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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Delores Jane Clark,

No. CV-11-2561-PHX- BSB

10 Plaintiff,

ORDER

11 vs.

12 Carolyn W. Colvin,
13 Commissioner of the Social Security
14 Administration,

15 Defendant.
16

17 Plaintiff Delores Jane Clark has filed a timely Motion for Award of Attorney's
18 Fees Pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. (Doc. 31.)
19 Defendant, the Commissioner of the Social Security Administration (the Commissioner
20 or the government), opposes this motion. (Doc. 34.) For the reasons set forth below, the
21 Court grants the motion and awards attorney's fees to Plaintiff in the amount of
22 \$13,501.50.

23 **I. Procedural History**

24 In June 2007, Plaintiff applied for supplemental security income under Title XVI
25 of the Social Security Act (the Act), 42 U.S.C. § 1381-1383f. (Tr. 18.)¹ Plaintiff alleged

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28 ¹ Citations to "Tr." are to the administrative record located at docket 12.

1 disability with an onset date of March 2003. (*Id.* at 32.) Plaintiff’s application was
2 denied at the initial level of administrative review. After a hearing, an Administrative
3 Law Judge (ALJ) denied Plaintiff’s application for benefits. (*Id.* at 30-58) This decision
4 became the Commissioner’s final decision when the Social Security Appeals Council
5 denied Plaintiff’s request for review of the ALJ’s decision. (*Id.* at 1-6.)

6 Plaintiff then brought this action, pursuant to 42 U.S.C. § 405(g), for judicial
7 review of the Commissioner’s final decision. (Doc. 1.) This Court issued an order on
8 January 23, 2013, remanding for further proceedings because it found that the ALJ erred
9 by rejecting treating physicians’ opinions, relying on the opinion of a one-time examiner
10 as substantial evidence, and rejecting Plaintiff’s symptom testimony. (Doc. 29 at 10-11,
11 15, 18-20.)

12 Plaintiff subsequently filed the pending motion requesting \$13,279.76 in
13 attorney’s fees. (Doc. 31.) In her Reply, Plaintiff seeks an additional \$221.74 in
14 attorney’s fees for time spent preparing her Reply. (Doc. 37.) The government argues
15 that the motion should be denied because its position was substantially justified. The
16 government also argues that any award of attorney’s fees should be paid directly to
17 Plaintiff, not to her attorney. (Doc. 34 at 9-11.)

18 **II. Attorney’s Fees under the EAJA**

19 In any action brought by or against the United States, the EAJA provides that “a
20 court shall award to a prevailing party other than the United States fees and other
21 expenses . . . unless the court finds that the position of the United States was *substantially*
22 *justified* or that special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A)
23 (emphasis added); *see Thomas v. Peterson*, 841 F.2d 332, 335 (9th Cir. 1988) (stating
24 that the EAJA creates a presumption that fees will be awarded to the prevailing party
25 unless the government establishes that its position was “substantially justified”). The
26 government bears the burden of establishing substantial justification. *Gutierrez v.*
27 *Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001).

1 “Substantially justified means justified in substance or in the main — that is,
2 justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487
3 U.S. 552, 565 (1988) (internal citations omitted). A substantially justified position must
4 have a reasonable basis both in law and fact. *Id.* “The ‘position of the United States’
5 includes both the government’s litigation position and the underlying agency action
6 giving rise to the civil action.” *Meier v. Colvin*, 2013 WL 3802382, at *1 (9th Cir. Jul.
7 23, 2013). The EAJA specifically provides that, “[t]he position of the United States’
8 means, in addition to the posture taken by the United States in the civil action, the action
9 or failure to act by the agency upon which the civil action is based.” 28
10 U.S.C. § 2412(d)(2)(D).

11 In the Social Security context, the Ninth Circuit treats an ALJ’s decision as the
12 “action or failure to act by the agency upon which the civil action is based.” *Meier*, 2013
13 WL 3802382, at *2. Thus, when applying the substantial justification test, the court
14 determines “(1) whether the [ALJ] was substantially justified in taking [the] original
15 action, and (2) whether the government was substantially justified in defending the
16 validity of the action in court.” *Gutierrez*, 274 F.3d at 1258; *see also Meier*, 2013 WL
17 3802382, at *3 (“Applying the substantial justification test [in the Social Security
18 context, the court] first consider[s] the underlying agency action, which . . . is the
19 decision of the ALJ. [The court] then considers the government’s litigation position.”).

20 **III. Analysis**

21 **A. Prevailing Party**

22 The Court must first determine whether Plaintiff qualifies as a prevailing party
23 under the EAJA. A plaintiff is a prevailing party if he or she succeeds on “any significant
24 issue that achieves some of the benefit sought in bringing the suit.” *Penrod v. Apfel*, 54
25 F. Supp. 2d 961, 963 (D. Ariz. 1999) (citing *Tex. State Teachers Ass’n. v. Garland Indep.*
26 *School Dist.*, 489 U.S. 782, 791-92 (1989)). A claimant who obtains a court order
27 remanding a Social Security case to the Commissioner either for further proceedings or
28 for an award of benefits is a prevailing party under the EAJA. *Shalala v. Schaefer*, 509

1 U.S. 292, 300-01 (1993). Here, the parties do not dispute that Plaintiff is a prevailing
2 party because the Court remanded this matter for further proceedings. *See Gutierrez*, 274
3 F.3d at 1257 (“An applicant for disability benefits becomes a prevailing party for
4 purposes of the EAJA if the denial of her benefits is reversed and remanded regardless of
5 whether disability benefits are ultimately awarded.”).

6 **B. Underlying Agency Conduct**

7 The parties dispute whether the ALJ’s decision was substantially justified. Here,
8 the order remanding this matter was based on the Court’s conclusion that the ALJ erred
9 by rejecting the treating physicians’ opinions, relying on the opinion of a one-time
10 examiner as substantial evidence, and rejecting Plaintiff’s symptom testimony without
11 providing sufficient reasons. (Doc. 29.) The Court remanded this matter for further
12 proceedings and consideration of the record because “[t]here may be evidence in the
13 record to which the [ALJ] can point to provide the requisite’ reasons for rejecting the
14 opinions of treating physicians Dr Tsingine and Dr. Summner and for discounting
15 Plaintiff’s credibility” (Doc. 29 at 21 (quoting *McAllister v. Sullivan*, 888 F.2d 599,
16 63 (9th Cir. 1989).)

17 In response to Plaintiff’s request for attorney’s fees, the government argues that
18 the ALJ provided sufficient reasons for discounting the opinions of Dr. Tsingine and
19 Dr. Sumner. The government argues that the ALJ noted that Dr. Tsingine’s opinion was
20 inconsistent with the objective medical findings and the record as a whole. (Doc. 34 at
21 4.) The government raised this same argument in its response to Plaintiff’s opening brief.
22 (Doc. 24 at 8-14.) The Court, however, rejected the government’s argument because the
23 ALJ did not identify the objective findings or other record evidence that conflicted with
24 the treating physicians’ opinions. (Doc. 29 at 11-12.)

25 The government also argues that the ALJ gave sufficient reasons for discounting
26 Plaintiff’s symptom testimony. (Doc. 34 at 5.) The government mainly reiterates
27 arguments from its opposition brief and does not present any new arguments in support of
28 the ALJ’s decision. (Doc. 24 at 17-22.) Thus, the government has not met its burden of

1 establishing that the ALJ's position was substantially justified. *See Eames v. Bowen*, 864
2 F.2d 251, 252, (2d Cir. 1988) (the government must make a "strong showing" to carry its
3 burden).

4 **C. Litigation Position**

5 Because the government's underlying position was not substantially justified, the
6 Court need not address whether the government's litigation position was justified. *Meier*,
7 2013 WL 3802382, at *4 (citing *Shafer v. Astrue*, 518 F.3d 1067, 1071 (9th Cir. 2008)
8 ("The government's position must be substantially justified at each stage of the
9 proceedings.")). Moreover, even if the Court considered the government's position in
10 this litigation, the Court would find that it was not substantially justified. *See Sampson v.*
11 *Chater*, 103 F.3d 918, 922 (9th Cir. 1996) (stating that "[i]t is difficult to imagine any
12 circumstance in which the government's decision to defend its actions in court would be
13 substantially justified, but the underlying administrative decision would not."). The
14 government's defense of the ALJ's decision mainly restates its arguments that the Court
15 previously rejected in its order remanding this matter for further proceedings.
16 Considering the errors in the ALJ's analysis, the Court cannot find that the government
17 was substantially justified in defending the ALJ's determination in this case.
18 Accordingly, the Court will award Plaintiff attorney's fees under the EAJA.

19 **IV. Award of Attorney's Fees**

20 Plaintiff's counsel has filed an affidavit and an itemized statement of attorney's
21 fees showing that he worked 66.1 hours on this case and that the attorney's fees total
22 \$13,501.50. (Docs. 49, Ex. 1; Doc. 51.) The amount of fees requested is based on the
23 following hourly rates and hours of work: (1) in 2011, 2.6 hours at the hourly rate of
24 \$180.59; (2) in 2012, 55.1 hours at the hourly rate of \$184.32; and (3) in 2013, 8.4 hours
25 at the hourly rate of \$184.32. (Docs. 33, Ex. 1; Doc. 37 at 4.) The government does not
26 oppose the amount of fees requested.

27 Attorney's fees and expenses under the EAJA must be reasonable. *See* 28
28 U.S.C. §§ 2412(d)(2)(A). Counsel for the prevailing party has an ethical duty to make a

1 good faith effort to exclude “excessive, redundant, or otherwise unnecessary” hours from
2 counsel’s fee petition. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). The district court
3 has discretion to determine a reasonable fee award. *See* 28 U.S.C. § 2412(b); *Pierce v.*
4 *Underwood*, 487 U.S. 552, 571 (1988).

5 The EAJA limits attorney’s fees to \$125.00 per hour “unless the court determines
6 that an increase in the cost of living or a special factor, such as the limited availability of
7 qualified attorneys for the proceeding involved, justifies a higher fee.” 28
8 U.S.C. § 2412(2)(d)(A). The Supreme Court has suggested that an increase based on the
9 cost of living is “next to automatic.” *Meyer v. Sullivan*, 958 F.2d 1029, 1035 n.9 (11th
10 Cir. 1992) (quoting *Pierce*, 487 U.S. at 571 (1988)). The cost of living adjustment is
11 determined by multiplying the base EAJA rate (\$125.00) by the current Consumer Price
12 Index for all Urban Consumers (CPI-U) and then dividing the product by the CPI-U in
13 the month that the cap was imposed (\$155.70). *See Sorenson v. Mink*, 239 F.3d 1140,
14 1148 (9th Cir. 2001) (citing *Ramon-Sepulveda v. INS*, 863 F.2d 1458, 1463) (9th Cir.
15 1988)).

16 Plaintiff has calculated the attorney’s fees award based on hourly rates that are
17 slightly less than or equal to the statutory maximum hourly rate under the EAJA. *See*
18 ‘Statutory Maximum Rates Under the Equal Access to Justice Act,’ available at
19 http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last visited Sept. 5,
20 2013).² Additionally, in view of the voluminous administrative record, the Court finds
21 that counsel expended a reasonable number of hours on this matter. Accordingly, the
22 Court awards Plaintiff the requested amount of attorney’s fees, \$13,501.50.

23 Finally, Plaintiff requests that the Court order that “any check be sent to Plaintiff’s
24 counsel’s office.” (Doc. 37.) The government argues that any award of attorney’s fees
25 should be made payable to Plaintiff, not her attorney. (Doc. 34.) In *Astrue v. Ratliff*, 560

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27 ² The applicable statutory maximum hourly rates under the EAJA, adjusted for
28 increases in the cost of living, are as follows: first half of 2013 — \$186.55; 2012 —
\$184.32; and 2011 — \$180.59.

1 U.S. ___, 130 S. Ct. 2521 (2010), the Supreme Court held that EAJA fees are payable to
2 the prevailing party, not his attorney. Plaintiff states that the fee agreement with counsel
3 provides that any EAJA fees are assigned to Plaintiff’s counsel. Plaintiff recognizes
4 *Ratliff’s* holding that EAJA fees are payable to the prevailing party, not his attorney, and
5 requests that the Court order that any award of attorney’s fees, payable to Plaintiff, be
6 sent to her attorney’s office “so that assignment between Plaintiff and counsel may be
7 executed” (Doc. 37 at 4.) Plaintiff does not request that the check be made payable
8 to her attorney.

9 In *Ratliff*, the Supreme Court held that EAJA fees are payable the prevailing party,
10 not his attorney, but the “practical reality that attorneys are the beneficiaries and, almost
11 always, the ultimate recipients of the fees that the statute awards to the ‘prevailing
12 part[ies]’” because of “nonstatutory (contractual and other assignment-based) rights that
13 typically confer upon the attorney the entitlement to payment of the fees award the statute
14 confers on the prevailing litigant.” 130 S. Ct. at 2529 (quoting *Venegas v. Mitchell*, 495
15 U.S. 82, 86 (1990)). The Court further noted that such “arrangements would be
16 unnecessary if . . . statutory fees language like that in . . . EAJA provide[d] attorneys with
17 a statutory right to direct payment of awards.” *Id.* Thus, although *Ratliff* clarifies that
18 EAJA awards of attorney’s fees are payable directly to the prevailing party, it does not
19 preclude the contractual assignment of the fee award to that party’s attorney.³ Therefore,
20 the Court declines to order *direct* payment of attorney’s fees to Plaintiff’s attorney, but
21 directs the government to mail the attorney’s fee award, made payable to Plaintiff, to the
22 office of Plaintiff’s attorney.

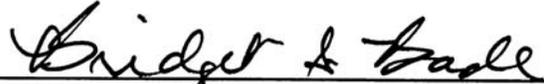
23 Accordingly,

24 **IT IS ORDERED** that Plaintiff’s Motion for Award of Attorney’s Fees under the

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26 ³ See *Brown v. Astrue*, 271 Fed. Appx. 741, 744 (10th Cir. 2008) (stating that “the
27 private contractual arrangement between [Plaintiff] and his counsel [is] a collateral matter
28 that the [Court] need not address when considering the EAJA fees motion.”).

1 Equal Access to Justice Act (Doc. 31) is **GRANTED** and that Plaintiff is awarded
2 \$13,501.50 in attorney's fees to be mailed (payable to Plaintiff) to Plaintiff's counsel,
3 Mark Caldwell, Caldwell & Ober PLLC, 1940 East Camelback Road, Suite 150,
4 Phoenix, Arizona 85016.

5 Dated this 5th day of September, 2013.

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10 Bridget S. Bade
11 United States Magistrate Judge
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