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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Jenifer May Irving,

9
10 **Plaintiff,**

11 v.

12 Michael J. Astrue, Commissioner of the
13 Social Security Administration,

14 **Defendant.**

No. CV09-1930-PHX-JAT

ORDER

15 Currently pending before the Court are Plaintiff Jenifer May Irving's Motion for
16 Award of Attorney's Fees Under 42 U.S.C. §406(b) (Doc. 42) and Motion for Award of
17 Attorney Fees Pursuant to the Equal Access to Justice Act (Doc. 39). The Court now
18 rules on the Motions.

19 **I. BACKGROUND**

20 Plaintiff filed her opening brief on January 8, 2010. (Doc. 19.) On January 12,
21 2010, the Commissioner filed a Motion for Entry of Judgment with Order of Remand
22 Pursuant to Sentence Six of Section 205(g) of the Social Security Act. (Doc. 20.) The
23 Commissioner sought a remand pursuant to sentence six for further administrative
24 proceedings. The Court granted the Commissioner's Motion to Remand on March 29,
25 2010. (Doc. 23.)

26 Plaintiff first moved for attorneys' fees pursuant to the Equal Access to Justice Act
27 (the "EAJA") on June 29, 2010. (Doc. 25.) The Commissioner objected to the motion
28 because Plaintiff did not become a prevailing party for purposes of the EAJA based on

1 the Court's sentence six remand. (Doc. 28, p.2.) Plaintiff conceded in her Reply that she
2 was not yet eligible as a prevailing party to recover attorneys' fees under the EAJA.
3 (Doc. 29, p.2.) The Court therefore denied her first motion for EAJA attorneys' fees.
4 (Doc. 30.)

5 Plaintiff again moved for attorneys' fees pursuant to the EAJA on December 10,
6 2010. (Doc. 31.) In support of her motion, Plaintiff filed a Notice of Decision – Fully
7 Favorable that Administrative Law Judge Nancy Alden entered on October 8, 2010.
8 (Doc. 31-1.) On remand from this Court, ALJ Alden found Plaintiff disabled since May
9 5, 2006. (*Id.*, p.5.) The Court again denied the motion as premature because the Court
10 had not yet entered a final judgment for Plaintiff, and the Court directed the
11 Commissioner to file a proposed form of judgment. (Doc. 36.)

12 The Commissioner filed a proposed form of judgment on August 31, 2011. (Doc.
13 37.) The Court entered final Judgment for Plaintiff that same day. Plaintiff's counsel
14 thereafter filed the pending Motions for Attorney Fees on November 28, 2011.

15 **II. FEES PURSUANT TO THE SOCIAL SECURITY ACT**

16 Plaintiff's counsel seeks \$17,504.25 in attorneys' fees pursuant to 42 U.S.C.
17 §406(b). Section 406(b) provides that whenever the Court renders a favorable judgment
18 to a social security claimant, the Court can award reasonable attorneys' fees for
19 representation of the claimant. 42 U.S.C. §406(b)(1)(A). The reasonable fee cannot
20 exceed twenty-five percent of the total past-due benefits awarded to the claimant. *Id.*
21 The fee is payable out of, and not in addition to, the amount of the past-due benefits. *Id.*

22 Section 406(b) "does not displace contingent-fee agreements as the primary means
23 by which fees are set for successfully representing" social security claimants in court.
24 *Gisbrecht v. Barnhart*, 535 U.S. 789, 807 (2002). Plaintiff and her counsel had a
25 contingent-fee agreement in this case typical of fee agreements in disability benefit cases.

26 The contingent-fee agreement provides that Plaintiff's counsel's fee shall equal
27 twenty-five percent of all past-due benefits awarded to Plaintiff and any other individuals
28 entitled to benefits by reason of the award to Plaintiff. (Doc. 42-2.) Twenty-five percent

1 of the total amount of past-due benefits awarded to Plaintiff and others as a result of the
2 Judgment in her favor is \$17,504.25. Plaintiff’s counsel therefore seeks an award of
3 attorneys’ fees in the amount of \$17,504.25. The Commissioner does not object to this
4 amount.

5 Because the Court finds the contingent fee in this case is reasonable, the Court will
6 award Plaintiff’s counsel attorneys’ fees in the amount of \$17,504.25 pursuant to 42
7 U.S.C. §406(b).

8 III. EAJA FEES

9 The EAJA authorizes courts to award attorneys’ fees when a party prevails against
10 the United States, including in an action based on an agency ruling. *Hardisty v. Astrue*,
11 592 F.3d 1072, 1076-77 (9th Cir. 2010). Plaintiff prevailed here because the Court
12 granted judgment in her favor and ordered payment of disability benefits. The Court
13 should award reasonable attorneys’ fees under the EAJA unless the Commissioner shows
14 that his position was substantially justified or that special circumstances make an award
15 unjust. 28 U.S.C. §2412(d)(1)(A).¹ The Commissioner does not argue that his position
16 was substantially justified or that special circumstances would make an award unjust in
17 this case. The Court therefore will award EAJA fees to Plaintiff, but must determine the
18 appropriate amount of fees.

19 The EAJA sets a maximum rate of \$125 an hour for attorneys’ fees, unless the
20 Court determines that “an increase in the cost of living or a special factor, such as the
21 limited availability of qualified attorneys for the proceedings involved, justifies a higher
22 fee.” 28 U.S.C. §2412(d)(2)(A). Plaintiff seeks an upward adjustment for cost of living
23 and a fee enhancement because of Plaintiff’s counsel’s expertise.

24 The Commissioner does not object to the upward adjust for cost of living
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27 ¹ If an attorney receives fees under the Social Security Act and the EAJA for the
28 same work, then the attorney must refund the amount of the smaller fee to the claimant.
Gisbrecht, 535 U.S. at 796.

1 requested by Plaintiff.² Nor does the Commissioner object to the number of hours that
2 Plaintiff's counsel spent on this case. But the Commissioner does object to a fee
3 enhancement.

4 The EAJA allows enhancement of the statutory hourly rate for special factors,
5 including the limited availability of qualified attorneys for the proceedings involved. To
6 establish entitlement to an enhanced fee under the EAJA, Plaintiff must show that her
7 attorney: 1) possesses a distinctive knowledge or specialized skill; 2) that was necessary
8 to the litigation in question; and 3) was not available elsewhere at the statutory rate.
9 *Nadarajah v. Holder*, 569 F.3d 906, 912 (9th Cir. 2009).

10 Although the Ninth Circuit Court of Appeals has not reached the precise issue,³
11 other Courts of Appeals have held that routine disability law is not a specialized area
12 warranting an enhanced rate. *See, e.g., Raines v. Shalala*, 44 F.3d 1355, 1361 (7th Cir.
13 1995); *Stockton v. Shalala*, 36 F.3d 49, 50 (8th Cir. 1994); *Harris v. Railroad Ret. Bd.*,
14 990 F.2d 519, 521 (10th Cir. 1990). This case was a routine social security disability
15 case that did not involve complex issues requiring a specialized knowledge or skill.

16 Moreover, the Ninth Circuit specifically has rejected "ability of counsel" and
17 "efficiency" – some of the reasons offered by Plaintiff's counsel - as reasons for fee
18 enhancement. *Natural Res. Def. Council Inc. v. Winter*, 543 F.3d 1152, 1160 (9th Cir.
19 2008)("Producing high-quality work on a short deadline hardly satisfies the standard in
20 *Pierce* of work requiring specialized skills or knowledge beyond what lawyers use on a
21 regular basis.")(internal citations omitted). Finally, Plaintiff has not shown that qualified
22 counsel was not otherwise available at the statutory rate. The Court therefore will not

24 ² The cost of living adjustment is determined by multiplying the base EAJA rate
25 by the current Consumer Price Index for all Urban Consumers ("CPI-U"), then dividing
the product by the CPI-U in the month that the cap was imposed.

26 ³ The Ninth Circuit Court of Appeals awarded enhanced EAJA fees in *Pirus v.*
27 *Bowen*, 869 F.2d 536 (9th Cir. 1989), which was a disability case. But *Pirus* is
28 distinguishable and does not present the same issue as this case because *Pirus* was a class
action challenging provisions of the Social Security Act, whereas this case is a routine
social security disability case.

1 award a fee enhancement.

2 The Court finds that Plaintiff is entitled to an award of attorneys' fees for the 20.8
3 hours her counsel worked on her case and to a cost-of-living adjustment to the statutory
4 hourly rate. But Plaintiff has not demonstrated entitlement to a special factor fee
5 enhancement. The Court therefore will award Plaintiff \$3,889.42 in attorneys' fees under
6 the EAJA.

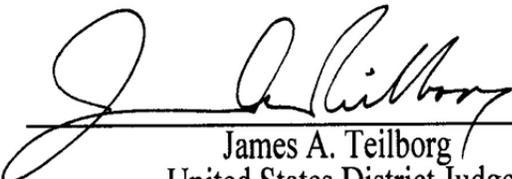
7 The Commissioner argues based on recent Supreme Court precedent that an award
8 of EAJA fees must be made payable to the claimant. *Astrue v. Ratliff*, 560 U.S. ___, 130
9 S.Ct. 2521 (2010). Plaintiff's counsel concedes that payment of the EAJA award must be
10 made directly to Plaintiff.

11 Accordingly,

12 **IT IS ORDERED** Granting Plaintiff's Attorney's Motion for Award of
13 Attorney's Fees under 42 U.S.C. §406(b) (Doc. 42). The Court awards Plaintiff's
14 counsel \$17,504.25 in attorneys' fees.

15 **IT IS FURTHER ORDERED** Granting Plaintiff's Motion for Award of Attorney
16 Fees Pursuant to the Equal Access to Justice Act (Doc. 39). The Court awards Plaintiff
17 \$3,889.42 in EAJA fees.

18 Dated this 5th day of June, 2012.

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23 James A. Teilborg
24 United States District Judge
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