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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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David Eugene Register,

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CIV 15-8067-PCT-MHB

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Plaintiff,

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**ORDER**

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vs.

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

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Defendant.

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Pending before the Court is Plaintiff David Eugene Register’s Motion for Award of Attorney’s Fees Pursuant to the Equal Access to Justice Act (“EAJA”) (Doc. 34). After reviewing the administrative record and the arguments of the parties, the Court now issues the following ruling.

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**BACKGROUND**

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Plaintiff filed applications for disability insurance benefits and supplemental security income pursuant to Titles II and XVI of the Social Security Act in July 2011, alleging disability beginning August 7, 2009. These claims were denied initially and upon reconsideration. After a subsequent hearing, an ALJ issued a decision denying Plaintiff’s claims. The Appeals Council denied Plaintiff’s request for review, thereby making the ALJ’s decision the final decision of the Commissioner. Plaintiff sought judicial review of the ALJ’s decision pursuant to 42 U.S.C. § 405(g).

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In his opening Brief, Plaintiff argued that the ALJ erred by: (1) failing to adequately consider the opinion of examining psychologist, Minette Doss, Ed.D.; (2) failing to account

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1 for limitations in concentration, persistence, and pace in the RFC; and (3) failing to provide  
2 legally sufficient reasons to discount his credibility. Plaintiff requested that the Court vacate  
3 the decision of the ALJ and remand for a determination of benefits.

4 In response to Plaintiff's Brief, the Commissioner filed a Brief Requesting Remand  
5 conceding that the ALJ's decision contained errors, and stating that outstanding issues must  
6 be addressed before it can be determined whether Plaintiff is disabled. Specifically, the  
7 Commissioner stated that prior to reaching any conclusions about whether Plaintiff is  
8 disabled within the meaning of the Social Security Act, it is essential that the fact-finder  
9 derive an RFC after considering and weighing all the evidence in the record, and present that  
10 RFC to a vocational expert for an evaluation of Plaintiff's ability to perform work. On  
11 remand, the Commissioner argued that the ALJ should (1) update the record; (2) hold a de  
12 novo hearing; (3) reevaluate the credibility of Plaintiff's subjective complaints; (4) reevaluate  
13 the medical evidence, including the opinion of Dr. Doss; (5) re-assess Plaintiff's RFC; and  
14 (6) continue the sequential evaluation process as appropriate.

15 Therefore, the only issue before the Court was whether this matter should be reversed  
16 and remanded for further proceedings or for an award of benefits. After reviewing the  
17 administrative record and the arguments of the parties, the Court remanded the matter to the  
18 Commissioner for further proceedings. Specifically, the Court stated:

19 Here, the parties agree that the ALJ erred in assessing Plaintiff's RFC by  
20 failing to properly consider Dr. Doss' opinion and failing to properly account  
21 for limitations in concentration, persistence, and pace. Further, it appears that  
the ALJ relied upon an erroneous evaluation of the objective medical evidence,  
in part, to discount Plaintiff's credibility.

22 The Court finds ... that there are identifiable issues to be resolved on remand,  
23 notably whether Plaintiff is disabled. Although the parties concede, and the  
24 record reflects that the ALJ erred in failing to provide adequate reasons for his  
findings and conclusion, the ALJ did identify some conflicting evidence in the  
25 record that would seem to support a finding of non-disability. (Tr. at 18-21.)  
26 Thus, because there are outstanding issues to be resolved, the Court will  
remand for further administrative proceedings. Specifically, remand is  
27 appropriate for a renewed residual functional capacity assessment, which  
explicitly considers and reevaluates the opinion of Dr. Doss in conjunction  
with all other objective medical evidence, as well as, Plaintiff's subjective  
28 complaints.

1 **DISCUSSION**

2 The Ninth Circuit has succinctly stated the legal standard for an award of attorneys’  
3 fees under the EAJA as follows:

4 EAJA provides that a court shall award to a prevailing party other than the  
5 United States fees and other expenses incurred by that party in any civil action  
6 unless the court finds that the position of the United States was substantially  
7 justified or that special circumstances make an award unjust. It is the  
8 government’s burden to show that its position was substantially justified.  
9 Substantial justification means justified in substance or in the main – that is,  
10 justified to a degree that could satisfy a reasonable person. Put differently, the  
11 government’s position must have a reasonable basis both in law and fact. The  
12 position of the United States includes both the government’s litigation position  
13 and the underlying agency action giving rise to the civil action. Thus, if the  
14 government’s underlying position was not substantially justified, we must  
15 award fees and need not address whether the government’s litigation position  
16 was justified.

17 Tobeler v. Colvin, 749 F.3d 830, 832 (9<sup>th</sup> Cir. 2014) (citations, quotation marks, and  
18 alterations omitted).

19 When awarding attorneys’ fees under the EAJA, the Court should reimburse the  
20 prevailing party only for those fees which are reasonably expended by that party’s counsel.  
21 See 28 U.S.C. § 2412(d)(2)(A). The prevailing party bears the burden of proving the  
22 reasonableness of his request through sufficiently detailed accounts of hours expended on  
23 particular tasks so that the Court can evaluate his application. See Hensley v. Eckerhart, 461  
24 U.S. 424, 437 (1983); Neil v. Comm’r of Soc. Sec., 495 Fed.Appx. 845, 846 (9<sup>th</sup> Cir. 2012)  
25 (“A fee applicant should maintain billing records in a manner that enables a reviewing court  
26 to easily identify the hours reasonably expended.” (quotation omitted)). Generally, if the  
27 Court reduces a fee application it must provide a reason, however, “a district court can  
28 impose a reduction of up to 10 percent – a ‘haircut’ – based purely on the exercise of its  
discretion and without more specific explanation.” Costa v. Comm’r of Soc. Sec., 690 F.3d  
1132, 1135 (9<sup>th</sup> Cir. 2012) (citing Moreno v. City of Sacramento, 534 F.3d 1106, 1111 (9<sup>th</sup>  
Cir. 2008)).

29 In his request for fees pursuant to the EAJA, Plaintiff contends that he is the  
30 prevailing party, the position of the Commissioner was not substantially justified, and his  
31 application for attorney fees for 34.8 hours of service totaling \$6,642.33 is reasonable.

1 Plaintiff argues, in pertinent part, that on remand, he obtained better results than proposed  
2 in the Commissioner's request. He states that the Commissioner requested further  
3 proceedings only to re-evaluate the opinion from the agency's consultative examiner, Dr.  
4 Doss, but the final remand included a specific statement that favorably addressed Plaintiff's  
5 argument that the ALJ provided an erroneous evaluation of his credibility.

6 In response, the Commissioner does not contest that Plaintiff is entitled to EAJA fees.  
7 The Commissioner, however, objects to the reasonableness of the requested amount, in light  
8 of Plaintiff's refusal to accept the Commissioner's settlement offer and his unsuccessful  
9 attempt to litigate for greater relief than was offered by the Commissioner. The  
10 Commissioner asks this Court to find the time Plaintiff spent opposing the Commissioner's  
11 Brief Requesting Remand after the Commissioner conceded error – the Reply brief – not  
12 reasonable and, therefore, should not be compensated. According to the response, the  
13 Commissioner states that this reduction would result in an EAJA award of \$4,834.67 – rather  
14 than Plaintiff's requested award of \$6,642.33.

15 As the record states, Plaintiff requested a remand for computation of benefits. The  
16 Commissioner conceded error and agreed to accept a remand for further administrative  
17 proceedings. Plaintiff filed a reply brief requesting payment of benefits. The Court,  
18 ultimately, remanded the case for further proceedings finding identifiable issues to be  
19 resolved on remand.

20 Although Plaintiff contends that the Court ordered relief beyond the Commissioner's  
21 remand request, in the Commissioner's Brief Requesting Remand, the Commissioner  
22 specifically requested that the Court order the ALJ to:

- 23 - Update the record;
- 24 - Hold a de novo hearing;
- 25 - *Reevaluate the credibility of Plaintiff's subjective complaints*;
- 26 - Reevaluate the medical evidence, including the opinion of Minette Doss, Ed.D.;
- 27 - Re-assess Plaintiff's RFC; and
- 28 - Continue the sequential evaluation process as appropriate

29 Thus, the Commissioner did, in fact, request on remand that the ALJ "Reevaluate the  
30 credibility of Plaintiff's subjective complaints." Since Plaintiff's Reply brief did not advance

1 his position, the Court agrees with the Commissioner that the time spend drafting the Reply  
2 should not be compensated under the EAJA.

3 According to the pleadings, counsel spent 9.5 hours on the Reply brief, resulting in  
4 a request for an additional \$1,807.66 (at the rate of \$190.28 per hour):

5 4/18/16 Began review of opening brief, reply brief, review of paper copies of  
6 Administrative Law Judge decision and DOSS CE report, in preparation for  
draft of reply brief. 3.0

7 4/19/16 Review of parties' briefs, portions of administrative transcript, legal  
8 research, draft of entire reply brief, edited x 2, emailed to office. 6.5

9 Total: 9.5

10 Therefore, having reviewed the affidavits and the statement of fees, and having  
11 considered the relevant fee award factors, see Hensley, 461 U.S. at 429-30 & n.3, the Court  
12 will grant Plaintiff's Motion for Award of Attorney's Fees Pursuant to the Equal Access to  
13 Justice Act in part, and award Plaintiff a reasonable attorney fee under the EAJA in the  
14 amount of \$4,834.67.

15 Accordingly,

16 **IT IS ORDERED** that Plaintiff's Motion for Award of Attorney's Fees Pursuant to  
the Equal Access to Justice Act (Doc. 34) is **GRANTED in part**;

17 **IT IS FURTHER ORDERED** that Plaintiff is awarded \$4,834.67 pursuant to the  
18 Equal Access to Justice Act;

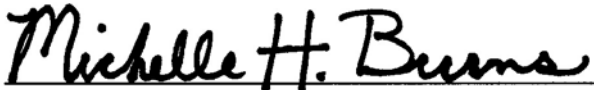
19 **IT IS FURTHER ORDERED** that, pursuant to the assignment of fees in Plaintiff's  
20 fee agreement, the government shall pay the fee award, minus any offset as explained below,  
21 payable to Plaintiff, care of counsel's office: Mark Caldwell, Law Office of Mark Caldwell,  
22 P.C., 9920 S. Rural Road, No. 108-167, Tempe, Arizona 85284-4100;

23 **IT IS FURTHER ORDERED** that, although fees under the EAJA are awarded to the  
24 prevailing party, not to the party's attorney, the Commissioner shall determine whether  
25 Plaintiff owes a debt to the government and, if the Acting Commissioner of Social Security  
26 (1) determines upon effectuation of the Court's Equal Access to Justice Act fee order that  
27 Plaintiff does not owe a debt that is subject to offset under the Treasury Offset Program, and  
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1 (2) agrees to waive the requirements of the Anti-Assignment Act, the fees will be made  
2 payable to Plaintiff's attorney;

3 **IT IS FURTHER ORDERED** that Plaintiff's counsel shall refund to Plaintiff the  
4 lesser of fees awarded under the Equal Access to Justice Act and any fees awarded from  
5 past-due benefits under 42 U.S.C. § 406(b).

6 DATED this 30th day of January, 2017.

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9 Michelle H. Burns  
10 United States Magistrate Judge  
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