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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ashley Morgan Gallagher,

10 Plaintiff,

11 v.

12 Commissioner of Social Security
13 Administration,

14 Defendant.

No. CV-19-05766-PHX-MTL

ORDER

15 Before the Court is Plaintiff Ashley Morgan Gallagher’s Motion for Award of
16 Attorney Fees as Authorized by the Equal Access to Justice Act (the “Motion”). (Doc.
17 23.) For the following reasons, the Court grants the Motion and awards \$13,148.46 in
18 attorneys’ fees.

19 **I. BACKGROUND**

20 On November 5, 2020, the Court reversed the May 6, 2019 decision of the
21 Administrative Law Judge (“ALJ”) and remanded for further consideration of Plaintiff’s
22 Application for Disability Insurance Benefits. (Doc. 21.) Judgment was entered on the
23 same day. (Doc. 22.) On February 3, 2021, Plaintiff filed the pending Motion and
24 Memorandum in support thereof. (Docs. 23, 24.) Plaintiff’s counsel seeks attorneys’ fees
25 in the amount of \$13,148.46.¹ Defendant Commissioner of the Social Security
26 Administration (the “Commissioner”) opposes the granting of fees and, should the Court

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28 ¹ Plaintiff’s Motion sought \$12,317.34 in attorneys’ fees. (Doc. 23 at 2.) The reply in support of Plaintiff’s motion amended that amount to \$13,148.46 to reflect the additional hours spent to complete the briefing. (Doc. 26 at 11.)

1 grant Plaintiff's Motion, the amount requested. (Doc. 25.)

2 **II. LEGAL STANDARD**

3 The Equal Access to Justice Act (the "EAJA"), 28 U.S.C. § 2412, "directs a court
4 to award fees and other expenses to private parties who prevail in litigation against the
5 United States if, *inter alia*, the Government's position was not 'substantially justified.'" *Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 154 (1990) (quoting 28 U.S.C. § 2412(d)(1)(A)).
6 For purposes of the EAJA, the position of the United States refers to "both the
7 government's litigation position and the underlying agency action giving rise to the civil
8 action." *Meier v. Colvin*, 727 F.3d 867, 870 (9th Cir. 2013). The EAJA directs courts to
9 award attorneys' fees "to a prevailing plaintiff unless the government meets its burden to
10 demonstrate that both its litigation position and the agency decision on review were
11 substantially justified." *Campbell v. Astrue*, 736 F.3d 867, 868 (9th Cir. 2013) (internal
12 quotation marks and citations omitted).
13

14 To meet the substantial justification standard, the government's position must
15 have been "justified in substance or in the main—that is, justified to a degree that could
16 satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal
17 quotation marks omitted). Just because "the government lost . . . does not raise a
18 presumption that its position was not substantially justified." *Ibrahim v. U.S. Dep't of*
19 *Homeland Sec.*, 912 F.3d 1147, 1168 (9th Cir. 2019) (citing *Edwards v. McMahon*, 834
20 F.2d 796, 802 (9th Cir. 1987)). A court should "look to decisions of the ALJ to determine
21 whether the government's position in the underlying agency action was substantially
22 justified." *Meier*, 727 F.3d at 872. Furthermore, the nature and scope of the ALJ's legal
23 errors are material in determining whether the Commissioner's decision to defend them
24 was substantially justified. *See Flores v. Shalala*, 49 F.3d 562, 570 (9th Cir. 1995).

25 Fees awarded under the EAJA must be reasonable. *See* 28 U.S.C. § 2412(d)(2)(A).
26 "The most useful starting point for determining the amount of a reasonable fee is the
27 number of hours reasonably expended on the litigation multiplied by a reasonable hourly
28 rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). A reasonable fee does not include

1 hours that are “excessive, redundant, or otherwise unnecessary.” *Id.* at 434. Courts also
2 consider the relationship between the fees requested by the prevailing party and the
3 results obtained. *Id.*; *see also Atkins v. Apfel*, 154 F.3d 986, 988 (9th Cir. 1998)
4 (remanding the case when the district court failed to consider the results obtained as part
5 of the fee calculation). “[T]he fee applicant bears the burden of establishing entitlement
6 to an award and documenting the appropriate hours expended and hourly rates.” *Hensley*,
7 461 U.S. at 438. “Where the documentation of hours is inadequate, the district court may
8 reduce the award accordingly.” *Id.* at 433.

9 **III. DISCUSSION**

10 Plaintiff was the prevailing party for purposes of the EAJA because she obtained a
11 Court order remanding the case to the Commissioner. *See Shalala v. Schaefer*, 509 U.S.
12 292, 300–01 (1993) (holding that a claimant who obtains a reversal, with or without a
13 remand, is a prevailing party under the EAJA). The Court must therefore address whether
14 the government can prove that its position was substantially justified, and if not, whether
15 Plaintiff’s requested fees are reasonable. 28 U.S.C. § 2412(d)(1)(A).

16 **A. Substantial Justification**

17 The Court remanded the case for further administrative proceedings because the
18 ALJ improperly rejected Plaintiff’s symptom testimony and erred in calculating the
19 Plaintiff’s residual functional capacity (“RFC”).² (Doc. 21 at 4–6.) As more fully
20 explained there, the Court held that the ALJ failed to provide “specific, clear and
21 convincing” reasons for rejecting plaintiff’s testimony. (*Id.* at 6). The Commissioner
22 argues that the underlying government position was substantially justified because the
23 ALJ’s findings had a “reasonable basis in law and fact.” (Doc. 25 at 3–4, 12.) This
24 argument is unpersuasive because the record reflects that the Commissioner has not met
25 its burden to show its position was substantially justified. *See Pierce v. Underwood*, 487
26 U.S. 552, 564–65. The Ninth Circuit has consistently held that a “holding that the

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28 ² The Commissioner failed to adequately respond to Plaintiff’s argument that the ALJ
erred in calculating Plaintiff’s RFC. (Doc. 21 at 6.) Thus, this Court found that the
inadequate response indicated the Commissioner’s concession to that argument. (*Id.*)

1 agency's decision was unsupported by *substantial evidence* is a strong indication that the
2 position of the United States was not *substantially justified*." *Meier*, 727 F.3d at 872
3 (emphasis added) (citation and punctuation omitted); *Thangaraja v. Gonzales*, 428 F.3d
4 870, 874 (9th Cir. 2005) ("[I]t will be only a 'decidedly unusual case in which there is
5 substantial justification under the EAJA even though the agency's decision was reversed
6 as lacking in reasonable, substantial and probative evidence in the record.'" (citation
7 omitted). This reason alone is enough to find that the government's position was not
8 substantially justified.

9 Even if the underlying action was justified, the government's litigation position
10 would not be. The Court is not persuaded by the Commissioner's argument that the
11 government's litigation position was substantially justified because the "ALJ's findings
12 had a reasonable basis in law and fact." (Doc. 25 at 12.) The Ninth Circuit precedent is
13 clear. The ALJ's failure to provide "specific, clear and convincing" reasons for rejecting
14 Plaintiff's testimony constituted fundamental procedural error. *Shafer*, 518 F.3d at 1071–
15 72. Defense of such error, as seen in the Commissioner's Motion to Remand (Doc. 18 at
16 8–12), lacks substantial justification. *Id.* (citing *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th
17 Cir. 1998)); *see also Jager v. Astrue*, 290 F. App'x 27, 27 (9th Cir. 2008) ("[T]he
18 government was not substantially justified in defending the ALJ's procedural errors.").
19 The Court therefore finds that the government's litigation position was not substantially
20 justified.

21 **B. Reasonable Fees**

22 A plaintiff is entitled to reasonable fees as the prevailing party where the
23 government's position was not substantially justified. 28 U.S.C. § 2412(d)(1)(A).
24 Because Plaintiff is entitled to attorneys' fees, the Court must assess the reasonableness
25 of her request. The hourly rates and the hours expended must both be reasonable for a
26 plaintiff to be awarded his or her requested amount. *Hensley*, 461 U.S. at 433. Here,
27 Plaintiff requests \$13,148.46 in attorneys' fees for 59.4 hours of services rendered in this
28 case. (Doc. 24-2; Doc. 26 at 11.) The Commissioner argues that the time expended was

1 unreasonable and asks the Court to deduct 39.4 hours, for a total award of \$4,155.60.
2 (Doc. 25 at 3.) The Commissioner does not object to the Plaintiff’s hourly rates of
3 \$205.25 for 2019, \$207.78 for 2020, and \$207.78 for 2021. (See Doc. 24-2 at 4.) The
4 Court therefore finds that the hourly rates are reasonable and will evaluate the
5 reasonableness of the time expended below.

6 **1. Plaintiff’s Burden to Show Reasonableness**

7 The Commissioner first asserts that Plaintiff is not entitled to the requested fees
8 because her request did not substantively address why the request is reasonable. (Doc. 25
9 at 14.) It is true that a plaintiff bears the burden of showing that his or her request is
10 reasonable. *Hensley*, 461 U.S. at 433. But, the “[p]laintiff need not preemptively guess
11 what reasonableness challenges might be forthcoming.” *Murrieta v. Comm’r of Soc. Sec.*
12 *Admin.*, No. CV-19-04865-PHX-DWL, 2021 WL 1208980, at *2 (D. Ariz. Mar. 31,
13 2021). Instead, a plaintiff can meet his or her burden by “affirmatively submitting an
14 itemization of services and then by defending against whatever challenges a defendant
15 mounts in opposition.” *Id.*; see *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir.
16 2000) (quoting *Hensley*, 461 U.S. at 437 n.12) (“[P]laintiff’s counsel can meet his [or
17 her] burden—although just barely—by simply listing his [or her] hours and ‘identify[ing]
18 the general subject matter of his time expenditures.’”). Here, Plaintiff provided an
19 Itemization of Services, which is sufficient for the Court to determine whether the time
20 spent was reasonable. (Doc. 24-2.) This itemization details each task, with corresponding
21 hours worked, and provides a calculation for all the fees requested. (*Id.*) The Court finds
22 that Plaintiff met her burden and therefore will not deduct the requested 39.4 hours.

23 **2. Motion to Remand**

24 Next, the Commissioner argues that Plaintiff should not recover fees for opposing
25 the motion to remand because the Commissioner offered to remand the case voluntarily
26 and Plaintiff’s opposition was unreasonable. (Doc. 25 at 13–15.) Plaintiff maintains that
27 she raised reasonable and nonfrivolous arguments, which should not be considered
28 otherwise simply because the Court disagreed. (Doc. 26 at 7–9.)

1 To begin, the Court will not reduce the award merely because the Commissioner
2 offered to remand the case. Plaintiff ultimately was “not obligated to stipulate to
3 remand,” so this argument is unpersuasive. *Wright v. Comm’r of Soc. Sec. Admin.*, No.
4 CV-19-04508-PHX-DLR, 2020 WL 6781308, at *2 (D. Ariz. Nov. 18, 2020). To
5 determine whether Plaintiff is entitled to fees for litigating the motion to remand, the
6 court must look at whether the opposition to remand was reasonable and whether Plaintiff
7 obtained a compensable level of success. *Hensley*, 461 U.S. at 434. Other courts have
8 denied or decreased fees when the plaintiff unreasonably opposed remand to obtain an
9 award of benefits. *See Uphill v. Barnhart*, 271 F. Supp. 2d 1086, 1094–96 (E.D. Wis.
10 July 3, 2003); *Gutierrez v. Colvin*, No. CV-13-02168-PHX-DGC, 2015 WL 254642, at
11 *1 (D. Ariz. Jan. 20, 2015); *Rogers v. Astrue*, No. 1:09-cv-02158-JLT, 2010 WL
12 4569058, at *3–4 (E.D. Cal. Nov. 3, 2010). But even where a plaintiff’s opposition to
13 remand was unreasonable, these courts have considered other benefits that may have
14 derived from the opposition, such as guidance on remand that benefitted the plaintiff.
15 *Uphill*, 271 F. Supp. 2d at 1096 (adjusting fees incurred in opposing the motion down by
16 80%); *Minton v. Astrue*, No. CV 11-00461-PHX-FJM, 2012 WL 2368492, at *1–2
17 (D. Ariz. June 21, 2012) (awarding full amount of fees despite a finding that “plaintiff
18 should not have reasonably expected to remand for immediate award of benefits”).

19 The Court agrees with the Commissioner that Plaintiff could not have reasonably
20 expected to prevail on her motion for remand for an award of benefits. Prevailing on such
21 a motion requires the claimant to meet each of the elements of the credit-as-true rule
22 regarding her discounted testimony—a test that applies “only in rare circumstances” and
23 is difficult to overcome. *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1100
24 (9th Cir. 2014). (internal citations omitted). Here, the Court found that the second and
25 third steps of the credit-as-true doctrine were not met because inconsistencies in the
26 record created “serious doubt as to whether Plaintiff is disabled.” (Doc. 21 at 8 (internal
27 quotation omitted).) Ultimately, these inconsistencies indicate that Plaintiff’s opposition
28 to remand was unreasonable because it was highly unlikely that the Court would apply

1 the credit-as-true test. *See McLaurin v. Apfel*, 95 F. Supp. 2d 111, 116 (E.D.N.Y. 2000)
2 (holding that a plaintiff’s position against remand was not reasonable when the plaintiff
3 “should have recognized that the conflicting evidence clearly warranted remand”).

4 That said, a plaintiff may still receive fees in similar situations if they “achieved a
5 level of success that makes the hours reasonably expended a satisfactory basis for making
6 a fee award.” *Hensley*, 461 U.S. at 434. “Where a plaintiff has obtained excellent results,
7 his attorney should recover a fully compensatory fee.” *Id.* at 435. “A plaintiff may obtain
8 excellent results without receiving all the relief requested.” *Sorenson v. Mink*, 239 F.3d
9 1140, 1147 (9th Cir. 2001) (citing *Hensley*, 461 U.S. at 435 n.11). Plaintiff here achieved
10 success, even though there was not an immediate award of benefits as she hoped.

11 In a similar case, *Betancourt v. Colvin*, a plaintiff challenged the ALJ’s decision
12 and requested that “the [c]ourt remand the matter for an award of benefits or,
13 alternatively, remand the matter for further proceedings.” No. CV 15-37-TUC-BPV, 2016
14 WL 6778365, at *4 (D. Ariz. Nov. 16, 2016). The court held that the plaintiff was entitled
15 to compensation for time spent opposing remand when the plaintiff “prevailed on all
16 merits arguments and was unsuccessful only in achieving one alternative remedy.” *Id.*
17 Here, Plaintiff challenged the ALJ decision on the grounds that the ALJ incorrectly
18 discounted her symptom testimony and erred when calculating her RFC. (Doc. 13 at 1.)
19 Plaintiff requested a “remand without rehearing” for an award of benefits and,
20 alternatively, a “remand for further administrative proceedings.” (*Id.* at 22–23.) The
21 Court agreed that the ALJ failed to sufficiently explain its reason for rejecting Plaintiff’s
22 symptom testimony and held that the Commissioner conceded to Plaintiff’s argument
23 regarding her RFC. (Doc. 21 at 6–7.) The Court, however, chose to remand for further
24 proceedings because there was doubt regarding Plaintiff’s ultimate disability. (*Id.* at 9.)
25 Just like *Betancourt*, Plaintiff prevailed on her arguments, secured a remand for further
26 proceedings, and only failed to obtain an immediate award of benefits. The Court
27 therefore finds that Plaintiff achieved a level of success that justifies awarding reasonable
28 fees for that work.

1 Plaintiff's opposition to remand also "resulted in a remand more beneficial to her
2 than that offered by the [Commissioner]." *Minton*, 2012 WL 2368492, at *2. In *Minton*,
3 the court held that although the plaintiff's opposition to remand was unreasonable, the
4 time expended was still compensable because it "brought her some success and did not
5 'unnecessarily protract[] the proceedings.'" *Id.* at *2 (citing 28 U.S.C. § 2412(d)(2)(D)).
6 In that case, the Commissioner argued that the "ALJ reasonably discounted [the]
7 plaintiff's subjective symptoms," but the court disagreed and ordered a new evaluation of
8 those symptoms on remand. *Id.* Ultimately, "[a]lthough [the plaintiff] did not succeed in
9 securing immediate benefits, she achieved more than she would have had she stipulated
10 to a remand on [the Commissioner]'s terms." *Id.* That made the time compensable. *Id.*
11 Here, the Commissioner argued in the motion to remand that "the ALJ did not err in
12 analyzing Plaintiff's subjective complaints," that "outstanding issues exist[ed]," and that
13 there was "significant doubt that Plaintiff is actually disabled." (Doc. 18 at 8, 12, 14.) In
14 its remand order, the Court found that the ALJ *did* err in analyzing Plaintiff's symptom
15 testimony, and that no outstanding issues existed. (Doc. 21 at 6.) Plaintiff's opposition to
16 remand resulted in a more favorable remand than the Commissioner proposed because
17 she also succeeded in obtaining a new evaluation of her symptoms. The Court finds that
18 the hours expended opposing remand are reasonable. Accordingly, the Court will not
19 deduct this time from the fee award.

20 **3. Good Faith Effort**

21 The Commissioner argues that "Plaintiff's counsel did not make a good faith effort
22 to resolve his EAJA fee request" per Local Rule of Civil Procedure 54.2(d)(1). (Doc. 25
23 at 16.) As Plaintiff points out, however, that rule only applies "in cases assigned Standard
24 Track or Complex Track of the local rule governing Differentiated Case Management."
25 LRCiv 54.2(a). Social Security appeals are assigned to the Expedited Track. LRCiv
26 16.2(b)(1)(A)(i). The Court will therefore not reduce the fee award on this basis.

27 **4. Unreasonable and Unnecessary Billing**

28 Finally, the Commissioner argues that Plaintiff's fee motion was excessive and

1 that “litigating a case after the Commissioner offered to remand” constitutes
2 unreasonable and unnecessary billing. (Doc. 25 at 18.) It is unclear, however, if the
3 Commissioner is arguing that Plaintiff’s time spent on the fee motion was excessive or if
4 the overall time requested in that motion was excessive. Either way, the Court finds that
5 the time spent on both was reasonable. As discussed above, Plaintiff was not required to
6 substantively address why the request was reasonable. And the Court will “defer to the
7 winning lawyer’s professional judgment as to how much time he was required to spend
8 on the case; after all, he won, and might not have, had he been more of a slacker.”
9 *Moreno*, 534 F.3d at 1112. “If opposing counsel cannot come up with specific reasons for
10 reducing the fee request that the district court finds persuasive, it should normally grant
11 the award in full, or with no more than a haircut.” *Id.* at 1106. Merely asserting that the
12 time expended by Plaintiff’s counsel was “professional overkill” is not a persuasive
13 reason to reduce the fee award. (Doc. 25 at 18.) The Court has reviewed the Itemization
14 of Services (Doc. 24-2) and finds that the time spent on this case was reasonable.

15 **5. Litigation of EAJA Fees**

16 Because Plaintiff has ultimately prevailed in this litigation, she is entitled to
17 recover fees for time spent litigating her fee request. *Jean*, 496 U.S. at 163 n.10. The
18 plaintiff bears the burden of providing adequate documentation to support a fee request,
19 and the Commissioner bears the burden of “producing a sufficiently cogent explanation”
20 for why the fee request is excessive. *Moreno*, 534 F.3d at 1106. Here, Plaintiff’s counsel
21 met this burden by indicating both the time expended and the tasks completed during that
22 time. (Doc. 26 at 10.) The Commissioner has not provided an explanation for why the
23 time spent litigating the EAJA motion was unreasonable, so he has not met his burden.
24 Even if he did provide a reason, Plaintiff has demonstrated that the time spent preparing
25 this Motion was reasonable. *See Moreno*, 534 F.3d at 1112. The Court will therefore
26 award the time spent on this Motion.

27 **IV. CONCLUSION**

28 The Court has reviewed the Attorney Itemization of Services attached to

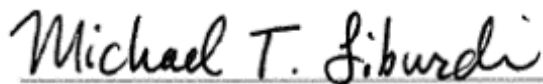
1 Plaintiff's Motion (Doc. 24-2) and finds that both the time expended and amounts
2 charged are reasonable for this case. Therefore, the Court grants Plaintiff's Motion and
3 awards fees in the amount of \$13,148.46. Accordingly,

4 **IT IS ORDERED granting** Plaintiff's Motion for Award of Attorney Fees as
5 Authorized by the EAJA (Doc. 23).

6 **IT IS FURTHER ORDERED** that Plaintiff is awarded \$13,148.46 in attorneys'
7 fees.

8 **IT IS FINALLY ORDERED** that if the Commissioner determines that Plaintiff
9 does not owe a debt that is subject to offset under the Treasury Offset Program, and
10 agrees to waive the requirements of the Anti-Assignment Act (31 U.S.C. § 3727(b)), the
11 fees will be made payable to Plaintiff's counsel. However, if there is a debt owed under
12 the Treasury Offset Program, the remaining EAJA fees after offset will be paid by check
13 made out to Plaintiff but delivered to Plaintiff's counsel. *See Astrue v. Ratliff*, 560 U.S.
14 586, 589 (2010).

15 Dated this 9th day of July, 2021.

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19 Michael T. Liburdi
20 United States District Judge
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