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

8 Jill Ann Alexander,

9 Plaintiff,

10 v.

11 Michael J. Astrue, Commissioner of Social  
12 Security,

13 Defendant.

No. CV11-02465-PHX-DGC

**ORDER**

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16 Plaintiff has filed a motion for attorney fees and costs pursuant to the Equal  
17 Access to Justice Act (“EAJA”), 28 U.S.C. § 2412. Doc. 18. The motion is fully briefed.  
18 Docs. 18-20. No party has requested oral argument. For the reasons that follow, the  
19 Court will grant the motion and award Plaintiff fees in the amount of \$6,870.90.

20 **I. Background.**

21 An administrative law judge (“ALJ”) denied Plaintiff’s application for social  
22 security benefits at step four of the five-step evaluation process, finding that Plaintiff’s  
23 residual functional capacity (“RFC”) did not preclude her from performing her past work  
24 as a financial sales representative, educational course sales representative, customer  
25 service representative, food service manager, waitress, and bartender. This decision  
26 became Defendant’s final decision when the Appeals Council denied review. Plaintiff  
27 brought this action for judicial review pursuant to 42 U.S.C. § 405(g). The Court  
28 remanded the case to Defendant for further proceedings.

1     **II. Discussion.**

2             “The EAJA creates a presumption that fees will be awarded to prevailing parties.”  
3     *Flores v. Shalala*, 49 F.3d 562, 569 (9th Cir. 1995). Plaintiff is a prevailing party  
4     because this matter was remanded pursuant to sentence four of the Social Security Act,  
5     42 U.S.C. § 405(g). See Doc. 16; *Gutierrez v. Barnhart*, 274 F.3d 1255, 1257 (9th Cir.  
6     2001) (“An applicant for disability benefits becomes a prevailing party for purposes of  
7     the EAJA if the denial of her benefits is reversed and remanded regardless of whether  
8     disability benefits ultimately are awarded.”); *Flores*, 49 F.3d at 567 (“If the district court  
9     enters judgment reversing and remanding under sentence four, then the claimant must  
10    apply for fees within 30 days of the date the judgment becomes final.”). The Court  
11    should award reasonable attorney fees and costs under the EAJA unless Defendant shows  
12    that its position with respect to the issue on which the district court based its remand was  
13    “substantially justified.” 28 U.S.C. § 2412(d)(1)(A); see *Lewis v. Barnhart*, 281 F.3d  
14    1081, 1083 (9th Cir. 2002).

15            **A. Was Defendant’s Position Substantially Justified?**

16            Under the EAJA, “substantial justification” means that “the government’s  
17    position must have a reasonable basis in law and fact.” *Shafer v. Astrue*, 518 F.3d 1067,  
18    1071 (9th Cir. 2008) (quoting *Corbin v. Apfel*, 149 F.3d 1051, 1052 (9th Cir. 1998)).  
19    “Where, as here, the ALJ’s decision was reversed on the basis of procedural errors, the  
20    question is *not* whether [Defendant’s] position as to the merits of [Plaintiff’s] disability  
21    claim was substantially justified. Rather, the relevant question is whether [Defendant’s]  
22    decision to defend on appeal the procedural errors committed by the ALJ was  
23    substantially justified.” *Id.* (emphasis in original).

24            Defendant argues that its decision to defend the ALJ’s position is substantially  
25    justified because the Commissioner prevailed on eight of the nine issues raised by  
26    Plaintiff in her appeal (Doc. 19 at 4-5),<sup>1</sup> and the Court found no explicit error in the

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28            <sup>1</sup> Since the Court directed the ALJ to consider Plaintiff’s newly submitted  
evidence on remand (Doc. 16 at 21), Plaintiff argues it also prevailed on this issue

1 ALJ's determination, instead finding that the ALJ's determination was "inconclusive."  
2 (Doc. 19 at 5).

3 At step four of the evaluation, Plaintiff had the burden of showing that she could  
4 no longer perform her past relevant work. *Lewis*, 281 F.3d at 1083 (citing *Pinto v.*  
5 *Massanari*, 249 F.3d 840, 844 (9th Cir. 2001)). The ALJ was required to examine  
6 Plaintiff's "residual functional capacity and the physical and mental demands" of  
7 Plaintiff's past relevant work. *Id.* The medical records were inconclusive as to the  
8 amount of rest Plaintiff requires for her right arm, and the ALJ failed to determine how  
9 much rest Plaintiff's right arm would require. Doc. 16 at 20. The ALJ also failed to ask  
10 the vocational expert whether there would be any jobs in the national economy that  
11 Plaintiff could perform if she required 15 to 30 minutes of rest but was not limited to  
12 sedentary work. The ALJ thus did not determine if Plaintiff's required rest would  
13 disqualify her for non-sedentary work. *Id.*

14 The Court finds that Defendant's decision to defend the ALJ's position on step  
15 four did not have a reasonable basis in law and fact because the ALJ must make factual  
16 findings to support the conclusion that Plaintiff's RFC precluded her from performing her  
17 past relevant work. The ALJ failed to "fully and fairly develop the record and to assure  
18 that the claimant's interests are considered," *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th  
19 Cir. 1996) (quotations and citations omitted), and the Commissioner was not substantially  
20 justified in defending the inconclusive record. Defendant's "'defense of basic and  
21 fundamental errors such as the ones in the present case' lacked substantial justification."  
22 *Shafer*, 518 F.3d at 1071-72 (quoting *Corbin*, 149 F.3d at 1053).

23 **B. Is the Amount of the Requested Fee Award Reasonable?**

24 Plaintiff's counsel has filed an affidavit and an itemized statement of fees showing  
25 that he worked 38.5 hours on this case, incurring fees and costs of \$6,870.90. Doc. 18-4  
26 at 1-6. Defendant does not dispute the reasonableness of the requested fee award.

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 (Doc. 20 at 2-3). The Court did not, however, remand because of the newly submitted  
evidence, and thus this issue was not a basis for the Court's decision to remand.

1 Doc. 19. Having reviewed counsel’s affidavit and the statement of fees, and having  
2 considered the relevant fee award factors, *see Hensley v. Eckerhart*, 461 U.S. 424, 429-30  
3 & n.3 (1983), the Court finds the requested fee award reasonable. The Court will grant  
4 Plaintiff’s motion and award her \$6,870.90 in attorney’s fees and costs.

5 **C. Is the Award Assignable to Plaintiff’s Counsel?**

6 Plaintiff assigned her right to any EAJA award to Plaintiff’s counsel. Docs. 18-7  
7 at 2. Defendant argues an EAJA award is payable only to a prevailing plaintiff, and that  
8 awarding fees to Plaintiff’s counsel pursuant to the assignment would violate the Anti-  
9 Assignment Act (“the Act”), 31 U.S.C. § 3727. Doc. 19 at 6-7.

10 In *Astrue v. Ratliff*, the Supreme Court interpreted § 2412(d) and held that EAJA  
11 fees are payable to litigants and thus subject to offset where a litigant has outstanding  
12 federal debts. 130 S. Ct. 2521, 2527 (2010). The Supreme Court noted that although the  
13 government had a history of paying EAJA awards directly to attorneys in certain cases, in  
14 2006 it discontinued that practice, making direct payments to the attorneys “only in cases  
15 where the plaintiff does not owe a debt to the government and assigns the right to receive  
16 the fees to the attorney.” *Id.* at 2529 (quotations and citations omitted). Since *Ratliff*,  
17 district courts in other circuits have ordered fees paid directly to counsel so long as the  
18 government is afforded an opportunity to offset any preexisting debt owed by the  
19 plaintiff, and the plaintiff has assigned all rights in the fee award to counsel. *See Meyer*  
20 *v. Astrue*, 2011 WL 4036398, at \*3 (D. Minn. 2011). In this case, Plaintiff has assigned  
21 all rights to any EAJA award to counsel (Doc. 18-7 at 2), and Plaintiff’s counsel submits  
22 that he has verified with the U.S. Treasury Department that Plaintiff does not owe any  
23 debt to the United States (Doc. 18 at 4; Doc. 18-6).

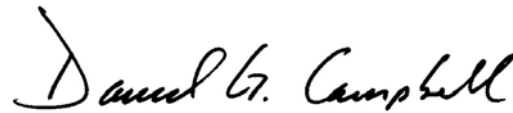
24 The Anti-Assignment Act (“the Act”) precludes the assignment of certain claims  
25 against the United States unless the government waives the Act’s requirements. 31  
26 U.S.C. § 3727. Under the Act, an assignment is permissible only (1) after a claim is  
27 allowed, (2) when the amount has been decided, and (3) when a warrant for payment of  
28 the claim has been issued. 31 U.S.C. § 3727(b). Plaintiff’s assignment was executed on

1 October 1, 2012, well before any EAJA claim was allowed or the amount decided.  
2 Doc. 18-7 at 2-3. Since this assignment runs afoul of the Act, and the government does  
3 not appear to waive the Act's provisions, the Court finds that the assignment is invalid as  
4 contrary to the Anti-Assignment Act. The Court will not order that the fees be paid to  
5 Plaintiff's counsel.

6 **IT IS ORDERED:**

- 7 1. Plaintiff's motion for attorney fees (Doc. 18) is **granted**.
- 8 2. Plaintiff is awarded **\$6,870.90** in attorney fees and costs pursuant to the  
9 Equal Access to Justice Act, 28 U.S.C. § 2412.

10 Dated this 28th day of November, 2012.

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14 David G. Campbell  
15 United States District Judge  
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