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

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9 Stella Weiskopf,

) CIV 13-1979-PHX-MHB

10 Plaintiff,

) **ORDER**

11 vs.

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

14 Defendant.

15 Pending before the Court is Plaintiff Stella Weiskopf’s application for attorney’s fees
16 under the Equal Access to Justice Act (“EAJA”) (Doc. 47). After reviewing the arguments
17 of the parties, the Court now issues the following ruling.

18 On October 14, 2010, Plaintiff filed an application for disability insurance benefits
19 and supplemental security income alleging disability beginning March 6, 2009. Plaintiff’s
20 claims were denied initially and on reconsideration. Thereafter, Plaintiff requested a hearing
21 before an administrative law judge, and a hearing was held on April 9, 2012. Afterwards, the
22 ALJ issued a decision finding that Plaintiff was not disabled. The Appeals Council denied
23 Plaintiff’s request for review, making the ALJ’s decision the final decision of the
24 Commissioner. Plaintiff then sought judicial review of the ALJ’s decision pursuant to 42
25 U.S.C. § 405(g).

26 This Court, after reviewing the administrative record and the arguments of the parties,
27 affirmed the decision of the ALJ, finding that: (1) the ALJ properly weighed the medical
28 source opinion evidence; and (2) the ALJ provided a sufficient basis to find Plaintiff’s

1 allegations not credible. Thereafter, Plaintiff appealed the Court’s decision to the Ninth
2 Circuit Court of Appeals.

3 On August 4, 2017, the Ninth Circuit issued its Mandate, finding that the ALJ’s
4 decision was not supported by substantial evidence, and remanding this matter back to the
5 district court with instructions to remand to the Commissioner for further proceedings.
6 Specifically, the court found, as follows:

7 The ALJ did not set forth clear, specific and legitimate reasons for rejecting
8 the medical opinions of Appellant’s treating pain management specialist and
9 treating neurologist in determining Appellant’s ability to do work-related
10 activities. These two treating physicians provided opinions of her functional
11 capacity. The ALJ rejected both opinions, assigning one of them “little weight”
12 and the other “limited weight.” But she failed to provide specific and
13 legitimate reasons for doing so. *See Orn*, 495 F.3d at 632 (“Even if the treating
14 doctor’s opinion is contradicted by another doctor, the ALJ may not reject this
15 opinion without providing specific and legitimate reasons supported by
16 substantial evidence in the record.” (quoting *Redding v. Chater*, 157 F.3d 715,
17 725 (9th Cir. 1998))). The ALJ recited portions of treating physicians’
18 treatment notes and then simply stated their opinions of Weiskopf’s functional
19 capacity were inconsistent with the notes. The ALJ failed to explain why the
20 conclusion she drew from the treatment notes—that Weiskopf can perform
21 limited, sedentary work—makes any more sense than the treating physicians’
22 conclusions. ...

23 The ALJ thus did not sufficiently explained why the treating physicians’
24 opinions did not deserve “controlling weight,” and further, she completely
25 failed to explain why the opinions merited only “little” and “limited” weight.
26 Even when there is substantial evidence contradicting a treating physician’s
27 opinion such that it is no longer entitled to controlling weight, the opinion is
28 nevertheless “entitled to deference.” *Orn*, 495 F.3d at 633 (quoting SSR 96-2P,
at *4). To determine the amount of deference, the opinion “must be weighed
using all of the factors provided in 20 C.F.R. [§] 404.1527.” SSR 96-2P, at *4.
These factors include, among others, the length of the treatment relationship,
frequency of examination, and the nature and extent of the treatment
relationship. 20 C.F.R. § 404.1527(c). The ALJ did not engage in this analysis.

29 Furthermore, the ALJ did not properly analyze Weiskopf’s evidence of
30 fibromyalgia. The ALJ did not consider fibromyalgia when determining
31 Weiskopf’s residual functional capacity, even though she was supposed to
32 consider all medically determinable impairments (MDIs) — even those that are
33 not severe. *See* 20 C.F.R. § 404.1545 (“We will consider all of your medically
34 determinable impairments of which we are aware, including your medically
35 determinable impairments that are not ‘severe,’ as explained in §§
36 404.1520(c), 404.1521, and 404.1523, when we assess your residual functional
37 capacity.”). The ALJ explained that she refused to do so because
38 “examinations d[id] not reveal any trigger point tenderness.” This analysis was
at odds with Social Security Ruling 12-2P. The ruling describes two ways that
fibromyalgia may be determined to be an MDI, only one of which requires
trigger point tenderness. The ALJ ignored the second possible basis for finding
that a claimant has an MDI of fibromyalgia:

- 1 1) A history of widespread pain . . .;
- 2 2) Repeated manifestations of six or more FM symptoms, signs,
3 or cooccurring conditions especially manifestations of fatigue,
4 cognitive or memory problems (“fibro fog”), waking
5 unrefreshed, depression, anxiety disorder, or irritable bowel
6 syndrome; and
- 7 3) Evidence that other disorders that could cause these repeated
8 manifestations of symptoms, signs, or co-occurring conditions
9 were excluded.

10 SSR 12-2P, at *3. She therefore failed to adequately explain why she did not
11 consider Weiskopf’s fibromyalgia in her residual functional capacity
12 determination.

13 The EAJA allows “a prevailing party other than the United States fees and other
14 expenses ... incurred by that party in any civil action ... unless the court finds that the position
15 of the United States was substantially justified or that special circumstances make an award
16 unjust.” 28 U.S.C. § 2412(d)(1)(A). An applicant for disability benefits becomes a prevailing
17 party for the purposes of the EAJA if the denial of her benefits is reversed and remanded
18 regardless of whether disability benefits are ultimately awarded. See Shalala v. Schaefer, 509
19 U.S. 292, 300-02 (1993).

20 The “position of the United States” includes both its litigating position and the “action
21 or failure to act by the agency upon which the civil action is based.” 28 U.S.C. §
22 2412(d)(2)(D). For this position to be substantially justified, it must be “justified in substance
23 or in the main – that is, justified to a degree that could satisfy a reasonable person.” Pierce
24 v. Underwood, 487 U.S. 552, 565 (1988) (holding that substantially justified means having
25 a reasonable basis both in law and fact). In EAJA actions, the government bears the burden
26 of proving that its position was substantially justified. See Gonzales v. Free Speech
27 Coalition, 408 F.3d 613, 618 (9th Cir. 2005). However, “the government’s failure to prevail
28 does not raise a presumption that its position was not substantially justified.” Kali v. Bowen,
854 F.2d 329, 332 (9th Cir. 1988).

When analyzing the government’s position for substantial justification, the Court’s
inquiry should be focused on the issue that was the basis for remand and not the merits of
Plaintiff’s claim in its entirety or the ultimate disability determination. See Flores v. Shalala,
49 F.3d 562, 569 (9th Cir. 2008); see also Corbin v. Apfel, 149 F.3d 1051, 1052 (9th Cir.

1 1998) (“The government’s position must be substantially justified at each stage of the
2 proceedings.”).

3 Plaintiff moves for an award of attorney’s fees and expenses under the EAJA in the
4 amount of \$20,947.58. Defendant opposes Plaintiff’s request, arguing that the government’s
5 position was substantially justified.

6 It is undisputed that Plaintiff is the prevailing party. Therefore, the issue before the
7 Court is whether Defendant’s position in opposing Plaintiff’s appeal was “substantially
8 justified.” Shafer v. Astrue, 518 F.3d 1067, 1071 (9th Cir. 2008). Having reviewed the
9 parties’ pleading and the record in this matter, the Court concludes that Defendant’s decision
10 to defend the ALJ’s determination was not substantially justified.

11 In its response, the government argues that, although the Ninth Circuit did not agree,
12 the Commissioner properly outlined facts from the record and relevant case law supporting
13 her position that the reasons the ALJ gave to discount Drs. Sahai’s and Qureshi’s opinions,
14 the opinion of PA Scholzen, and Plaintiff’s subjective complaints were valid and supported
15 by the record. Defendant argues that the Ninth Circuit’s remand “appears generally based on
16 the ALJ’s lack of proper articulation in identifying specifics regarding the opinions of Drs.
17 Sahai and Qureshi and provided more discussion on Plaintiff’s fibromyalgia” Defendant
18 also contends that “[a]t least two reasonable minds—the ALJ and this Court’s—agreed that
19 Plaintiff was not disabled under the strict standards of the Act. In light of these findings, the
20 Court should find that the Commissioner’s position—both at the agency level and before this
21 Court—had a reasonable basis in law and fact”

22 As stated previously, the Ninth Circuit determined that the ALJ’s decision was not
23 supported by substantial evidence. The court specifically found that the ALJ failed to set
24 forth clear, specific and legitimate reasons for rejecting the medical opinions of Plaintiff’s
25 treating pain management specialist and treating neurologist in determining Plaintiff’s ability
26 to do work-related activities. The court found that the ALJ rejected both opinions, assigning
27 one of them “little weight” and the other “limited weight,” but she failed to provide specific
28 and legitimate reasons for doing so. Further, the court found that the ALJ failed to properly

1 analyze Plaintiff’s evidence of fibromyalgia, even though she was supposed to consider all
2 medically determinable impairments – even those that are not severe.

3 The ALJ’s errors in improperly weighing the medical source opinion evidence were
4 a clear procedural errors and, as such, the Court cannot say that the Commissioner’s defense
5 of the ALJ’s findings were substantially justified. See Garrison v. Colvin, 759 F.3d 995,
6 1012-13 (9th Cir. 2014) (“an ALJ errs when he rejects a medical opinion or assigns it little
7 weight while doing nothing more than ignoring it, asserting without explanation that another
8 medical opinion is more persuasive, or criticizing it with boilerplate language that fails to
9 offer a substantive basis for his conclusion”); Orn v. Astrue, 495 F.3d 625, 632 (9th Cir.
10 2007) (“If the ALJ wishes to disregard the opinion of the treating physician, he or she must
11 make findings setting forth specific, legitimate reasons for doing so that are based on
12 substantial evidence in the record.”); Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995)
13 (“Even if the treating doctor’s opinion is contradicted by another doctor, the Commissioner
14 may not reject this opinion without providing specific and legitimate reasons supported by
15 substantial evidence in the record for so doing.”).

16 Defendant argues that the Ninth Circuit was primarily concerned with the ALJ’s lack
17 of proper articulation. This argument is not persuasive. Legal errors such as those committed
18 by the ALJ here are procedural errors, and defense of such is not substantially justified under
19 established Ninth Circuit precedent.

20 Defendant also contends that since both the ALJ and this Court agreed that Plaintiff
21 was not disabled, the Court should find that the Commissioner’s position had a reasonable
22 basis in law and fact. Although it is proper to consider the government’s past successes when
23 evaluating substantial justification, see Meier v. Colvin, 727 F.3d 867, 873 (9th Cir. 2013)
24 (citing Lewis v. Barnhart, 281 F.3d 1081, 1084 (9th Cir. 2002)), success at the district court
25 level alone – without legitimate reasons supported by substantial evidence – does not make
26 the government’s position substantially justified, see id. at 872-73.

27 Here, the Commissioner has failed to produce sufficient reasons supported by
28 substantial evidence to defend the government’s position. Thus, the Commissioner’s success

1 at the district court, without more, fails to demonstrate that the government's position is
2 substantially justified. Therefore, Plaintiff is entitled to reasonable attorney's fees under the
3 EAJA.

4 Because Plaintiff is entitled to attorney's fees, the Court will determine whether the
5 requested fees are reasonable. Plaintiff moves for an award of attorney's fees and expenses
6 under the EAJA in the amount of \$20,947.58. Along with his application, Plaintiff's counsel
7 has filed an Itemization of Services and Affidavit indicating that the fee amount represents
8 104.9 hours of attorney time, 7.4 hours of paralegal time, and expenses associated with this
9 case. Defendant has not objected to the number of hours spent on this matter or to the hourly
10 rate. The Court finds that Plaintiff's request for a total cumulative fee award of \$20,947.58
11 is reasonable. Plaintiff's application for attorney's fees under the Equal Access to Justice Act
12 ("EAJA") (Doc. 47) will be granted.

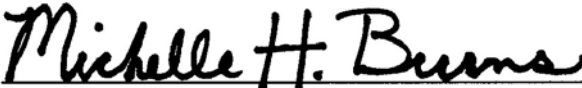
13 Accordingly,

14 **IT IS ORDERED** that Plaintiff's application for attorney's fees under the Equal
15 Access to Justice Act (Doc. 47) is **GRANTED**;

16 **IT IS FURTHER ORDERED** that Plaintiff is awarded \$20,947.58 pursuant to the
17 Equal Access to Justice Act;

18 **IT IS FURTHER ORDERED** that, this award shall be payable to Plaintiff and is
19 subject to offset to satisfy any pre-existing debt that Plaintiff owes the United States pursuant
20 to Astrue v. Ratliff, 560 U.S. 586, 594 (2010)

21 DATED this 24th day of January, 2018.

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24 Michelle H. Burns
25 United States Magistrate Judge
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