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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Charles Evan Reed, Jr.,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-17-04752-PHX-SMB

ORDER

15 Pending before the Court is Plaintiff’s Motion for Attorney Fees Under the Equal
16 Access to Justice Act. (Doc. 30.) Plaintiff attached a memorandum in support of the
17 motion. (Doc. 31.) The Social Security Administration (“SSA”) has filed a response. (Doc.
18 33.) Plaintiff has filed a reply. (Doc. 40.) The Court grants the motion and awards
19 \$27,709.80 for the reasons discussed below.

20 **I. BACKGROUND**

21 Plaintiff commenced this social security action on December 22, 2017. (Doc. 1.) On
22 August 30, 2019, this Court affirmed the Commissioner of Social Security’s decision that
23 Plaintiff was not disabled pursuant to the Social Security Act, 42 U.S.C. §§ 416, 423 (Docs.
24 23, 24.) Plaintiff appealed, and on November 19, 2020, the Ninth Circuit reversed and
25 remanded this case to the SSA for further proceedings. (Memorandum, No. 19-17179,
26 DktEntry 36-1.)

27 Thereafter, Plaintiff filed the instant motion for attorney’s fees and supporting
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1 memorandum.¹ (Doc. 30, 31.) The Commissioner opposes the granting of fees, contending
2 that its position in defending the ALJ’s assessment was “substantially justified” and
3 alternatively, that the fees are nevertheless unreasonable. (Doc. 33 at 5, 10.) Plaintiff filed
4 a reply. (Doc. 40.)

5 II. LEGAL STANDARD

6 The Equal Access to Justice Act (“EAJA”) provides for an award of fees, other
7 expenses, and costs to a prevailing plaintiff “in any civil action (other than cases sounding
8 in tort), including proceedings for judicial review of agency action” unless “the position of
9 the United States was substantially justified or that special circumstances make an award
10 unjust.” 28 U.S.C. § 2412(d)(1)(A). The United States’ position “includes both the
11 government’s litigation position and the underlying agency action giving rise to the civil
12 action.” *Meir v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013). In the social security context,
13 the ALJ’s decision is the relevant underlying agency action. *Id.*

14 To be “substantially justified,” the government’s position does not need to be
15 correct, but rather needs to be “‘justified in substance or in the main’—that is, justified to
16 a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565
17 (1988). The government bears the burden of showing “that its position was substantially
18 justified or that special circumstances exist.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258
19 (9th Cir. 2001.) An agency’s decision that was “unsupported by substantial evidence” is “a
20 strong indication” that the United States’ position “was not substantially justified.”
21 *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005). “Indeed, it will be only a
22 “decidedly unusual case in which there is substantial justification under the EAJA even
23 though the agency’s decision was reversed as lacking in reasonable, substantial and
24 probative evidence in the record.” *Id.* (citing *Al-Harbi v. I.N.S.*, 284 F.3d 1080, 1085 (9th
25 Cir. 2002)). However, this is not dispositive, because the government’s loss “does not raise

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27 ¹ Plaintiff’s motion sought payment as authorized by the EAJA in the amount of
28 \$26,255.34. (Doc. 30 at 2.) Plaintiff’s reply in support of the motion amended that amount
to \$27,709.80 based on the additional time spent to complete the pending briefing. (Doc.
40 at 16.)

1 a presumption that its position was not substantially justified.” *Ibrahim v. U.S. Dep’t of*
2 *Homeland Sec.*, 912 F.3d 1147, 1168 (9th Cir. 2019). The Court should only consider the
3 “procedural issues” that caused the remand and need not consider “the ultimate issue of
4 disability” or the government’s position on “any other questions.” *Flores v. Shalala*, 49
5 F.3d 562, 566 (9th Cir. 1995); *see also Sampson v. Chater*, 103 F.3d 918, 922 (9th Cir.
6 1996) (citing *Flores*, 49 F.3d at 570) (“The nature and scope of the ALJ’s legal errors are
7 material in determining whether the Commissioner’s decision to defend them was
8 substantially justified.”).

9 **III. DISCUSSION**

10 Plaintiff asserts he is the prevailing party for EAJA purposes because he obtained
11 a remand for further proceedings from the Ninth Circuit. (Doc. 30 at 1); *see Shalala v.*
12 *Schaefer*, 509 U.S. 292, 300-01 (1993). The Commissioner does not dispute Plaintiff’s
13 prevailing party status. (Doc. 33 at 4.) Therefore, the Court will now determine whether
14 the SSA has succeeded in showing the government’s position was substantially justified.

15 **A. Substantial Justification**

16 When determining whether the government’s position was substantially justified,
17 “unreasonable agency action at any level entitles the litigant to EAJA fees.” *Ibrahim*, 912
18 F.3d at 1167; *see also Meier*, 727 F.3d at 872 (“Because the government’s underlying
19 position was not substantially justified, we need not address whether the government’s
20 litigation position was justified.”). Hence, the Court will first determine whether the ALJ
21 decision was substantially justified.

22 The Ninth Circuit upheld the ALJ’s rationale on all but one issue. (Doc. 31 at 6.)
23 The appellate court remanded because the ALJ erred in rejecting the Plaintiff’s testimony
24 regarding the severity of his symptoms. (*Id.*) The Ninth Circuit held that the ALJ “could
25 only reject Reed’s testimony ... by offering specific, clear and convincing reasons for
26 doing so.” (*Id.* at 6-7); *see Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). The
27 appellate court noted that the ALJ “merely stated that Reed’s “statements concerning the
28 intensity, persistence, and limiting effects of these symptoms are not supported by the

1 evidence to the extent they are inconsistent with the above residual functional capacity
2 assessment,” and then turned to a discussion of the medical evidence.” (*Id.* at 7.) Thus, the
3 Circuit court found that the ALJ’s findings were “insufficient to meet our requirements of
4 specificity.” (*Id.*)

5 The SSA contends the Ninth Circuit remanded because “the panel took a different
6 view” regarding how the ALJ should have articulated its findings about Plaintiff’s
7 subjective symptoms, and “the ALJ cited the standard boilerplate language.” (Doc. 33 at
8 7.)² The Commissioner further adds that the panel did not state whether the ALJ’s findings
9 “would have been proper reasons” because the findings were “articulated in a different
10 portion of the ALJ decision.” (*Id.*) The Plaintiff argues that this is incorrect because the
11 ALJ did not “specify what symptom testimony is rejected, and what evidence is found to
12 undermine that symptom testimony.” (Doc. 40 at 4.) Plaintiff is correct. The ALJ failed to
13 offer “specific, clear and convincing reasons” for rejecting Plaintiff’s testimony. (Doc. 31
14 at 6, 7.)

15 An ALJ’s failure to provide “clear and convincing reasons” for discrediting a
16 plaintiff’s testimony is a fundamental procedural error that lacks substantial justification.
17 *Shafer v. Astrue*, 518 F.3d 1067, 1071-72 (9th Cir. 2008). “General findings are
18 insufficient” to discredit Plaintiff’s subjective symptom testimony. *Lester v. Chater*, 81
19 F.3d 821, 834 (9th Cir. 1995). Here, the ALJ committed a fundamental procedural error by
20 rejecting the Plaintiff’s symptom testimony without clear and convincing reasons.
21 Therefore, the underlying government action was not substantially justified.

22 At this point in the analysis, since the Court has found that the government’s
23 underlying action was not substantially justified, the Court does not need to address
24 whether the government’s litigation position was substantially justified. *See Meier*, 727
25 F.3d at 872. However, for good measure, the Court will still address this inquiry. While the

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27 ² The SSA mentions that the “ALJ’s specific findings discussed by this Court” were not
28 analyzed by the Ninth Circuit. (Doc. 33 at 7.) “It is settled law that a district court’s decision
to affirm, reverse or modify a determination of the Social Security Administration is
reviewed *de novo* on appeal.” *Harman v. Apfel*, 211 F.3d 1172, 1174 (9th Cir. 2000).

1 government’s defense of an ALJ’s procedural error “does not automatically require a
2 finding that the government’s position was not substantially justified, the defense of basic
3 and fundamental errors . . . is difficult to justify.” *Corbin v. Apfel*, 149 F.3d 1051, 1053
4 (9th Cir. 1998).

5 The SSA argues that the its actions met a “lower substantially justified” standard.
6 (Doc. 33 at 5.) More specifically, the SSA cites to *Tommasetti* to assert that the defense of
7 the ALJ’s decision was substantially justified because “an ALJ’s ‘credibility’ findings are
8 sufficient when they show that the ALJ did not arbitrarily discredit a claimant’s testimony.”
9 *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). However, the opinion goes
10 further to state that, “the ALJ can reject the claimant’s testimony about the severity of [his]
11 symptoms only by offering specific, clear and convincing reasons for doing so.” *Id.* As
12 mentioned above, the ALJ failed to offer such reasons here. Therefore, the SSA has clearly
13 not presented evidence of a lower substantially justified standard.³

14 The SSA contends that the fact this Court affirmed the agency decision to deny
15 Plaintiff’s application for disability benefits “implies [the SSA’s] position was reasonably
16 based in law and fact.” (Doc. 33 at 6.) The Plaintiff argues that “while a prior favorable

17 ³ The SSA additionally cites to *Williams v. Bowen*, 934 F.2d 221, 223 (9th Cir. 1991),
18 *amended and superseded by Williams v. Bowen*, 966 F.2d 1259 (9th Cir. 1991), to show
19 that the substantial justification test is satisfied if “some evidence supported the Secretary’s
20 position.” (Doc. 33 at 8.) While *Bowen* held that the district court did not abuse its
21 discretion in denying EAJA fees, the Ninth Circuit case law has since adopted a new
22 interpretation of substantial justification. *See Flores v. Shalala*, 49 F.3d 562, 569-70 (9th
23 Cir. 1995).

23 The SSA also cites to *Hardisty v. Astrue*, 592 F.3d 1072, 1075 (9th Cir. 2010), to argue
24 that the ALJ’s subjective symptom analysis has a “reasonable basis in fact” because the
25 record “provides at least some support for the ALJ’s findings.” (Doc. 33 at 8.) However,
26 *Hardisty* does not apply to these facts. In *Hardisty*, the ALJ made an erroneous credibility
27 finding due to facts and testimony that were later discredited. *Hardisty*, 592 F.3d at 1075.
28 There, the Ninth Circuit found the government’s position substantially justified because
the evidence that the government relied upon to make its credibility determination had
some basis in the record. *Id.* Here, the cause for remand is solely because the ALJ failed to
set forth “specific, clear and convincing reasons” to reject the Plaintiff’s testimony. (Doc.
31 at 6.)

1 ruling may be a factor to be considered,” the ruling is insufficient to demonstrate substantial
2 justification. (Doc. 40 at 3.) “Obviously, the fact one other court agreed or disagreed with
3 the Government does not establish whether its position was substantially justified.” *Pierce*,
4 487 U.S. 552 at 569. However, “objective indicia,” such as prior court rulings, can be
5 relevant to establishing “substantial justification.” *Id.* at 553. The prior decision is not alone
6 sufficient to show the government’s litigation position was substantially justified.

7 Thus, the Court finds Plaintiff eligible for an award of fees under the EAJA.

8 **B. Reasonableness of the Fee Request**

9 “[O]nce a private litigant has met the multiple conditions for eligibility for EAJA
10 fees, the district court’s task of determining what fee is reasonable is essentially the same
11 as that described in *Hensley*.” *Comm’r, I.N.S. v. Jean*, 496 U.S. 154, 161 (1990). “The most
12 useful starting point for determining the amount of a reasonable fee is the number of hours
13 reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v.*
14 *Eckerhart*, 461 U.S. 424, 433 (1983).⁴ Hours that were not “reasonably expended” should
15 be excluded from the initial fee calculation. *Id.* This method of fee calculation is now
16 referred to as the “lodestar” method. *Costa v. Comm’r of Soc. Sec. Admin.*, 690 F.3d 1132,
17 1135 (9th Cir. 2012).

18 The SSA does not dispute the reasonableness of the hourly rate charged because
19 Plaintiff’s counsel charged the statutory maximum rates.⁵ However, the SSA disputes
20 whether the amount of time Plaintiff’s counsel billed was reasonable.

21 Plaintiff requests \$27,709.80 in attorney’s fees as reimbursement for 135.30 billable
22 hours. (Doc. 31; Doc. 40.) The SSA argues that the Court should reduce Plaintiff’s original
23 fee request by \$6,279.10 to account for unreasonable billing. (Doc. 33 at 19.) The SSA
24 challenges the documented hours on the following grounds: (1) the Plaintiff has “failed to

26 ⁴ In *Whitehead v. Colvin*, 2016 WL 1464469, at *2 n.1 (W.D. Wash. Apr. 14, 2016), the
27 court noted that the Prison Litigation Reform Act had in part superseded *Hensley*. This
28 statutory change is not relevant here, because this case does not involve prisoner litigation.

⁵ “Statutory Maximum Rates Under the Equal Access to Justice Act,” available at
https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039.

1 meet his burden that his fee request is reasonable,” (2) the amount of fees “requested for
2 drafting of the complaint” is unreasonable, (3) the “time spent drafting and reviewing the
3 district court opening brief was unreasonable,” (4) the “time spent drafting and reviewing
4 the Ninth Circuit opening brief was unreasonable, and (5) the fees sought for “reviewing
5 filed documents that counsel had already reviewed and edited are unreasonable.” (*Id.* at 2.)
6 The SSA does not cite to any authority to offer arguments concerning its first point that
7 Plaintiff’s counsel’s fees were unreasonable. (*Id.* at 10.) Therefore, the Court will focus on
8 the SSA’s remaining four arguments.

9 The SSA contends that there is no justification for “spending 9.5 hours drafting a
10 16-page complaint.” (*Id.* at 9.) To support this position, the SSA argues that Plaintiff’s
11 counsel could have drafted a simpler complaint, akin to the *pro se* complaints this Court
12 and other courts find sufficient. (*Id.* at 10.) The Plaintiff argues that a “persuasive complaint
13 might avoid further litigation by convincing the agency that its position is unjustified and
14 the case merits remand for administrative action to correct the agency’s errors.” (Doc. 40
15 at 11.) The Plaintiff cites to 42 U.S.C. § 405(g) which contemplates such a scenario and
16 multiple cases where this occurred. (*Id.*) Expending time early on at the complaint-stage to
17 avoid unnecessary litigation is wise in any litigation, and the Court finds the time requested
18 is not unreasonable.

19 The Commissioner asserts that the time Plaintiff’s counsel spent drafting the district
20 court and Ninth Circuit briefs was unreasonable because of the use of boilerplate language
21 and the “duplicate work.” (Doc. 33 at 14, 17.) The Plaintiff contends that the use of
22 boilerplate language saved time. (Doc. 40 at 12.) Additionally, while the use of multiple
23 attorneys may lead to some duplication of services, the Plaintiff asserts that “it is the result
24 that counts,” and the case here “could have been more efficiently lost, as well.” (Doc. 40
25 at 12); *see also Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (“One
26 certainly expects some degree of duplication as an inherent part of the process.”). The Court
27 agrees with the Plaintiff that technical efficiency is not the primary aim of representation
28 and finds that the hours expended to draft the district court and Ninth Circuit briefs was

1 reasonable.

2 The SSA additionally asserts that Plaintiff's counsel should not request fees for time
3 spent reviewing filed documents. (Doc. 33 at 18.) Plaintiff contends that "at times errors
4 have been caught in filed documents that could be corrected before this Court's review."
5 (Doc. 40 at 15.) Because this Court allows for the correction of errors in filed documents,
6 such review for potential revisions is acceptable.

7 Finally, the Commissioner argues that any fees requested by Plaintiff in drafting a
8 reply should not be permitted. (Doc. 33 at 18.) The Plaintiff requests compensation for 7.0
9 additional hours. (Doc. 40 at 16.) The award of "fees-on-fees," or fees accrued in
10 connection with a motion for attorney's fees, is permitted. *Thompson v. Gomez*, 45 F.3d
11 1365, 1367 (9th Cir. 1995). Therefore, the total EAJA request of \$27,709.80 will be
12 awarded.

13 Pursuant to Plaintiff's fee agreement (Doc. 31-1), the Court will award EAJA
14 attorney's fees payable to Plaintiff's counsel so long as Plaintiff does not owe debt subject
15 to the Treasury Offset Program. *See Astrue v. Ratliff*, 560 U.S. 586, 597 (2010).

16 **IV. CONCLUSION**

17 For the above stated reasons,

18 **IT IS ORDERED** that Plaintiff's Motion for Award of Attorney Fees as Authorized
19 by the Equal Access to Justice Act, (Doc. 30), **is granted**.

20 **IT IS FURTHER ORDERED** that Plaintiff is awarded \$27,709.80 in attorney's
21 fees.

22 **IT IS FURTHER ORDERED** that if there is a debt owed under the Treasury Offset
23 Program, the remaining award after offset will be paid in the name of the Plaintiff, but the
24 check will be sent to Plaintiff's counsel. However, if the SSA determines that Plaintiff does

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1 not owe a federal debt subject to offset and agrees to waive the requirements of the Anti-
2 Assignment Act, 31 U.S.C. § 3727, payment shall be made in the name of Plaintiff's
3 counsel.

4 Dated this 13th day of July, 2021.

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9 Honorable Susan M. Brnovich
10 United States District Judge
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