

1 **WO**

2

3

4

5

NOT FOR PUBLICATION

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Thomas Morris, III,

)

No. CV-06-2312-PHX-FJM

10

Plaintiff,

)

ORDER

11

vs.

)

12

Michael J. Astrue, Commissioner of Social Security,

)

13

Defendant.

)

14

)

16

We have before us plaintiff’s application for attorney’s fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (“EAJA”) (doc. 31), defendant’s response (doc. 37), and plaintiff’s reply (doc. 42).

19

On October 25, 2007, we held that the Administrative Law Judge’s (“ALJ”) decision that plaintiff was not disabled and therefore not entitled to benefits under Titles II and XVI of the Social Security Act was supported by substantial evidence in the record and not in legal error (doc. 24). The United States Court of Appeals for the Ninth Circuit reversed our decision on appeal and remanded for an award of benefits. Plaintiff now seeks \$17,814.93 in attorney’s fees and \$805 in costs.

25

A prevailing party in an action against the United States is entitled to an award of attorney’s fees and costs under the EAJA unless the government’s position was “substantially justified.” 28 U.S.C. § 2412(d)(1)(A). The government’s position is substantially justified “if a reasonable person could think it correct, that is, if it has a reasonable basis in law and

28

1 fact.” Pierce v. Underwood, 487 U.S. 552, 566 n.2, 108 S. Ct. 2541, 2550 n.2 (1988). The
2 parties do not dispute that plaintiff was the prevailing party. However, the Commissioner
3 contends that its position defending the ALJ’s determination against plaintiff’s appeal was
4 “substantially justified.” We must, therefore, consider whether the Commissioner’s position
5 “with respect to the issue on which the court based its remand was ‘substantially justified.’”
6 Flores v. Shalala, 49 F.3d 562, 569 (9th Cir. 1995).

7 The Ninth Circuit Court of Appeals reversed the ALJ’s decision on the grounds that
8 he had failed to provide clear and convincing reasons for rejecting plaintiff’s testimony. The
9 court noted that the clear and convincing standard “is the most demanding required in Social
10 Security cases.” Moore v. Comm’r of the Soc. Sec. Admin., 278 F.3d 920, 924 (9th Cir.
11 2002). It also concluded that plaintiff was entitled to an award of benefits because the
12 opinions of two treating physicians, Drs. Graff and Bressler, supported plaintiff’s testimony
13 regarding his physical limitations, and the vocational expert testified that a person with those
14 limitations would qualify as disabled. The court did not, however, address the ALJ’s
15 assessment of Dr. Graff and Dr. Bressler’s reports.

16 In evaluating plaintiff’s motion for attorney’s fees, we need not assess whether the
17 ALJ’s position was correct, but whether the Commissioner has a reasonable basis in law and
18 fact for opposing plaintiff’s appeal. Although the Ninth Circuit decided that they were not
19 clear and convincing, the ALJ provided several reasons for rejecting plaintiff’s subjective
20 complaints. Tr. at 25. First, the ALJ questioned plaintiff’s credibility because he claimed
21 to rely on his wife to remember things even though his wife had a disabling mental
22 impairment, which suggested that her memory may not be reliable. See Burch v. Barnhart,
23 400 F.3d 676, 680 (9th Cir. 2005) (“In determining credibility, an ALJ may engage in
24 ordinary techniques of credibility evaluation, such as considering claimant’s reputation for
25 truthfulness and inconsistencies in claimant’s testimony.”). His conclusion was also based
26 on the lack of significant objective medical evidence. See Id. at 681 (holding that ALJ
27 properly considered the lack of objective medical evidence as a factor in evaluating
28 subjective complaints); Orn v. Astrue, 495 F.3d 625, 638 (9th Cir. 2007) (holding that

1 unexplained gaps in medical treatment are relevant to an adverse credibility finding). The
2 ALJ also found plaintiff's use of a single pill to treat his fibromyalgia and plaintiff's failure
3 to treat his sleep apnea inconsistent with his complaints of excessive pain. See Parra v.
4 Astrue, 481 F.3d 742, 751 (9th Cir. 2007) (“[E]vidence of ‘conservative treatment’ is
5 sufficient to discount a claimant’s testimony regarding severity of an impairment.”) (citation
6 omitted). Finally, the ALJ concluded that plaintiff may be exaggerating his symptoms
7 because he had commented to a treating nurse practitioner that “he was tired of his work and
8 where he worked” for reasons other than his disability. Tr. at 25.

9 Moreover, the ALJ evaluated and rejected the medical opinions upon which the Ninth
10 Circuit relied to conclude that plaintiff was entitled to an award of benefits. The ALJ gave
11 no weight to Dr. Graff’s opinion because it was based on plaintiff’s subjective complaints.
12 This is a legitimate consideration in weighing a treating physician’s opinion. See Morgan
13 v. Comm’r of Soc. Sec. Admin., 169 F.3d 595, 602 (9th Cir. 1999). He also gave Dr.
14 Bressler’s conclusions little weight because they were inconsistent with the objective
15 evidence in the doctor’s report. Id. at 601 (finding that ALJ properly rejected the opinion of
16 a treating physician regarding the plaintiff’s functional limitations where it was inconsistent
17 with other evidence contained in the doctor’s report).

18 We conclude, therefore, that the Commissioner had a reasonable basis in law and fact
19 for arguing that the ALJ carefully evaluated the evidence and made specific findings
20 supported by precedent.

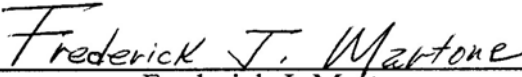
21 Defendant relies on Shafer v. Astrue, 518 F.3d 1067 (9th Cir. 2008), to argue that he
22 is entitled to fees in this case. In Shafer, the court determined that an award of attorney’s
23 fees under the EAJA was appropriate where the ALJ failed to provide clear and convincing
24 reasons for rejecting the plaintiff’s subjective complaints. Unlike this case, however, the
25 ALJ in Shafer did not “specify which parts of Shafer’s testimony were not credible and what
26 evidence in the record undermined such testimony.” Id. at 1070. Here, as discussed, the ALJ
27 provided several specific reasons for rejecting plaintiff’s testimony supported by evidence
28 in the record. Although the Ninth Circuit ultimately concluded that the ALJ’s determination

1 was incorrect, the Commissioner was substantially justified in defending the ALJ's errors.
2 See Pierce, 487 U.S. at 566 n.2, 108 S. Ct. at 2550 n.2 (“[A] position can be justified even
3 though it is not correct, . . . if it has a reasonable basis in law and fact.”).

4 Accordingly, **IT IS ORDERED DENYING** plaintiff's motion for attorney's fees
5 (doc. 31).

6 DATED this 21st day of August, 2009.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Frederick J. Martone
United States District Judge