servs., No. 82-419E (W.D.N.Y. Sept. 27, 1989) (WESTLAW, Allfeds library, Dist file). In *Reynolds*, the district court held that the court's order reversing and remanding solely for calculation of benefits was a final judgment within the meaning of EAJA, and the thirty-day filing period began to run as of the date of the court's reversal. *See Reynolds*, No. 82-419E. This holding, however, is clearly incorrect. Under EAJA, a judgment is not final unless it is no longer appealable. Because the district court order reversing the Secretary may be appealed by the Secretary, it cannot be a final judgment under EAJA until the Secretary's time to appeal it expires.

61. *See* Gowen v. Bowen, 855 F.2d 613, 616 (8th Cir. 1988); Miller v. Bowen, 703 F. Supp. 885, 889-90 (D. Kan. 1988); McBride v. Bowen, 701 F. Supp. 403, 404 (W.D.N.Y. 1988).

62. *See, e.g., Miller*, 703 F. Supp. at 889-90 (remanded to Secretary for further proceedings since ALJ did not sufficiently develop the record as to residual function capacity of claimant); *McBride*, 701 F. Supp. at 404 (remanded for further proceedings because an expert witness was not produced during initial administrative process); Smith v. Bowen, 687 F. Supp. 902, 906 (S.D.N.Y. 1988) (remanded to ALJ because ALJ did not sufficiently question claimant, request additional reports from claimant, or obtain complete records on claimant from treating hospital); Seeger v. Bowen, 679 F. Supp. 817, 817 (N.D. Ill. 1988) (remand required to clarify grounds upon which ALJ based his conclusions as to lack of disability); Rosa v. Bowen, 677 F. Supp. 782, 785 (D.N.J. 1988) (remand required where court found Secretary failed to provide claimant with full and fair hearing).

63. *See, e.g.*, Sullivan v. Hudson, 109 S. Ct. 2248, 2255 (1989) ("there will often be no final judgment . . . until the administrative proceedings on remand are complete"); Papazian v. Bowen, 856 F.2d 1455, 1456 (9th Cir. 1988) (neither government nor court consider remand order to be requisite final judgment under EAJA); Skip Kirchdorfer, Inc. v. United States, 803 F.2d 711, 712 (D.C. Cir. 1986) ("[W]here the tribunal on remand must determine a significant part of the case, . . . a request for fees before the judgment on remand is generally premature. Any other position would result in piecemeal consideration of fee awards."); Warner v. Bowen, 648 F. Supp. 1409, 1410 (S.D. Fla. 1986) (order of remand to Secretary is not final judgment necessary to trigger 30-day filing period for attorney fees).

64. *See* 20 C.F.R. § 404.983 (1988).

the Secretary, on remand, to find the claimant disabled.[65]

Once the Secretary has made a new decision on remand, section 405(g) of the Social Security Act requires the Secretary to file his new decision and findings of fact with the district court.[66] After finding the claimant disabled, the Secretary must then compute the amount of monthly benefits to which the claimant is entitled.[67]

In *Guthrie v. Schweiker*,[68] a claimant appealed his denial of benefits to the district court, which remanded the case back to the Secretary for further consideration. On remand, the Secretary issued his final decision finding claimant disabled and entitled to benefits.[69] The Fourth Circuit held that, after the Secretary makes his decision on remand and files this decision with the district court pursuant to section 405(g), the district court must then enter an order either affirming, modifying or reversing the Secretary's final decision.[70] According to the Fourth Circuit, this last district court order is the final judgment for EAJA purposes.[71]

In a case with similar facts, the Ninth Circuit, in a withdrawn opinion,[72] concluded that it was not necessary for the district court to issue an order subsequent to the Secretary's decision on remand. It held that the Secretary's decision on remand as to the claiamnt's disability was not a final judgment under EAJA. Rather, the Secretary's later decision as to the *amount* of benefits was the final judgment for EAJA purposes.[73]

The final approach, recently adopted by the Ninth Circuit in substitution for its withdrawn opinion, is to consider the Secretary's decision on remand, finding the claimant disabled and entitled to benefits, to be a final judgment under EAJA.[74]

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65. *See Sullivan*, 109 S. Ct. at 2252; Melkonyan v. Heckler, 895 F.2d 556, 557 (9th Cir. 1990); *Papazian*, 856 F.2d at 1455; Gowen v. Bowen, 855 F.2d 613, 614 (8th Cir. 1988); Thompson v. Sullivan, 715 F. Supp. 1019, 1020 (D. Kan. 1989); McBride v. Bowen, 701 F. Supp. 403, 404 (W.D.N.Y. 1988).

66. *See* 42 U.S.C. § 405(g) (1982). The provision states in relevant part: "the Secretary shall, after the case is remanded, . . . modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision . . . ." *Id.*

67. *See* 20 C.F.R. § 404.201 (1988). The calculation of benefits may occur prior to the Secretary's filing his new decision with the district court, or it may occur after such filing.

68. 718 F.2d 104 (4th Cir. 1983).

69. *See id.* at 105-06.

70. *See id.*

71. *See id.* at 106.

72. Melkonyan v. Heckler, 878 F.2d 1183 (9th Cir. 1989) (on file at Fordham Law Review), *withdrawn*, 895 F.2d 556 (1990).

73. *See id.* at 1186.

74. *See* Melkonyan v. Heckler, 895 F.2d 556, 558-59 (9th Cir. 1990); *see also* Wagaman v. Bowen, 698 F. Supp. 187, 189 (D.S.D. 1988) (using same approach).

III. INADEQUACY OF FOURTH AND ORIGINAL NINTH CIRCUIT APPROACHES

A. *Fourth Circuit Approach*

In *Guthrie v. Schweiker*,[75] the Fourth Circuit rejected the premise that the Agency decision on remand could be a final judgment,[76] and held that after the Secretary files his new decision with the district court, the district court must then enter an order either affirming, reversing or modifying the Secretary's decision.[77] In rejecting the notion that an agency decision could act as a final judgment in the action for EAJA purposes, the Fourth Circuit relied on the contention that EAJA clearly distinguishes between administrative action and judicial action.[78] Consequently, a final judgment in a judicial action is necessary.

The Supreme Court in *Sullivan v. Hudson*,[79] however, recently rejected this assertion. *Sullivan* removed, for EAJA purposes, the distinction between agency action pursuant to remand and judicial action.[80] Reaffirming some of its earlier cases, the *Sullivan* Court rejected the contention that "the word 'action' in the fee-shifting provision should be read narrowly to exclude all proceedings which could be plausibly characterized as 'non-judicial.' "[81] The Court noted that "where administrative proceedings are intimately tied to the resolution of the judicial action . . . they should be considered part and parcel of the action . . . ."[82] According to the Court, "[t]his is particularly so in the Social Security context where [a suit brought in a court of law] remains pending and depends for its resolution upon the outcome of the administrative proceedings."[83] Thus, after the Court's decision in *Sullivan*, the Fourth Circuit's rationale concerning the non-viability of an agency decision acting as a final judgment for EAJA purposes is unsound.

In holding that the district court must enter an order following the Secretary's filing of his new decision with the district court, the Fourth Circuit reasoned that the judicial review section of the Social Security Act[84] requires the Secretary to seek judicial review and affirmance of all final agency decisions following court-ordered remands.[85] Quoting from the Social Security Act, the Fourth Circuit stated: "The Secretary must file [with the district court] any 'additional and modified findings of fact and decision, and a transcript of the additional record and testimony

75. 718 F.2d 104 (4th Cir. 1983).
76. *See id.* at 106.
77. *See id.*
78. *See id.*
79. 109 S. Ct. 2248 (1989).
80. *See id.* at 2255-56.
81. *Id.* at 2256.
82. *Id.* at 2255.
83. *Id.* at 2257.
84. 42 U.S.C. § 405(g) (1982).
85. *See* Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983).

. . . .' "[86] Adding its own analysis of section 405(g), the Fourth Circuit stated that "[t]he district court *then* may enter a judgment affirming, modifying, or reversing the Secretary's decision."[87]

While section 405(g) requires the Secretary to file his new decision with the court following a remand, it does not permit the court to enter a judgment affirming, modifying, or reversing the Secretary's decision if the decision is fully favorable to the claimant.[88]

Instead, section 405(g) permits the Secretary's new decision to be reviewed only to the extent that an original decision of the Secretary may have been reviewed. Under the Social Security Act, an individual may seek judicial review of a final decision of the Secretary by bringing an action in the district court within sixty days of the mailing to him of notice of such decision.[89] Claimants, however, may not seek review of favorable determinations by the Secretary.[90] Thus, section 405(g), which gives the district courts authority to review decisions of the Secretary, does not permit a judge to enter a judgment affirming, modifying or reversing a decision of the Secretary, made on remand, that is fully favorable to the claimant. *Guthrie*'s interpretation of section 405(g) is contrary to the plain language of the statute.

Furthermore, since its enactment in the mid-1950s and prior to the enactment of EAJA, no other decision has interpreted section 405(g) in the manner that *Guthrie* did, and no congressional committee dealing with an amendment or proposed amendment of section 405(g) has ever suggested that it should be interpreted in such a manner.[91] However, the legislative committee considering the 1985 amendments to EAJA noted with approval *Guthrie*'s interpretation of section 405(g), stating that "the District Court should enter an order affirming, modifying, or reversing the final HHS decision, and this will usually be the final judgment that starts the 30 days running."[92] This statement, however, is not an authoritative interpretation of section 405(g) of the Social Security Act because "it is the function of the Courts and not the Legislature, much less a

86. *Id.* (quoting 42 U.S.C. § 405(g) (1982)).

87. *Id.* (emphasis added).

88. *See* 42 U.S.C. § 405(g) (1982). This section states in relevant part:

> [A]nd the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision *shall be reviewable only to the extent provided for review of the original findings of fact and decision.*

Id. (emphasis added).

89. *See* Gregory v. Bowen, No. 88-1208 (D.N.J. Mar. 29, 1989) (WESTLAW, Allfeds library, Dist file); 42 U.S.C § 405(g) (1982).

90. *See* Jones v. Califano, 576 F.2d 12, 18 (2d Cir. 1978); *Gregory*, No. 88-1208.

91. *See* Appellee's Petition for Rehearing at 5, Melkonyan v. Heckler, 878 F.2d 1183 (9th Cir. 1989) (No. 87-5716) (on file at *Fordham Law Review*).

92. *House Report II*, *supra* note 13, at 148.

Committee of one House of the Legislature, to say what an enacted statute means."[93] The EAJA amendment committee's offhand and peripheral comment purporting to interpret the judicial review section of the Social Security Act (§ 405(g)) is not binding and should be ignored.

The Ninth Circuit also recognized that *Guthrie*'s interpretation of section 405(g) is incorrect.[94] In *Melkonyan v. Heckler*,[95] the Ninth Circuit stated, "*Guthrie*'s approach is troublesome. While section 405(g) requires the Secretary to file the new decision and findings after remand, it does not confer upon the district court any independent power to review the post-remand filing."[96]

Another flaw in the *Guthrie* holding and rationale is that it allows the Secretary, by his inaction, to thwart the claimant's ability to receive fees. If a final judgment may not be obtained until the Secretary files his new decision with the court which then issues its final order, the Secretary, by failing to file his new decision, can prevent a final judgment from being entered. While section 405(g) requires that the Secretary file his new decision and findings, it does not specify a period of time in which the filing must take place.[97] The statute merely states that the Secretary "shall file with the court any such additional and modified findings of fact and decision . . . ."[98] In fact, it is not uncommon for the Secretary, in violation of section 405(g), to fail to file anything with the district court concerning the outcome of the remand.[99]

As a result of this filing delay, courts following *Guthrie* accept fee petitions filed months, sometimes years, after the Secretary has made his final decision.[100] Courts are alerted to these situations when a claimant, months after the Secretary's decision, files an EAJA petition.[101] In such cases, because no final judgment has been entered, the court dismisses the EAJA petition without prejudice and orders the Secretary to file the documents required by § 405(g).[102] Once the Secretary's documents are filed, the court will enter its final judgment and then will accept the

93. Pierce v. Underwood, 487 U.S. 552, 566 (1988).

94. *See* Melkonyan v. Heckler, 895 F.2d 556, 559 (9th Cir. 1990).

95. 895 F.2d 556 (9th Cir. 1990).

96. *Id.* at 559.

97. *See* 42 U.S.C. § 405(g) (1982).

98. *Id.*

99. *See, e.g.*, Guthrie v. Schweiker, 718 F.2d 104, 106 (4th Cir. 1983) ("Despite the requirement of 42 U.S.C. § 405(g), the Secretary filed nothing with the district court concerning the outcome of the . . . remand."); Thompson v. Sullivan, 715 F. Supp. 1019, 1020 (D. Kan. 1989) (Secretary did not file decision on remand with district court until ordered to do so by district court two years later); Prewentowski v. Sullivan, No. 84-144E (W.D.N.Y. Mar. 23, 1989) (WESTLAW, Allfeds library, Dist file) (no notice filed by Secretary for 17 months).

100. *See Guthrie*, 718 F.2d at 106; *Thompson*, 715 F. Supp. at 1020; *Prewentowski*, No. 84-144E.

101. *See, e.g., Guthrie*, 718 F.2d at 106 (EAJA petition filed 3 months after Secretary issued final decision); *Prewentowski*, No. 84-144E (EAJA petition filed and accepted 17 months after Secretary's remand decision).

102. *See Guthrie*, 718 F.2d at 106; *Prewentowski*, No. 84-144E.

claimant's EAJA petition.[103]

This unnecessary delay is contrary to the purpose of EAJA.[104] One of the primary purposes for providing for attorney's fees was to ensure that economic considerations would not prompt individuals to allow their rights to be abused. The Secretary's ability, under *Guthrie*, to keep a claimant from obtaining attorney's fees indefinitely is contrary to this intent.

B. *Original Ninth Circuit Approach*

Another approach, adopted by the Ninth Circuit in *Melkonyan v. Heckler*,[105] an opinion that was later withdrawn by the court, is to consider the later decision of the Secretary pertaining to the *amount* of benefits as a judgment for EAJA purposes which becomes final once the time to appeal expires.[106] The Ninth Circuit rejected the Secretary's argument that the new disability determination on remand was a final judgment, reasoning that the Secretary's decision determining that a claimant is disabled, but failing to calculate the amount of benefits, is not a final judgment because "a claimant may be recognized as disabled and be awarded benefits, yet seek . . . review of the amount of benefits actually awarded."[107]

In their briefs for the rehearing of *Melkonyan*, both the Secretary and the claimant took issue with the Ninth Circuit's holding.[108] The Secretary argued that the decision had confused the disability and benefits determinations, treating them as inextricably related.[109] This argument is persuasive; the Social Security Administration regulations make it clear that these determinations are two distinct determinations, each subject to separate administrative and judicial review.[110]

In addition, the only issue litigated in a district court action brought by a claimant after the Secretary denies his disability is the issue of disability.[111] This issue is resolved when the Secretary, on remand, finds that

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103. *See Guthrie*, 718 F.2d at 106; *Prewentowski*, No. 84-144E.

104. *See supra* notes 11-14 and accompanying text.

105. 878 F.2d 1183 (9th Cir. 1989) (on file at Fordham Law Review), *withdrawn*, 895 F.2d 556 (1990).

106. *See id.* at 1186. Melkonyan had 65 days to appeal the amount of benefits awarded; once the 65 days expired, the decision as to the amount of benefits became final and Melkonyan then had 30 days to file his application for EAJA fees. *See id.*

107. *Id.*

108. *See* Appellees Petition for Rehearing at 1, *Melkonyan*, 878 F.2d 1183 (9th Cir. 1989) (on file at *Fordham Law Review*); Brief for Appellant at 4-6, *Melkonyan*, 878 F.2d 1183 (9th Cir. 1989) (on file at *Fordham Law Review*).

109. *See* Appellees Response to Suggestion for Rehearing *En Banc* at 9, *Melkonyan*, 878 F.2d 1183 (9th Cir. 1989) (on file at *Fordham Law Review*).

110. *See* 20 C.F.R. § 404.902 (1988); *see also* Ellis v. Heckler, 569 F. Supp. 792, 793 (E.D. Pa. 1983) (claimant's counsel attempted to argue that there could be no final judgment until the amount of benefits was calculated; the court rejected the argument stating that "the calculation of benefits is a level . . . separable and distinct from the [disability determination]").

111. Section 405(g) of the Social Security Act permits the district court to review "any

the claimant is disabled. The amount of benefits is not argued and is not an issue in a claimant's district court action to establish entitlement to benefits.[112] In fact, before a claimant can contest the amount of benefits in the district court, he must first exhaust all his administrative appeals.[113]

Under this final judgment approach, if a claimant does contest the amount of benefits, he may not apply for EAJA fees until all appeals pertaining to the amount of benefits have been completed or have been allowed to expire. Thus, the claimant would be forced to choose between: 1) acquiescing to and accepting a low benefits award so that he could immediately apply for EAJA fees and avoid the long final judgment delay caused by the appeal process; or 2) contesting what he believes to be an unfair benefits award, thus foregoing the ability to immediately apply for attorney's fees for all the previous litigation.

Under such an approach, the Secretary might even be encouraged to award smaller benefits, in the hope that a claimant would acquiesce and accept the amount so as to be able to immediately apply for EAJA fees, rather than contest and receive no benefits and no EAJA fees until all appeals are completed. Forcing an individual to acquiesce to government action because of the economic deterrent of attorney's fees is exactly what Congress intended to prevent by creating and passing EAJA.[114] "Providing an award of fees to a prevailing party represents one way to improve citizen access to courts. . . . When there is an opportunity to recover costs [as there is under EAJA], a party does not have to choose between acquiescing to an unreasonable Government order or to prevailing to his financial detriment."[115] While it could be argued that the Secretary has an incentive to award smaller benefits without the existence of EAJA, the presence of EAJA increases the incentive.

Furthermore, this approach creates a problem of notice. Under this view, a letter from the Social Security Administration advising the claimant of the amount of his benefits constitutes a final judgment. Counsel for the claimant in *Melkonyan* submitted affidavits from three attorneys practicing Social Security law in California, each of whom stated that such letters are rarely, if ever, sent to a claimant's attorney.[116] This unofficial and awkward procedure creates the potential for an attorney's fail-

final decision of the Secretary." 42 U.S.C. § 405(g) (1982). Where the Secretary's final decision was to deny benefits, the district court's review may extend no further than determining whether a denial benefit was based on substantial evidence and therefore appropriate. *See id.*

112. This is because a calculation of benefits is precluded by the Secretary's finding that claimant is ineligible for benefits.

113. *See* R. Francis, *supra* note 35, § 6:34, at 23.

114. *See House Report I, supra* note 11, at 4991.

115. *Id.*

116. *See* Appellants Petition for Rehearing *En Banc*, Exhibits A, B & C at 10-13, Melkonyan v. Heckler, 878 F.2d 1183 (9th Cir. 1989) (No. 87-5716) (on file at *Fordham Law Review*).

ing to meet the EAJA deadline simply because he never received notice from the Secretary.

By analogy, such an approach is also contrary to the majority of cases holding that where the district court finds claimant disabled and reverses the Secretary outright, remanding the case solely for the calculation of benefits, the critical date is that of the court's reversal and remand, not the date upon which benefits are eventually calculated.[117]

C. *New Ninth Circuit &* Wagaman *Approaches Best Comport with the Purpose and Intent of EAJA*

The Supreme Court's decision in *Sullivan v. Hudson*[118] eliminated the distinction, for EAJA purposes, between agency action pursuant to remand and judicial action, and consequently laid the groundwork for holding that an agency decision on remand may be considered the final judgement in the action. Prior to this decision, however, a South Dakota district court in *Wagaman v. Bowen*[119] held that the disability determination made by the Secretary on remand constitutes a final judgment under EAJA.[120] *Wagaman*'s reasoning was simple and persuasive: because the Secretary's decision may not be appealed, it is a final judgment.[121] That is, if on remand the Secretary issues a decision fully favorable to the claimant, neither the Secretary nor the claimant may appeal, either within the Administration or in the courts.[122] Hence, the claimant becomes a prevailing party and the decision of the Secretary is final and unappealable. A final judgment has been entered that starts the tolling of the thirty-day filing period.

The Ninth Circuit adopted the *Wagaman* approach in its revised *Melkonyan* opinion.[123] Recognizing that the Secretary's decision on remand, favorable to a claimant, may not be appealed by either the claimant or the Secretary, the Ninth Circuit concluded that the date of the Secretary's decision was the date of final judgment.[124] Noting its disapproval of the Fourth Circuit's holding in *Guthrie*, *Melkonyan* saw no need to interpret "judgment" as requiring a judgment by a court.[125] Instead, the Ninth Circuit felt that the individual would benefit and consequently, EAJA would be better served, if the claimant could seek EAJA

117. *See* Martindale v. Sullivan, 890 F.2d 410, 412-13 (11th Cir. 1989); Taylor v. United States, 749 F.2d 171, 174 (3d Cir. 1984); Najor v. Secretary of Health & Hum. Servs., 675 F. Supp. 379, 381 (E.D. Mich. 1987).

118. 109 S. Ct. 2248 (1989).

119. 698 F. Supp. 187 (D.S.D. 1988).

120. *See id.* at 189-90.

121. *See id.* at 189.

122. *See* Melkonyan v. Heckler, 895 F.2d 556, 558 (9th Cir. 1990); Gregory v. Bowen, No. 88-1208 (D.N.J. Mar. 29, 1989) (WESTLAW, Allfeds library, Dist file).

123. Melkonyan v. Heckler, 895 F.2d 556 (9th Cir. 1990).

124. *See id.* at 558-60.

125. *See id.* at 559.

fees as soon as the Secretary's action on remand becomes final.[126]

Unlike the *Guthrie* approach, which basically allows the Secretary to hold up final judgment by not filing his new decision with the district court, the Ninth Circuit's approach in *Melkonyan* "sets definite limits for purposes of finality."[127]

This view comports with the intent of EAJA to lessen the economic burden on the individual who must litigate against the government in order to vindicate his rights.[128] The approach adopted in *Melkonyan* and *Wagaman* allows a claimant to seek EAJA fees as soon as he becomes a prevailing party. Once a claimant prevails and an irreversible decision in his favor has been issued, there is no apparent reason why he should not be able to seek attorney's fees immediately. An unnecessary delay between the time the claimant's rights are vindicated and the time he is able to apply for fees so that he may pay his attorney acts as deterrent to litigation and ignores the spirit of EAJA.

In addition, considering the Secretary's new decision on remand as the final judgment for EAJA purposes is in harmony with the widely accepted practice of considering a district court's decision finding the claimant disabled and entitled to benefits to be a final judgment.[129] Most decisions agree that a district court order reversing the Secretary and remanding solely for the calculation of the amount of benefits due is a final judgment once the time to appeal has expired.[130] That is, the claimant is clearly a prevailing party, and once the time to appeal expires, no other judgment concerning the issue of claimant's disabled status may be made.[131] Similarly, when the Secretary on remand renders a decision fully favorable to the claimant finding him disabled, no other judgment as to claimant's disabled status may be made.[132]

A potential argument that could be made in opposition to holding that the date of the Secretary's decision is a final judgment is that such a conclusion could cause a fragmentation of fee petitions under EAJA and section 406(b) of the Social Security Act, when past-due benefits are not calculated until some time after final judgment. Section 406(b) is the section of the Social Security Act that permits the district court to award attorney's fees out of claimant's past-due benefits.[133]

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126. *See id.* at 559-60.
127. *Id.* at 559.
128. *See supra* notes 11-14 and accompanying text.
129. *See supra* note 60 and accompanying text.
130. *See id.*
131. *See id.*
132. *See* Melkonyan v. Heckler, 895 F.2d 556, 558 (9th Cir. 1990).
133. *See* 42 U.S.C. § 406(b) (1982). Past-due benefits are those benefits that the claimant should have received had his application been properly approved. The court may only award up to 25% of the past-due benefits as attorney fees. *See id.* For example, suppose a claimant applies for disability benefits in January 1985 and his application is denied. After two years of administrative proceedings, he appeals to the district court. Six months later, the claimant is finally found to be disabled and entitled to benefits of $400 per month. He is entitled to the monthly benefits as of the date of his initial applica-

A fragmentation of fee petitions will not occur, however, because EAJA and 406(b) applications may be reviewed simultaneously and decided by the district court even prior to the calculation of benefits.[134] In *Watford v. Heckler*,[135] the amount of past-due benefits had not been calculated at the time the claimant and his attorney submitted fee applications under both EAJA and 406(b), yet both applications were considered simultaneously. That is, the court calculated what it believed was a reasonable fee under 406(b), and then instructed the Secretary to pay the lesser of that amount or 25 percent of claimant's past-due benefits to the claimant's attorney.[136] Where EAJA fees are awarded along with 406(b) fees, the district court can order the Secretary to give both awards to the claimant's attorney who must then surrender the lesser of the two awards to the claimant.[137] Under such an approach, attorney's fees are calculated quickly, judicial efficiency is fostered, and the claimant and his attorney are satisfied.

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tion: January 1985. Thus, claimant is entitled to 30 months at $400 per month, or $12,000 in past-due benefits. Of this $12,000, the district court may award up to $3,000 to claimant's attorney as compensation for his services performed in the district court.

The distinction between EAJA and the Social Security Act fees is that EAJA fees are recovered directly from the government while 406(b) fees are recovered from the claimant. An attorney may apply for fees under both statutes, *see* R. Francis, *supra* note 35, § 5.34, at 39, but must give the lesser of the two to the claimant. *See* Wells v. Bowen, 855 F.2d 37, 41 (2d Cir. 1988); Kemp v. Bowen, 822 F.2d 966, 967-68 (10th Cir. 1987). The higher award goes to the attorney. *See Wells*, 855 F.2d at 42. One fee is not generally smaller than the other. *See, e.g.*, Hills v. Secretary of Health & Hum. Servs., 726 F. Supp. 434, 437 (E.D.N.Y. 1989) (EAJA award $2,619.00; 406(b) award $3,906.25); Brown v. Sullivan, 724 F. Supp. 76, 81 (W.D.N.Y. 1989) (EAJA award $4,230.00; 406(b) award $3,960.00); Freedle v. Bowen, 674 F. Supp. 799, 800-02 (D. Nev. 1987) (EAJA award $2,135.00; 406(b) award $3,935.00). Under section 406(b), the district court may award up to 25 percent of the claimant's past-due benefits to the claimant's attorney as attorney fees. *See* 42 U.S.C. § 406(b) (1982).

Some courts prefer not to consider a 406(b) application until the amount of past-due benefits has been calculated by the Secretary. It is not uncommon for the Secretary to take months from the time of his final decision to compute the amount of benefits. Consequently, while an EAJA petition must be filed within thirty days of the Secretary's decision on remand, 406(b) applications, according to some courts, must await calculation of past-due benefits. This creates a fragmentation problem. The solution espoused by the district court in O'Grady v. Heckler, 629 F. Supp. 1186 (E.D.N.Y. 1986), is to hold the EAJA petition in abeyance until the past due benefits have been calculated and consequently the 406(b) application may be considered. Such an approach, delaying consideration of EAJA applications because of section 406(b), is not necessary because a court may consider and decide a 406(b) application before benefits are calculated, yet after a final judgment on the merits has been made.

134. *See* Watford v. Heckler, 765 F.2d 1562, 1565 (11th Cir.), *cert. denied*, 105 S. Ct. 3531 (1985).

135. 765 F.2d 1562, 1565 (11th Cir.), *cert. denied*, 105 S. Ct. 3531 (1985).

136. *See id.*; *see also* Donovan v. Secretary of Health & Hum. Servs., 598 F. Supp. 120, 121-22 (D. Del. 1984) (in event 406(b) award exceeds 25 percent of past-due benefits, Secretary authorized to reduce 406(b) award to 25 percent).

137. *See* Lee v. Sullivan, 723 F. Supp. 92, 98 (E.D. Wis. 1989).

CONCLUSION

The purpose of the Equal Access to Justice Act is to improve access to courts and to ensure that certain individuals will not be deterred from defending against or seeking review of unreasonable government action because of the expense involved. When a disability claimant is found to be disabled and entitled to benefits by the Secretary on remand, he should be able to apply immediately for EAJA fees. The Ninth Circuit's interpretation of final judgment in *Melkonyan v. Heckler* provides for immediate fee applications and should be adopted by other jurisdictions so that a uniform standard may be applied to disabled individuals across the United States. Under this approach, a prevailing party, in accordance with the spirit of EAJA, would be able to seek attorney's fees as soon as he prevails and EAJA could fulfill its intended role for Social Security disability claimants.

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