SUPREME COURT OF THE UNITED STATES

No. 92–311

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER *v.* RICHARD H. SCHAEFER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 24, 1993]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

In *Sullivan* v. *Hudson*, 490 U. S. 877 (1989), a case, like this one, in which a federal court reversed the Secretary of Health and Human Services' claims determination and remanded the case to the Social Security Administration (Agency) for reconsideration (a so-called "sentence-four" remand), we held that claimants who are otherwise eligible for attorneys fees under the Equal Access to Justice Act (EAJA), 28 U. S. C. §2412(d), are entitled to reimbursement for fees incurred on remand. In so holding, it was our understanding, consistent with "prevailing party" jurisprudence in other areas of the law, *id.*, at 886–887, that "[n]o fee award at all would have been available to [the claimant] absent successful conclusion of the remand proceedings," *id.*, at 889.

Two Terms later, in *Melkonyan* v. *Sullivan*, 501 U. S. ___ (1991), we stated in dicta that in sentence-four remand cases, the 30-day period in which claimants must submit their EAJA fee applications begins to run when the district court issues its remand order. *Id.*, at ___. That statement was in obvious tension with the holding of *Hudson;* for it makes little sense to start the 30-day EAJA clock running before a claimant even knows whether he or she will be a "prevailing party" under EAJA by securing benefits on remand.

The question presented in this case is how best to reconcile this tension in our cases. If we reject the Government's rather bizarre proposal of requiring *all* Social Security claimants who achieve a sentence-four remand to file a protective EAJA application within 30 days of the remand order, and then update or amend their applications if they are successful on remand, see Brief for Petitioner 26–30, we are left with essentially two alternatives. We can overrule *Hudson* and endorse *Melkonyan*'s dicta that the 30-day clock under EAJA begins to run once the district court issues a sentence-four remand order. That is the path followed by the majority. Alternatively, we can repudiate the dicta in *Melkonyan* and reaffirm the understanding of EAJA that we had at the time we decided *Hudson:* that fees are available for services rendered on remand before the Agency and the 30-day EAJA clock begins to run when the district court enters a final, dispositive judgment for EAJA purposes once the proceedings on remand have been completed. That is the path followed by the Court of Appeals in this case and several Courts of Appeals that have struggled with the tension between *Hudson* and *Melkonyan*.[1] Because that approach accords with a proper understanding of the purposes underlying EAJA and, in my view, common sense, I would affirm not only the judgment of the Court of Appeals, but its reasoning as well.

The major premise underlying the Court's contrary decision today is that there is sharp distinction, for purposes of EAJA, between remands ordered pursuant to sentence four and sentence six of 42 U. S. C. §405(g).[2] Legal expenses incurred in a "sentence-six"

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[1]See, *e.g.*, *Hafner* v. *Sullivan*, 972 F. 2d 249, 252 (CA8 1992); *Larie* v. *Secretary of Health and Human Services*, 976 F. 2d 779, 785 (CA1 1992); *Gutierrez* v. *Sullivan*, 953 F. 2d 579, 584 (CA10 1992).

[2]See *ante*, at 4, n. 1. The Court reasons that remands

remand may be recoverable under EAJA, the Court suggests, whereas such expenses incurred in a sentence-four remand, the far more common of the two, are most definitely not recoverable. *Ante*, at 6–8. While this dichotomy has the superficial appeal of purporting to "harmoniz[e] the remand provisions of §405(g) with the EAJA requirement that a `final judgment' be entered in the civil action in order to trigger the EAJA filing period," *Melkonyan*, 501 U. S., at ___ (slip op., at 12),[3] it directly contradicts, in my

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can be ordered only pursuant to sentence six or sentence four, and that Congress left no room for hybrids or for cases that did not fit neatly into either category. Thus, referring to "the plain language of sentence four," *ante*, at 4–5, the Court assumes that the sentence "authorizes a district court to enter a judgment `with or without' a remand order, not a remand order `with or without' a judgment." Ironically, when we come to the end of the Court's opinion, we learn that the respondent has prevailed precisely *because* the District Court in this case did enter a remand order without entering a judgment.

[3]The EAJA, 28 U. S. C. §2412, provides in relevant part:

"(d)(1)(A) [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 . . . 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.

"(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought . . . .

view, the admonition repeated in our cases that "the language of [EAJA] must be construed with reference to the purpose of . . . EAJA and the realities of litigation against the Government." *Sullivan* v. *Finkelstein*, 496 U. S. 617, 630 (1990). See also *Sullivan* v. *Hudson*, 490 U. S., at 889–890.

As explained above, our decision in *Hudson* was based in part on the premise that prevailing party status for purposes of EAJA could not be determined until after proceedings on remand were completed. I find unpersuasive the Court's attempt to distinguish cases relied upon in *Hudson* that we previously characterized as "for all intents and purposes identical," *Id.,* at 886; see *ante*, at 9.[4] Nevertheless,

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The party shall also allege that the position of the United States was not substantially justified."

[4]As we explained in *Hudson:*

"[I]n a case such as this one, where a court's remand to the agency for further administrative proceedings does not necessarily dictate the receipt of benefits, the claimant will not normally attain `prevailing party' status within the meaning of §2412(d)(1)(A) until after the result of the administrative proceedings is known. The situation is for all intents and purposes identical to that we addressed in *Hanrahan* v. *Hampton*, 446 U. S. 754 (1980). There we held that the reversal of a directed verdict for defendants on appeal did not render the plaintiffs in that action `prevailing parties' such that an interim award of attorney's fees would be justified under 42 U. S. C. §1988. We found that such `procedural or evidentiary rulings' were not themselves `matters on which a party could "prevail" for purposes of shifting his counsel fees to the opposing party under §1988.' *Id.*, at 759. More recently in *Texas State Teachers Assn.* v. *Garland Independent School Dist.*, 489 U. S. 782 (1989), we indicated that in order to be considered a prevailing party, a plaintiff must achieve some of the benefit

the Court's holding today that a claimant who secures nothing more than an order instructing the Secretary to try again is a "prevailing party" does undermine one premise of our decision in *Hudson*. It is, however, only one premise. *Hudson* stood on broader grounds, and I continue to believe that our opinion in that case correctly explained why legal services performed in agency proceedings on remand are properly within the coverage of EAJA:

> "We think the principles we found persuasive in [*Pennsylvania* v.] *Delaware Valley* [*Citizens' Council,* 478 U. S. 546 (1986),] and [*New York Gas Light Club, Inc.* v.] *Carey*[, 447 U. S. 54 (1980),] are controlling here. As in *Delaware Valley*, the administrative proceedings on remand in this case were `crucial to the vindication of [respondent's] rights.' *Delaware Valley, supra*, at 561. . . . [T]he services of any attorney may be necessary both to ensure compliance with the District Court's order in the administrative proceedings themselves, and to prepare for any further proceedings before the District Court to verify such compliance. In addition, as we did in *Carey*, we must endeavor to interpret the fee statute in light of the statutory provisions it was

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sought in bringing the action. *Id.*, at 791–793. We think it clear that under these principles a Social Security claimant would not, as a general matter, be a prevailing party within the meaning of the EAJA merely because a court had remanded the action to the agency for further proceedings. See *Hewitt* v. *Helms*, 482 U. S. 755, 760 (1987). Indeed, the vast majority of the Courts of Appeals have come to this conclusion. See, *e.g.*, *Paulson* v. *Bowen*, 836 F. 2d 1249, 1252 (CA9 1988); *Swedberg* v. *Bowen*, 804 F. 2d 432, 434 (CA8 1986); *Brown* v. *Secretary of Health and Human Services*, *supra*, at 880–881." *Hudson*, 490 U. S., at 886–887.

> designed to effectuate. Given the `mandatory' nature of the administrative proceedings at issue here, and their close relation in law and fact to the issues before the District Court on judicial review, we find it difficult to ascribe to Congress an intent to throw the Social Security claimant a lifeline that it knew was a foot short. Indeed, the incentive which such a system would create for attorneys to abandon claimants after judicial remand runs directly counter to long established ethical canons of the legal profession. See American Bar Association, Model Rules of Professional Conduct, Rule 1.16, pp 53–55 (1984). Given the anomalous nature of this result, and its frustration of the very purposes behind the EAJA itself, Congress cannot lightly be assumed to have intended it. See *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412, 418–419 (1978). Since the judicial review provisions of the Social Security Act contemplate an ongoing civil action of which the remand proceedings are but a part, and the EAJA allows `any court having jurisdiction of that action' to award fees, 28 U. S. C. §2412(d)(1)(A), we think the statute, read in light of its purpose `to diminish the deterrent effect of seeking review of, or defending against, governmental action,' 94 Stat. 2325, permits a court to award fees for services performed on remand before the Social Security Administration." 490 U. S., at 889–890.

Hudson was not based on a distinction between a remand ordered pursuant to sentence four and one ordered pursuant to sentence six of §405(g), and it was not based solely on our understanding of "prevailing party" jurisprudence in other areas of the law. It was based also on the common-sense conclusion that allowing for the recovery of legal fees incurred on remand before the Agency was necessary to effectuate the purposes underlying EAJA, and that

permitting the awarding of such fees accorded with Congress' intent in passing that statute.

That sound and eminently reasonable conclusion was not undermined by our decision in *Sullivan* v. *Finkelstein*, 496 U. S. 617 (1990) the case that first drew the distinction between sentence-four and sentence-six remands. To be sure, there is language in *Finkelstein* that supports the Court's conclusion today that a final judgment must accompany a sentence four remand order and that such a judgment starts the 30-day clock for filing a fee application under EAJA. But *Finkelstein*, unlike *Hudson*, was not a case interpreting EAJA. The question presented was whether the District Court order invalidating Agency regulations as inconsistent with the Social Security Act was a "final decision" within the meaning of 28 U. S. C. §1291 and thus subject to immediate appeal by the Secretary. In holding that it was, we were careful to note that the issue presented was "appealability," not "the proper time period for filing a petition for attorneys fees under EAJA." 496 U. S., at 628–629, n. 8. More directly, we expressly declined respondent's invitation to import into our analysis of appealability under §1291 our reasoning and analysis of the EAJA in *Hudson*. See 496 U. S., at 630.

In *Melkonyan*, we changed course. The distinction that we had drawn between the question of appealability under §1291 and eligibility for fees under EAJA was blurred; in *Melkonyan*, we imported wholecloth our analysis from *Finkelstein*, which, again, concerned §1291, into our analysis of when the 30-day limitations period for filing an EAJA fee application began to run. It was in that case that we first crafted the rigid distinction between a sentence-four remand and a sentence-six remand *for purposes of EAJA*, and stated in dicta that the "final judgment in the action" referred to in §2412(d)(1)(B) of EAJA was the judgment entered concomitantly with a

sentence-four remand order.

In my opinion, we should abandon that dicta. While the distinction between a sentence-four and a sentence-six remand may have some force for purposes of appealability, it is a distinction without a difference when viewed, as it should be, "with reference to the purpose of the EAJA and the realities of litigation against the Government." *Finkelstein*, 496 U. S., at 630. Regardless of whether the remand is ordered pursuant to sentence four or sentence six, the claimant will be dependent on the lawyer's services on remand in order to secure the benefits to which he or she may be entitled. If anything, recovery of fees in cases remanded pursuant to sentence four is more important for purposes of effectuating the goals of EAJA than the recovery of fees in sentence-six cases. As we explained in *Finkelstein*, a sentence-six remand frequently occurs because the claimant seeks to present new evidence of which neither the Agency nor the claimant was aware at the time the Secretary's benefits determination was is made. *Id.*, at 626. Thus, in many sentence-six cases the added expenses incurred by the claimant on remand cannot be attributed to any wrongful or unjustified decisions by the Secretary. That is not the case, of course, with a sentence-four remand; a court's order to remand a case pursuant to sentence four of §405(g) necessarily means that the Secretary has committed legal error. The claimant is sent back to the administrative proceedings, with all the expenses incurred therein, *precisely because* of decisions made by the Secretary. For the reasons we articulated in *Hudson*, fees incurred under these circumstances should be covered under EAJA.

Claimants have 30 days from "final judgment in the action" to file an application for fees. 28 U. S. C. §2412(d)(1)(B). In *Hudson*, the Government conceded that the "final judgment" referred to in §2412(d)(1)(B) was a judgment entered in the district

court *after* the proceedings on remand were completed. *Hudson*, 490 U. S., at 887. In my view, nothing in *Finkelstein*, a case interpreting a different statute, undermined that common-sense understanding of the procedural steps that must be taken to become eligible for a fee award: (1) secure a remand order; (2) prevail on remand; and (3) have an appropriate judgment entered. I would therefore disavow the dicta in *Melkonyan* and hold, as did the court below and the Courts of Appeals for two other Federal Circuits,[5] that:

> "[W]hen a judicial remand order in Social Security disability cases contemplates additional administrative proceedings that will determine the merits of the claimant's application for benefits, and thus will determine whether the claimant is a prevailing party, the district court retains discretion to enter a final judgment for EAJA purposes after the proceedings on remand have been completed." *Hafner* v. *Sullivan*, 972 F. 2d 249, 252 (CA8 1992).

Thus, while I agree with the Court's judgment in this case, I respectfully disagree with its decision to overrule *Sullivan* v. *Hudson*.

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[5]See n. 1, *supra*.