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

8 Brandy M. Huber,

9 Plaintiff,

10 vs.

11 Michael J. Astrue, Commissioner of Social
12 Security,

13 Defendant.

No. CV-10-8043-PCT-DGC

ORDER

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15 An administrative law judge (“ALJ”) denied Plaintiff’s application for
16 supplemental security income. Doc. 20, Tr. 19-29. This decision became Defendant’s
17 final decision when the Appeals Council denied review. Tr. 5-8. Plaintiff then brought
18 this action for judicial review pursuant to 42 U.S.C. § 405(g). Doc. 1. The Court
19 reversed Defendant’s decision and remanded the case for an award of benefits. Doc. 25.

20 Plaintiff has filed a motion for attorneys’ fees and costs pursuant to the Equal
21 Access to Justice Act (“EAJA”), 28 U.S.C. § 2412. Doc. 28. Defendant has filed a
22 response. Doc. 30. Oral argument has not been requested. For reasons stated below, the
23 Court will grant the motion and award Plaintiff fees in the amount of \$3,911.86 plus \$350
24 in costs.

25 “The EAJA creates a presumption that fees will be awarded to prevailing parties.”
26 *Flores v. Shalala*, 49 F.3d 562, 567 (9th Cir. 1995). Plaintiff is a prevailing party
27 because this matter was remanded pursuant to sentence four of the Social Security Act,
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1 42 U.S.C. § 405(g). Doc. 25; see *Shalala v. Schaefer*, 509 U.S. 292, 301 (1993);
2 *Gutierrez v. Barnhart*, 274 F.3d 1255, 1257 (9th Cir. 2001). The Court should award
3 reasonable attorneys' fees under the EAJA unless Defendant shows that his position in
4 this case was "substantially justified or that special circumstances make an award unjust."
5 28 U.S.C. § 2412(d)(1)(A); see *Gutierrez*, 274 F.3d at 1258.

6 Defendant does not contend that an award of fees in this case would be unjust.
7 Nor has he shown that each position taken in defense of the ALJ's erroneous decision
8 was substantially justified.

9 In finding that Plaintiff's impairments do not meet the listing for mental
10 retardation, listing 12.05, the ALJ committed clear error. A claimant's impairment meets
11 listing 12.05 "where it satisfies the diagnostic description in the introductory paragraph
12 and any one of the four sets of criteria[.]" 20 C.F.R. Pt. 404, Subpt. P, App. 1, §
13 12.00(A).

14 The ALJ found that there is no evidence that Plaintiff meets the two paragraph C
15 criteria for listing 12.05. Tr. 22. But Plaintiff's valid IQ scores of 65 and 66 (Tr. 329)
16 unquestionably satisfy the first prong of paragraph C. See *Fanning v. Bowen*, 827 F.2d
17 631, 633 (9th Cir. 1987). Under *Fanning* and § 12.00(A), the ALJ's finding that
18 Plaintiff's depressive disorder is severe satisfies the second prong of paragraph C. See
19 *Frazier v. Astrue*, No. CV-09-3063-CI, 2010 WL 3910331, at *5 (E.D. Wash. Oct. 4,
20 2010). The paragraph C criteria clearly were met in this case.

21 The diagnostic description for mental retardation is "significantly subaverage
22 general intellectual functioning with deficits in adaptive functioning" initially manifested
23 during the developmental period, that is, before age 22. 20 C.F.R. Pt. 404, Subpt. P,
24 App. 1, § 12.05. As explained more fully in the order of reversal (Doc. 25 at 4-5), the
25 record is replete with evidence that Plaintiff had subaverage intellectual functioning with
26 deficits in adaptive function before she was 22 years old. Indeed, Plaintiff's subaverage
27 intellectual functioning resulted from *congenital* galactosemia. See Tr. 21. When she
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1 was 13 years old, Plaintiff had IQ scores as low as 53, suggesting “a level of functioning
2 many years and grades below [normal].” Tr. 181-82. Plaintiff was enrolled in special
3 education classes since middle school, and completed high school with a modified
4 diploma. Tr. 23-24, 348. In short, the ALJ clearly erred in finding (Tr. 23) no history of
5 deficits in adaptive functioning as required to meet the diagnostic description of mental
6 retardation. *See, e.g., Blackwell v. Comm’r of Soc. Sec.*, No. CIV S-08-1454 EFB, 2010
7 WL 1267811, at *5 (E.D. Cal. Mar. 31, 2010).

8 The ALJ also committed legal error in relying on the fact that Plaintiff has had no
9 formal diagnosis of mental retardation. Tr. 23. Listing 12.05 does not require a
10 diagnosis or medical finding of mental retardation, but relies instead on valid IQ scores in
11 conjunction with other evidence to establish “subaverage general intellectual
12 functioning.” 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05. Listing 12.05 is different
13 than most other listings in that it requires only that a claimant’s impairment satisfy a
14 diagnostic description. *See Blackwell*, 2010 WL 1267811, at *5. Stated differently, a
15 claimant can meet listing 12.05(C) “without having to demonstrate a disabling, or even
16 severe, level of mental functioning impairment.” *Gomez v. Astrue*, 695 F. Supp. 2d 1049,
17 1057 (C.D. Cal. 2010). In promulgating listing 12.05(C), and its requirement of IQs
18 between 60 and 70, the Commissioner expressly singled out individuals with mild mental
19 retardation “for special treatment in determining entitlement to disability benefits.”
20 *Brown v. Sec’y of HHS*, 948 F.2d 268, 270 (6th Cir. 1991).

21 Defendant notes that doctors had diagnosed borderline intellectual functioning
22 (Doc. 30 at 5), but cites no legal authority holding that this diagnosis precludes a claimant
23 from satisfying the listing for mental retardation. As previously explained (Doc. 25 at 7),
24 the argument that a claimant must show intellectual functioning below the range of
25 borderline through some manner other than IQ scores “finds no support in Listing
26 12.05 (C).” *Lewis v. Astrue*, No. C 06-6608 SI, 2008 WL 191415, at *5 (N.D. Cal. Jan.
27 22, 2008). In summary, the defense of the ALJ’s clearly erroneous finding that Plaintiff’s
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1 impairments do not meet the listing for mental retardation was not substantially justified.

2 Plaintiff is entitled to an award of fees and costs as a prevailing party, and because
3 Defendant has not shown that his position in this case was substantially justified or that
4 special circumstances make an award unjust. 28 U.S.C. § 2412(a), (d). Plaintiff's
5 counsel has filed an affidavit (Doc. 28-2) and an itemized statement of fees (Doc. 28-3)
6 showing that 22.75 hours were spent on this case and that the fees total \$3,911.86 (\$172
7 per hour). Having reviewed the affidavit and the statement of fees, and having
8 considered the relevant fee award factors, *see Hensley v. Eckerhart*, 461 U.S. 424, 429-30
9 & n.3 (1983), the Court finds the amount of the requested fee award to be reasonable.
10 The EAJA requires that the award be made directly to Plaintiff, the "prevailing party."
11 28 U.S.C. § 2412(d); *see Astrue v. Ratliff*, 130 S. Ct. 2521, 2524 (2010).

12 **IT IS ORDERED:**

- 13 1. Plaintiff's motion for attorneys' fees and costs (Doc. 28) is **granted**.
- 14 2. Plaintiff is awarded **\$3,911.86** in attorneys' fees and **\$350.00** in costs
15 pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

16 Dated this 22nd day of March, 2011.

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21 David G. Campbell
22 United States District Judge
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