

1 **DISCUSSION**

2 The EAJA provides in pertinent part:

3 “Except as otherwise specifically provided by statute, a court shall
4 award to a prevailing party other than the United States fees and other
5 expenses . . . incurred by that party in any civil action (other than cases
6 sounding in tort), including proceedings for judicial review of agency
7 action, brought by or against the United States in any court having
8 jurisdiction of that action, unless the court finds that the position of the
9 United States was substantially justified or that special circumstances
10 make an award unjust.” 28 U.S.C. § 2412(d)(1)(A).
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12 The term “position of the United States” is not limited to the legal position of
13 the Government during litigation, but rather includes “the action or failure to act by
14 the agency upon which the civil action is based. See 28 U.S.C. § 2412(d)(2)(D);
15 Gutierrez v. Barnhart, 274 F.3d 1255, 1259 (9th Cir. 2001); Andrew v. Bowen, 837
16 F.2d 875, 878 (9th Cir. 1988). Thus, the burden here is on the Government to
17 establish that it was substantially justified on the whole, considering both the
18 underlying administrative decision of the ALJ and the Commissioner’s litigation
19 position in defending the ALJ’s decision. See Gutierrez, 274 F.3d at 1259; Kali v.
20 Bowen, 854 F.2d 329, 332 (9th Cir. 1988). However, the Ninth Circuit also has
21 observed that “[i]t is difficult to imagine any circumstance in which the government’s
22 decision to defend its actions in court would be substantially justified, but the
23 underlying administrative decision would not.” See Flores v. Shalala, 49 F.3d 562,
24 570 n.11 (9th Cir. 1995).

25 In Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 181 L. Ed. 2d 490
26 (1988), the Supreme Court held that the statutory phrase “substantially justified” does
27 not mean “justified to a high degree.” Rather, it means “justified in substance or in
28 the main,” or in other words “justified to a degree that could satisfy a reasonable

1 person.” The Supreme Court further held that this interpretation of the phrase was
2 equivalent to the formula adopted by the Ninth Circuit Court of Appeals, i.e., “a
3 reasonable basis both in law and fact.” There is no presumption that the
4 Government’s position was not substantially justified merely because it lost the case.
5 See United States v. Marolf, 277 F.3d 1156, 1162 (9th Cir. 2002); Kali, 854 F.2d at
6 334. Under the reasonableness standard approved by the Supreme Court in Pierce,
7 the Ninth Circuit has found the Commissioner’s position substantially justified even
8 where, for example, an ALJ “badly mischaracterized” evidence and “ignored . . . clear
9 direct evidence” that the claimant’s past work required more than her residual
10 functional capacity limitations would allow her to do. See Lewis v. Barnhart, 281
11 F.3d 1081, 1083-84 (9th Cir. 2002).

12 Here, in plaintiff’s underlying case, which included a total of six disputed
13 issues, the Court was unable to affirm the ALJ’s decision with respect to Disputed
14 Issue Nos. 1-4: (1) whether the ALJ properly evaluated all the medical opinions in the
15 record; (2) whether the ALJ properly determined plaintiff’s residual functional
16 capacity; (3) whether the ALJ made a proper adverse credibility determination with
17 respect to plaintiff’s son; and (4) whether the ALJ made a proper adverse credibility
18 determination with respect to plaintiff. With respect to Disputed Issue Nos. 5-6, the
19 Court (5) agreed with the Government that the ALJ properly rejected the opinion of
20 plaintiff’s treating physician; and (6) determined that it was unnecessary to reach the
21 issue of whether the ALJ posed a proper hypothetical question to the vocational
22 expert, in light of the Court’s resolution of the other issues.

23
24 **A. The Government’s position was not substantially justified.**

25 The Government contends that its position was substantially justified, even
26 with respect to Disputed Issue Nos. 1-4. For the reasons discussed hereafter, the
27 Court disagrees.

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1 Disputed Issue No. 1¹

2 The ALJ's failure to properly evaluate all of the medical evidence in the record,
3 particularly the opinion of Dr. Angerman, contravened the Commissioner's own
4 regulations. See 20 C.F.R. § 404.1527(c) ("Regardless of its source, we will evaluate
5 every medical opinion we receive."). It follows that the Government's position with
6 respect to this issue was not substantially justified. See Shafer v. Astrue, 518 F.3d
7 1067, 1069, 1072 (9th Cir. 2008) (government's position was not substantially
8 justified where ALJ contravened SSA regulations by disregarding, without
9 explanation, a medical expert's opinion); see also Gutierrez, 274 F.3d at 1259
10 (government's position was not substantially justified where ALJ's decision reflected
11 failure to follow SSA regulations); Yang v. Shalala, 22 F.3d 213, 217 (9th Cir. 1994)
12 (same).

13 The Government contends that its position was substantially justified by merely
14 repeating its litigation position that such evidence was not significant and probative
15 (see Opp. at 4-5), a position that the Court squarely rejected in its Order reversing the
16 ALJ's decision (see Order at 6). Accordingly, the Court declines to find that there
17 was a reasonable basis both in law and fact for the ALJ to have disregarded the
18 evidence. See Flores, 49 F.3d at 570-71 (government's position was not substantially
19 justified where ALJ failed to consider, without explanation, report that was
20 significant and probative to claim of disability).

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24 ¹ Preliminarily, the Government points out that the Court overlooked its
25 position with respect to the ALJ's evaluation of the opinion of Dr. Marshak. (See
26 Opp. at 4.) However, even assuming arguendo that the Court had found that the ALJ
27 properly evaluated the opinion of Dr. Marshak, this would not have changed the
28 Court's ultimate finding in Disputed Issue No. 1 that the ALJ failed to properly
evaluate the medical evidence. Nor would such finding have rendered the
Government's position with respect to this disputed issue substantially justified.

1 The Court therefore finds that the Government’s position with respect to
2 Disputed Issue No. 1 was not substantially justified.

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4 Disputed Issue No. 2

5 It follows from the ALJ’s failure to properly evaluate all of the medical
6 evidence in the record that the ALJ erred in determining plaintiff’s residual functional
7 capacity (“RFC”). Accordingly, the Court also finds that the Government’s position
8 with respect to Disputed Issue No. 2 was not substantially justified. See Shafer, 518
9 F.3d at 1070, 1072 (government’s position was not substantially justified where ALJ
10 erred in assessing claimant’s RFC by failing to properly assess the medical evidence).

11
12 Disputed Issue No. 4

13 The ALJ’s adverse credibility determination with respect to plaintiff was not
14 based on clear and convincing reasons supported by substantial evidence. (See Order
15 at 8-11.) Recently, the Ninth Circuit held that in similar circumstances that the
16 Government’s position was not substantially justified. See Meier v. Colvin, - F.3d. -
17 2013 WL 3802382, at *3 (9th Cir. July 23, 2013) (government’s position was not
18 substantially justified where ALJ’s adverse credibility determination with respect to
19 claimant was not based on clear and convincing reasons, supported by substantial
20 evidence). The Court likewise finds that the Government’s position with respect to
21 Disputed Issue No. 4 was not substantially justified, especially since the ALJ’s
22 adverse credibility determination relied in part on a characterization of the record that
23 was “not entirely accurate.” (See Order at 11.)

24
25 Disputed Issue No. 3

26 The ALJ’s failure to address the testimony of plaintiff’s son, David Ramirez,
27 contravened the Commissioner’s own regulations. See 20 C.F.R. 404.1513(d)(4)
28 (noting that the Commissioner will consider evidence from “non-medical sources (for

1 example, spouses, parents and other caregivers, siblings, other relatives, friends,
2 neighbors, and clergy).”). It follows that the Government’s position with respect to
3 this disputed issue was not substantially justified. See Gutierrez, 274 F.3d at 1259;
4 Yang, 22 F.3d at 217.

5 The Government contends that the ALJ’s failure to consider Mr. Ramirez’s
6 testimony was harmless error by merely repeating its litigation position that Mr.
7 Ramirez’s testimony mirrored plaintiff’s testimony, which the ALJ properly rejected
8 (see Opp. at 10-11), a position that the Court squarely rejected. (See Order at 11-12.)
9 Accordingly, the Court declines to find that there was a reasonable basis both in law
10 and fact for the ALJ to have disregarded Mr. Ramirez’s testimony.

11 Moreover, to the extent that the Government now contends that its position was
12 substantially justified because the Court’s application of the harmless error test of
13 Stout v. Commissioner, Social Sec. Admin., 454 F.3d 1050 (9th Cir. 2006), was “out
14 of context” (see Opp. at 11), the Court disagrees.² Specifically, the Government
15 points to a statement by the Ninth Circuit, in Molina v. Astrue, 674 F.3d 1104, 1117
16 (9th Cir. 2012), that a claimant’s interpretation of Stout was “out of context” because
17 it required a finding that an ALJ’s failure to expressly reject a lay witness’s testimony
18 was per se prejudicial; rather, the Ninth Circuit observed that such an error would be
19 harmless where, for example, the ALJ had properly rejected the similar testimony of
20 nine other lay witnesses. Here, by way of contrast, the Court did not find that the
21 ALJ’s failure to properly consider Mr. Ramirez’s testimony was per se prejudicial;
22 rather, the Court found that the ALJ had failed to properly reject any testimony that
23 was similar to that of Mr. Ramirez. (See Order at 11-12.)

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25 ² In Stout, 454 F.3d at 1056, the Ninth Circuit held that “where the ALJ’s
26 error lies in a failure to properly discuss competent lay testimony favorable to the
27 claimant, a reviewing court cannot consider the error harmless unless it can
28 confidently conclude that no reasonable ALJ, when fully crediting the testimony,
could have reached a different disability determination.”

1 The Court therefore finds that the Government's position with respect to
2 Disputed Issue No. 3 was not substantially justified. See Sampson v. Chater, 103
3 F.3d 918, 922 (9th Cir. 1996) (government's position was not substantially justified
4 where ALJ failed to adequately account for testimony of claimant's mother).

5
6 Conclusion

7 The fact that the Court agreed with the Government's position with respect to
8 Disputed Issue No. 5 and found it unnecessary to decide Disputed Issue No. 6 is not
9 sufficient to render the Government's position substantially justified on the whole.
10 See Hackett v. Barnhart, 475 F.3d 1166, 1174 n.1 (10th Cir. 2007) (EAJA award was
11 not precluded even though Commissioner prevailed on 5 of 6 issues in district court).
12 The Court finds that it was not.

13
14 **B. The EAJA award, less any offset to which the Government legally is**
15 **entitled, should be paid directly to plaintiff's counsel.**

16 The Supreme Court has held that an EAJA award is payable to the litigant, as
17 opposed to the litigant's attorney, and is therefore subject to a Government offset to
18 satisfy a pre-existing debt that the litigant owes the United States. See Ratliff, 130
19 S. Ct. at 2522. Accordingly, the Government requests that, if any EAJA fees are
20 awarded, the Court order the fees paid to plaintiff, notwithstanding plaintiff's
21 assignment of any such fees awarded to his counsel. (See Opp. at 11-12.) The
22 Government does not contest the validity of the assignment contained in the fee
23 agreement between plaintiff and his counsel here, but proposes the following
24 approach:

25 "[I]f the Court orders EAJA fees, the Court [should] specify that
26 payment is to Plaintiff. If and when Plaintiff is awarded EAJA fees, the
27 United States Department of the Treasury will determine whether
28 Plaintiff owes a government debt and take appropriate action according

1 to its own statutes and regulations, as permitted by Ratliff.”

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3 In other post-Ratliff cases before this Court in which the parties have stipulated
4 to the foregoing approach, the Court has gone along with it. However, the Court does
5 not construe Ratliff as mandating this approach, or as precluding the Court from
6 recognizing a valid assignment of EAJA fees. Rather, the Court construes Ratliff as
7 standing simply for the proposition that, since EAJA fees are payable in the first
8 instance to the plaintiff, they are subject to a Government offset to satisfy any
9 pre-existing debt that the litigant owes the United States. However, subject to such
10 offset (if any), plaintiff’s counsel is entitled to direct payment of the EAJA award if
11 there has been a valid assignment. The Court notes that its view that Ratliff does not
12 preclude direct payment to plaintiff’s counsel is consistent with a number of post-
13 Ratliff decisions. See, e.g., Coffey v. Astrue, 2013 WL 120030, at *4 (N.D. Cal. Jan.
14 8, 2013) (directing that attorney’s fees, subject to any debt offset, be paid directly to
15 plaintiff’s counsel); Palomares v. Astrue, 2012 WL 6599552, at *9 (N.D. Cal. Dec.
16 18, 2012) (same); Castaneda v. Astrue, 2010 WL 2850778, at *2-*3 (C.D. Cal. July
17 20, 2010) (“The Court concludes that in light of the assignment, the amount awarded
18 herein, subject to any legitimate offset, should be paid directly to Plaintiff’s
19 counsel.”); Booker v. Astrue, 2010 WL 2771875, at *3 (S.D. Ind. July 13, 2010)
20 (ordering payment of EAJA award directly to plaintiff’s counsel); Martin v. Astrue,
21 2010 WL 2639566, at *2 (M.D. Fla. June 29, 2010) (same); see also Watson v.
22 Astrue, 2010 WL 2903955, at *1 (W.D. La. July 19, 2010) (ordering that the EAJA
23 fees be made payable to both plaintiff and counsel).

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1 **ORDER**

2 IT IS THEREFORE ORDERED AS FOLLOWS: (1) plaintiff's EAJA Petition
3 is granted; (2) plaintiff is awarded EAJA fees in the amount of \$4,313.08, and costs
4 in the amount of \$350; and (3) the Commissioner shall pay such EAJA fees, subject
5 to any offset to which the Government legally is entitled, directly to plaintiff's
6 counsel.

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8 DATED: August 6, 2013



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11 **ROBERT N. BLOCK**
12 **UNITED STATES MAGISTRATE JUDGE**
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