

United States Court of Appeals

TENTH CIRCUIT
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October 18, 1990

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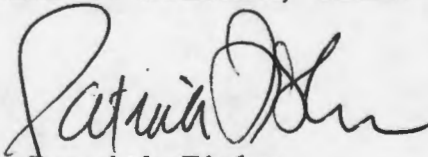
TO: ALL RECIPIENTS OF THE CAPTIONED ORDER AND JUDGMENT

RE: No. 89-1162 - Daniel v. Sullivan
Filed October 15, 1990 by Judge Bobby R. Baldock

Attached is a reissued order and judgment. The original was sent October 15, 1990. The order and judgment was reissued to reflect Judge Baldock as the author.

Very truly yours,

ROBERT L. HOECKER, CLERK

By 
Patrick Fisher
Chief Deputy Clerk

RLH;fg

Enclosure

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
OCT 15 1990

ROBERT L. HOECKER
Clerk

JIMMY G. DANIEL,
Plaintiff-Appellant,

vs.

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

No. 89-1162
(D.C. No. 87-Z-234)
(D. Colo.)

ORDER AND JUDGMENT*

Before BALDOCK, BARRETT and EBEL, Circuit Judges.

The government filed an appeal (No. 89-1153) from the district court's order reconsidering an award of attorney's fees to plaintiff-appellant Jimmy G. Daniel. Plaintiff cross-appealed from the original order awarding attorney's fees (No. 89-1162). By stipulation of the parties, the government's appeal was dismissed; only the cross-appeal remains pending. Our jurisdiction to review this Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d), award of attorney's fees arises under 28 U.S.C. 1291.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

the cost of living may have increased since 1981. Headlee, 869 F.2d at 551. We were persuaded that discretion to consider the cost of living as an element in the hourly rate under § 2412(d)(2)(A) properly lies with the district court; an increase is not automatic. Id. at 552; McNulty v. Sullivan, 886 F.2d 1074 (8th Cir. 1989). The district court is in a better position to evaluate the overall award, including the rate selected. See Commissioner, INS v. Jean, 110 S. Ct. 2316, 2320 (1990); Starrett v. Wadley, 876 F.2d 808, 825 (10th Cir. 1989) (citing Headlee).

Plaintiff requests that we reconsider our decision in Headlee in light of contrary caselaw in other circuits. See Headlee, 869 F.2d at 552 (McKay, J., dissenting). We decline to do so, instead entrusting the overall fee award, including the hourly rate determination, within the sound discretion of the district courts. Although plaintiff argues that the district court did not provide a sufficient explanation of why a cost-of-living adjustment was denied, in light of Headlee this argument is without merit. The district court implicitly determined that the amount awarded fit the amount and difficulty of the work performed. See rec. vol. I, doc. 7 at 5-6. On this record, that determination is not an abuse of discretion.

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge