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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Kimberly Lynn Schwab,

10 Plaintiff,

11 v.

12 Commissioner of Social Security  
13 Administration,

14 Defendant.

No. CV-15-01081-PHX-JAT

**ORDER**

15 Pending before the Court is Plaintiff Kimberly Lynn Schwab's Motion for  
16 Attorneys' Fees pursuant to the Equal Access to Justice Act ("EAJA"). ("Motion,"  
17 Doc. 23). Defendant Carolyn W. Colvin, Acting Commissioner of Social Security, has  
18 filed a response, (Doc. 24), to which Plaintiff has filed a reply, (Doc. 25). Having  
19 considered the parties' filings, the Court now rules on the Motion.

20 **I. Background**

21 In May of 2010, Plaintiff injured her lower back while lifting a table at work.  
22 (Doc. 17 at 2). Over the next few years, Plaintiff experienced difficulty maintaining even  
23 sedentary employment, and she "ha[d] not engaged in substantial gainful activity—  
24 including employment—since May 17, 2011." (*Id.*). On September 26, 2011, Plaintiff  
25 filed a claim for a period of disability and disability insurance benefits with the Social  
26 Security Administration ("SSA"). (*Id.* at 3). The SSA denied the claim, and Plaintiff  
27 appealed to an Administrative Law Judge ("ALJ"), who also denied the claim and  
28 affirmed that decision upon reconsideration. (*Id.* at 3–4). The SSA Appeals Council

1 denied Plaintiff’s request for review on April 14, 2015 prompting her to appeal to federal  
2 court on June 12, 2015. (*Id.* at 4).

3 On appeal, this Court reversed the ALJ’s decision and remanded for further  
4 proceedings. (*Id.* at 28). The Court affirmed the ALJ’s decision on all issues except the  
5 finding that Dr. Tromp’s opinion be given “no weight.” (*Id.* at 23–26). On that issue, the  
6 Court found that while the ALJ mentioned multiple reasons to discount Dr. Tromp’s  
7 opinion, the decision to do so ultimately relied on the fact that Dr. Tromp’s examination  
8 was arranged “through attorney referral” and that this “permeate[d] the finding to such a  
9 degree that the Court [found] that it constitutes the sole basis for rejecting Dr. Tromp’s  
10 opinion, which is impermissible.” (*Id.* at 25–26).

11 After the reversal, Defendant filed a Motion to Amend/Correct, (Doc. 19), which  
12 the Court denied, (Doc. 22). Plaintiff then filed the current Motion requesting attorneys’  
13 fees and costs under the EAJA. (Doc. 23).

## 14 **II. Legal Standard**

15 The EAJA allows “a prevailing party other than the United States fees and other  
16 expenses . . . incurred by that party in any civil action . . . unless the court finds that the  
17 position of the United States was substantially justified or that special circumstances  
18 make an award unjust.” 28 U.S.C. § 2412(d)(1)(A) (2012). An applicant for disability  
19 benefits becomes a prevailing party for the purposes of the EAJA if the denial of her  
20 benefits is reversed and remanded regardless of whether disability benefits are ultimately  
21 awarded. *Shalala v. Schaefer*, 509 U.S. 292, 300–02 (1993).

22 The “position of the United States” includes both its litigating position and the  
23 “action or failure to act by the agency upon which the civil action is based.”  
24 28 U.S.C. § 2412(d)(2)(D). For this position to be substantially justified, it must be  
25 “justified in substance or in the main—that is, justified to a degree that could satisfy a  
26 reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (holding that  
27 substantially justified means having a reasonable basis both in law and fact). In EAJA  
28 actions, the government bears the burden of proving that its position was substantially

1 justified. *Gonzales v. Free Speech Coalition*, 408 F.3d 613, 618 (9th Cir. 2005).  
2 However, “the government’s failure to prevail does not raise a presumption that its  
3 position was not substantially justified.” *Kali v. Bowen*, 854 F.2d 329, 332  
4 (9th Cir. 1988).

5 When analyzing the government’s position for substantial justification, the Court’s  
6 inquiry should be focused on the issue that was the basis for remand and not the merits of  
7 Plaintiff’s claim in its entirety or the ultimate disability determination. *Flores v. Shalala*,  
8 49 F.3d 562, 569 (9th Cir. 2008); *see also Corbin v. Apfel*, 149 F.3d 1051, 1052  
9 (9th Cir. 1998) (“The government’s position must be substantially justified at each stage  
10 of the proceedings.” (citation and internal quotation marks omitted)).

### 11 **III. Analysis**

12 As the prevailing party after winning remand from this Court, Plaintiff moves for  
13 an award of attorneys’ fees and costs under the EAJA in the amount of \$7,402.30.  
14 Defendant opposes Plaintiff’s request, arguing that the government’s position was  
15 substantially justified, (Doc. 24 at 5), and, alternatively, the requested amount is  
16 unreasonable and should be reduced, (*id.* at 6).

#### 17 **A. Substantial Justification**

18 Defendant argues that the government’s position was substantially justified  
19 because it was “reasonably based in both law and fact” and that “one good reason is  
20 sufficient to affirm the decision.” (*Id.* at 5). Defendant also asserts that the government’s  
21 position met the substantial justification standard because there was a “genuine dispute”  
22 that “reasonable people could differ” about. (*Id.* at 4).

23 The ALJ rejected Dr. Tromp’s opinion for three reasons: (1) it was  
24 “uncorroborated by the medical evidence of record”; (2) it “appear[ed]” to be “based on  
25 the claimant’s subjective complaints regarding her pain”; and (3) the examination was  
26 conducted “through attorney referral and in connection with an effort to generate  
27 evidence for the current appeal.” (Doc. 17 at 23–26). The Court found the ALJ’s  
28 reasoning to be improper due to its overwhelming “reliance on attorney referral” and

1 remanded on the basis of this sole issue. (*Id.* at 26).

2 Defendant first argues that the government’s defense of the ALJ’s position was  
3 reasonably based in law and fact because the ALJ provided a “specific and legitimate  
4 reason for discounting Dr. Tromp’s opinion,” and that “one good reason is sufficient to  
5 affirm the decision.” (Doc. 24 at 5). The Court finds this argument unpersuasive for three  
6 reasons. First, this is essentially the same argument the Court has already addressed in its  
7 order denying Defendant’s Motion to Amend/Correct. (Doc. 22 at 3–6).

8 Second, the Court finds Defendant’s argument unpersuasive because it states that  
9 “the Court concurred that the ALJ provided a specific and legitimate reason for  
10 discounting Dr. Tromp’s opinion.” (Doc. 24 at 5 (citing Doc. 17 at 24–25)). This  
11 assertion, however, mischaracterizes the Court’s reasoning because, while Defendant’s  
12 assertion is correct, it ignores the subsequent paragraph in which the Court explains why  
13 the ALJ’s improper “reliance on attorney referral” impermissibly overshadowed the other  
14 stated reasons. *Id.*; see also *Saelee v. Chater*, 94 F.3d 520, 522–23 (9th Cir. 1996)  
15 (finding that an ALJ can question a doctor’s credibility when their opinion is solicited by  
16 claimant’s counsel, but this does not provide a legitimate basis for rejection).

17 Finally, Defendant cites *Carmickle v. Comm’r of Soc. Sec.*, 533 F.3d 1155, 1162  
18 (9th Cir. 2008) and *Batson v. Comm’r of Soc. Sec.*, 359 F.3d 1190, 1197 (9th Cir. 2004)  
19 to argue that despite one invalid reason, an adverse credibility finding can remain legally  
20 valid so long as substantial evidence supporting the ultimate credibility conclusion exists.  
21 The Court finds that both of these cases are distinguishable from the present case because  
22 they deal with the credibility of a claimant’s testimony. Here, unlike in *Carmickle* or  
23 *Batson*, the credibility determination at issue is that of a treating physician, whose  
24 opinion is weighed differently than a claimant’s testimony. Compare *Molina v. Astrue*,  
25 674 F.3d 1104, 1112 (9th Cir. 2012) (defining a two-step analysis to determine a  
26 claimant’s credibility), with *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)  
27 (recognizing that an ALJ must have “specific, legitimate reasons” that are “based on  
28 substantial evidence” in order to disregard the opinion of a treating physician). Also, in

1 both cases, the Ninth Circuit Court of Appeals (the “Ninth Circuit”) determined the error  
2 to be harmless, or an error that is “inconsequential to the ultimate non-disability  
3 determination.” *Carmickle*, 533 F.3d at 1162 (citing *Stout v. Comm’r of Soc. Sec.*,  
4 454 F.3d 1050, 1055 (9th Cir. 2006)); *see also Batson*, 359 F.3d at 1196. Here, in  
5 contrast, the Court found that despite two good reasons, the ALJ’s excessive reliance on  
6 one bad reason was consequential to the overall non-disability determination and,  
7 thereby, constituted harmful error. (Doc. 17 at 26). Accordingly, the Court declines to  
8 follow Defendant’s line of reasoning as it is in direct conflict with this finding.

9         Despite the harmful error identified by the Court, Defendant argues that because  
10 there is a “genuine dispute” about the current action and “reasonable people could differ  
11 as to [the appropriateness of the contested action],” it has satisfied its burden of proving  
12 that the government’s position was substantially justified. (Doc. 24 at 4). The Court  
13 disagrees with Defendant’s conclusion. The law in this area is well-settled and leaves  
14 little room for dispute as the Ninth Circuit has consistently found that when an ALJ  
15 commits fundamental procedural errors, the defense of these errors lacks substantial  
16 justification. *See, e.g., Roe v. Comm’r of Soc. Sec.*, 651 F. App’x 583, 585  
17 (9th Cir. 2016); *Corbin*, 149 F.3d at 1052 (finding that “the government’s defense of  
18 basic and fundamental procedural errors” is “difficult to justify”); *see also Shafer v.*  
19 *Astrue*, 518 F.3d 1067, 1072 (9th Cir. 2008) (recognizing that an ALJ may commit a  
20 fundamental procedural error by rejecting a treating physician’s opinion in favor of a  
21 non-treating physician’s opinion without providing convincing reasons). Here, the ALJ’s  
22 decision to give no weight to Dr. Tromp’s opinion was overwhelmingly influenced by an  
23 improper reason. (Doc. 17 at 26). Therefore, the government’s defense of the ALJ’s  
24 procedural errors was not substantially justified, and Plaintiff is entitled to attorneys’ fees  
25 under the EAJA.

26         **B. Fee Amount**

27         Plaintiff requests attorneys’ fees in the amount of \$7,002.30, in addition to the  
28 costs of \$400.00, for a total of \$7,402.30. (Doc. 23-4 at 6). This amount represents the

1 36.8 hours Plaintiff’s counsel has expended on her case multiplied by the hourly rate of  
2 \$190.28<sup>1</sup>. (Docs. 23-4 at 6; 23-5). Defendant argues that if fees are awarded, they should  
3 be reduced because they are unreasonable. (Doc. 24 at 6). At 36.8 hours, the total amount  
4 of hours expended by Plaintiff is within the standard range awarded for Social Security  
5 cases. *Costa v. Comm’r of Soc. Sec.*, 690 F.3d 1132, 1136 (9th Cir. 2012) (“Many district  
6 courts have noted that twenty to forty hours is the range most often requested and granted  
7 in social security cases.” (citations omitted)). Therefore, the Court cannot find the  
8 requested fees unreasonable based solely on the hours Plaintiff’s counsel spent on the  
9 case.

10 Defendant also argues that fees should be reduced because Plaintiff achieved  
11 limited success. (Doc. 24 at 6). When examining a plaintiff’s level of success, it is  
12 improper to reduce requested fees solely because he or she prevailed on some claims but  
13 not on others. *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) (“Litigants in good faith  
14 may raise alternative legal grounds for a desired outcome, and the court’s rejection of or  
15 failure to reach certain grounds is not a sufficient reason for reducing a fee.”) Instead,  
16 where a plaintiff does not succeed on all claims, “the court must evaluate whether the  
17 successful and unsuccessful claims are ‘distinctly different claims for relief that are based  
18 on different facts and legal theories’ or whether they ‘involve a common core of facts or  
19 [are] based on related legal theories.’” *Schwarz v. Sec’y of Health & Human Servs.*,  
20 73 F.3d 895, 901 (9th Cir. 1995) (quoting *Hensley*, 461 U.S. at 434–35). Here, Plaintiff’s  
21 claims all revolve around her purported disabilities and the weight given to evidence  
22 about those disabilities. (Doc. 1 at 3). Therefore, Plaintiff’s claims “involve a common  
23 core of facts” and are “based on related legal theories.” *Hensley*, 461 U.S. at 435.

24 Also, “if the claims are related, the district court ‘should focus on the significance  
25 of the overall relief obtained by the plaintiff in relation to the hours reasonably expended

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27 <sup>1</sup> The base hourly rate for EAJA cases is \$125 per hour. The rate of \$190.28 is  
28 used in Plaintiff’s fee calculation after taking the Ninth Circuit’s cost of living adjustment  
into consideration. *Statutory Maximum Rates Under the Equal Access to Justice Act*,  
[http://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000039](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039) (last visited July 12,  
2017).

1 on the litigation,’ and ‘a plaintiff who has won substantial relief should not have [her]  
2 attorney’s fee reduced simply because the district court did not adopt each contention  
3 raised.’” *Schwarz*, 73 F.3d at 901 (quoting *Hensley*, 461 U.S. at 440). In EAJA actions,  
4 “reversal and remand for further administrative proceedings – does constitute substantial  
5 relief.” *Jones v. Colvin*, No. 10-CV-05483-RJB-KLS, 2013 WL 3490630, at \*9  
6 (W.D. Wash. Jun. 28, 2013); *see also Eastman v. Astrue*, No. 11-CV-701-PK,  
7 2013 WL 1130762, at \*8 (D. Or. Mar. 15, 2013). Therefore, the Court finds that Plaintiff  
8 won substantial relief when her claim was remanded.

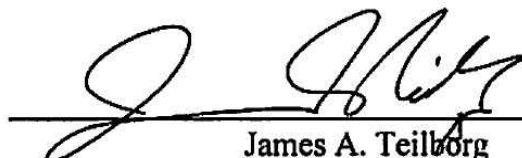
9 The Court finds that Plaintiff’s counsel expended a reasonable amount of time to  
10 raise related claims that achieved substantial relief for Plaintiff. Based on these findings,  
11 the Court awards Plaintiff the total amount of requested attorneys’ fees, \$7,002.30, in  
12 addition to the filing fee of \$400.00, for a total of \$7,402.30.

13 **IV. Conclusion**

14 Based on the foregoing,

15 **IT IS ORDERED** that Plaintiff’s Motion for an Award of Attorney’s Fees under  
16 the EAJA, (Doc. 23), is GRANTED in the amount of \$7,402.30. This award shall be  
17 payable directly to Plaintiff and is subject to offset to satisfy any pre-existing debt that  
18 Plaintiff owes the United States pursuant to *Astrue v. Ratliff*, 560 U.S. 586, 594 (2010).

19 Dated this 14th day of July, 2017.

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23 James A. Teilborg  
24 Senior United States District Judge  
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