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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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9 Roger Burke Anderson,

No. CV-13-00336-TUC-CRP

10 Plaintiff,

**ORDER**

11 vs.

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13 Carolyn W. Colvin, Acting Commissioner  
of Social Security Administration,

14 Defendant.

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17 On September 30, 2014, the Court filed an Order remanding this case to the  
18 Commissioner for further proceedings. (Doc. 32, Order). Plaintiff through counsel has filed  
19 a Motion for Attorney Fees Under the Equal Access to Justice Act (“EAJA”) (28 U.S.C. §  
20 2412(d)) (Doc. 36, EAJA Motion) and Memorandum in Support (Doc. 37). Defendant has  
21 filed an Objection to Plaintiff’s Motion for Attorney Fees (Doc. 38, Objection), and Plaintiff  
22 has filed an EAJA Reply Brief (Doc. 39, EAJA Reply). Plaintiff’s attorney also has filed a  
23 Motion for Attorney Fees Under 42 U.S.C. § 406(b) (Doc. 40, § 406(b) Motion) and Brief in  
24 Support (Doc. 41), and Defendant has filed a Response (Doc. 42). This case is before the  
25 Magistrate Judge based on the parties’ consent. (Doc. 23).

26 **I. Plaintiff’s Motion for Attorney’s Fees Under the EAJA**

27 In the EAJA Motion, Plaintiff seeks \$6,223.43 in attorney’s fees. (EAJA Motion at  
28 1). Plaintiff has submitted the affidavits of the three attorneys who worked on the case and

1 itemized statements showing the attorneys' time on the case as 33.2 hours. (Doc. 37 at 7-8  
2 & Ex. B, C & D). In the EAJA Reply, Plaintiff makes a supplemental request for \$760.24  
3 regarding four hours of additional attorney time for preparing the EAJA Reply, resulting in  
4 a cumulative total request of \$6,983.67. (EAJA Reply at 10-11).

5 Defendant contends in the Objection that the Commissioner's decision was substantially  
6 justified. Defendant asserts that, if the Court awards attorney fees, any award should be made  
7 payable to Plaintiff rather than to Plaintiff's counsel based on *Astrue v. Ratliff*, 560 U.S. 586  
8 (2010), subject to offset under the Treasury Offset Program.

9 **Whether Plaintiff is Entitled to an Award of Attorney's Fees**

10 The EAJA provides that a prevailing party in a civil suit against the federal government  
11 shall be awarded attorney's fees unless the court finds that the government's position was  
12 substantially justified or that special circumstances make the award unjust. 28 U.S.C. §  
13 2412(d)(1)(A). Defendant does not dispute Plaintiff's prevailing party status or contend that  
14 special circumstances make the award unjust. Defendant contends that the government's  
15 position was substantially justified.

16 To meet the "substantially justified" standard under the EAJA, "the government must  
17 advance a position that is 'justified in substance or in the main – that is, justified to a degree  
18 that could satisfy a reasonable person.'" *Le v. Astrue*, 529 F.3d 1200, 1201 (9th Cir. 2008)  
19 (quoting *United States v. Marolf*, 277 F.3d 1156, 1161 (9th Cir. 2002)). "[T]he government's  
20 position must have a reasonable basis in law and fact" and "be substantially justified at each  
21 stage of the proceedings." *Shafer v. Astrue*, 518 F.3d 1067, 1071 (9th Cir. 2008). The court's  
22 inquiry is limited to the issues that led to remand. *Hardisty v. Astrue*, 592 F.3d 1072, 1078  
23 (9th Cir. 2010). The Commissioner has the burden to show that its position was substantially  
24 justified or that special circumstances exist to make an award unjust. *Gutierrez v. Barnhart*,  
25 274 F.3d 1255, 1258 (9th Cir. 2001). Defendant contends her position was substantially  
26 justified, that is, reasonable in law and fact, even though the Court found that remand was  
27 necessary.



1 Defendant argues in her Objection that the ALJ reasonably concluded that Plaintiff's  
2 daily activities contradicted his claims of debilitating impairment. (Objection at 8). In  
3 determining that remand for further proceedings was appropriate, the Court noted that a  
4 reassessment of Dr. Ostrowski's opinion will impact the ALJ's existing credibility finding.  
5 (Order at 12). Defendant argues in her Objection that the ALJ properly considered the lay  
6 testimony. (Objection at 8-9). However, the Court noted that Defendant "conced[ed] that lay  
7 testimony cannot be rejected solely because it is unsupported by the medical evidence."  
8 (Order at 15).

9 The government's defense of "basic and fundamental errors" cannot be considered as  
10 substantially justified. *Shafer*, 518 F.3d at 1071-72 (holding, *inter alia*, that it was legal error  
11 to discredit claimant's testimony without giving clear and convincing reasons and to reject a  
12 treating physician's opinion without providing adequate reasons for doing so, and that the  
13 Commissioner was not substantially justified in defending it). Because of the ALJ's several  
14 fundamental errors, Defendant's position was not substantially justified.

15 **Reasonableness of the Attorney Fees Request**

16 Plaintiff's attorney fees request is based on 33.2 hours of attorney time at the 2013 and  
17 2014 hourly rates that correspond to the rates calculated by the Court of Appeals for the Ninth  
18 Circuit. (EAJA Mem. at 7). Defendant has not objected to the hours of attorney time or to  
19 the hourly rate. The Court finds that Plaintiff's request for a total cumulative fee award of  
20 \$6,983.67, which includes the attorney time and fee amount for preparing the EAJA Reply,  
21 is reasonable. Plaintiff's Motion for Attorney Fees under the EAJA will be granted.

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1 **Payment of Attorney Fees**

2 Defendant contends that any award of EAJA attorney fees should be paid to Plaintiff  
3 rather than to Plaintiff’s attorney. (Objection at 10-13). “EAJA fees are payable to litigants  
4 and are thus subject to offset where a litigant has outstanding federal debts.” *Ratliff*, 560 U.S.  
5 at 594. Defendant suggests the following payment procedure:

6 If, after receiving the Court’s EAJA fee order, the Commissioner (1) determines  
7 that Plaintiff has assigned his right to EAJA fees to his attorney; (2) determines  
8 that Plaintiff does not owe a debt that is subject to offset under the Treasury  
9 Offset Program; and (3) agrees to waive the requirements of the Anti-  
10 Assignment Act, then the EAJA fees will be made payable to Plaintiff’s  
11 attorney. However, if there is a debt owed under the Treasury Offset Program,  
12 the Commissioner cannot agree to waive the requirements of the Anti-  
13 Assignment Act, and the remaining EAJA fees after offset will be paid by a  
14 check made out to Plaintiff but delivered to Plaintiff’s attorney.

15 (Objection at 13, n.2). The EAJA fees award in this case is made subject to this procedure.

16 **II. Plaintiff’s Attorney’s Motion for Attorney’s Fees Under 42 U.S.C. § 406(b)**

17 Plaintiff’s counsel seeks \$20,000 in attorney’s fees for representing Plaintiff on a  
18 contingency fee basis. (Doc. 40, § 406(b) Motion). Plaintiff originally was represented by  
19 attorney Phillip B. Verrette who filed this civil action and then withdrew. Plaintiff then was  
20 represented by attorneys Patrick R. McNamara and Eric Schnauer on the merits of the  
21 litigation. Upon the Court’s reversal and remand for a rehearing, Plaintiff was found disabled  
22 as of June 2009. Plaintiff’s counsel has submitted the Award Notice (Doc. 41-5, Ex. E), the  
23 Contract for Attorney Representation (Doc. 41-1, Ex. A), and Attorney Time Records and  
24 Affidavits (Doc. 41-2 through 4, Ex. B-D). Defendant has filed a Response stating no  
25 position on this request for attorney fees.

26 Plaintiff retained counsel under a contract with a contingency fee agreement in which  
27 Plaintiff “agree[d] that my attorney shall charge and receive as the fee an amount equal to  
28 twenty-five percent (25%) of the” award of past due benefits. (Doc. 41-1, Ex. A). The  
contract provided that the attorney fee must be approved by the federal court. (*Id.*). Defendant  
has withheld \$6,000 in attorney’s fees from Plaintiff’s past-due benefits award, noting that  
\$30,084.73 should have been withheld. (Doc. 41-5, Ex. E, Award Notice).

1 Under 42 U.S.C. § 406(b)(1)(A), when a claimant represented by counsel has received  
2 a favorable judgment, “the court may determine and allow as part of its judgment a reasonable  
3 fee for such representation, not in excess of 25 percent of the total of the past-due benefits[.]”  
4 The Court “review[s] for reasonableness” the fee yielded by contingency fee agreements.  
5 *Gisbrecht v. Barnhart*, 535 U.S. 789, 808-09 (2002). The Court may consider the character  
6 of the representation, the results achieved, performance, delay, and whether the benefits are  
7 in proportion to the time spent on the case. *Crawford v. Astrue*, 586 F.3d 1142, 1151 (9th Cir.  
8 2009).

9 The Social Security Administration determined that Plaintiff was owed \$120,338.90  
10 in past due benefits. (Doc. 41 at 8). Twenty-five percent of that amount is \$30,084.73. (*Id.*).  
11 The Social Security Administration did not withhold that amount.

12 Plaintiff’s attorneys rely on 36.7 hours of service which results in an hourly rate of  
13 approximately \$544.96 based on the request for \$20,000 in attorney fees. (Doc. 41 at 11). The  
14 Court has considered counsel’s successful representation of Plaintiff, any delay in the  
15 proceedings, the contingency fee agreement, and the risk inherent in a contingency fee  
16 arrangement.

17 Plaintiff’s counsel did not seek any extensions of time regarding the filing of his legal  
18 memorandum in the proceedings before this Court. Plaintiff’s counsel asserted issues on the  
19 merits which the Court found to be meritorious as previously discussed. The record provides  
20 no reason for a reduction in the requested fee award on the basis of the character of counsel’s  
21 representation, the results achieved, or delay in the proceedings attributable to Plaintiff’s  
22 counsel.

23 The record does not suggest any reason to question the propriety of the Contract for  
24 Attorney Representation in this case. There is no showing that the fees requested exceed the  
25 twenty-five percent cap. The Court is mindful of the contingent-fee nature of this case and  
26 the risk imposed on counsel in agreeing to represent Plaintiff under such terms.

1 The fee sought must be reasonable “for the services rendered.” *Gisbrecht*, 535 U.S.  
2 at 807. The reviewing court should not allow a “windfall.” *Id.* at 808. As noted in *Gisbrecht*,  
3 “§ 406(b) does not displace contingent-fee agreements as the primary means by which fees  
4 are set for successfully representing Social Security benefits claimants in court.” *Id.* at 807.  
5 “Section 406(b) calls for court review of such arrangements as an independent check, to  
6 assure that they yield reasonable results in particular cases.” *Id.* (footnote omitted). The  
7 district court may reduce a § 406(b) award if “benefits ... are not in proportion to the time  
8 spent on the case.” *Crawford*, 586 F.3d at 1151 (citing *Gisbrecht*, 535 U.S. at 808). “If the  
9 benefits are large in comparison to the amount of time counsel spent on the case, a downward  
10 adjustment is ... in order.” *Gisbrecht*, 535 U.S. at 808.

11 The retroactive benefits award is not large in comparison to the 36.7 hours counsel  
12 spent on the case. Plaintiff’s counsel states that Mr. McNamara’s per hour non-contingent rate  
13 is \$400. (Doc. 41 at 11, n. 5). Mr. McNamara has more than 30 years of experience. (*Id.*).  
14 Mr. Schnauffer has more than 20 years of experience. (*Id.*). The hourly rate for attorneys with  
15 20 to 30 years of experience in the Mountain Region is \$440. (*Id.*).

16 The Court, in its discretion and taking into account counsel’s risk involved in the  
17 contingency fee arrangement in this case, finds that counsel’s fee request is reasonable.  
18 Plaintiff’s counsel is awarded a total fee amount of \$20,000 under § 406(b).

19 Accordingly,

20 **IT IS ORDERED** that Plaintiff’s Motion for Attorney Fees Under the Equal Access  
21 to Justice Act (Doc. 36) is granted and Plaintiff is awarded \$6,983.67 in attorney’s fees.

22 **IT IS FURTHER ORDERED** that if, after receiving the Court’s EAJA fees order,  
23 the Commissioner (1) determines that Plaintiff has assigned his right to EAJA fees to his  
24 attorney; (2) determines that Plaintiff does not owe a debt that is subject to offset under the  
25 Treasury Offset Program; and (3) agrees to waive the requirements of the Anti-Assignment  
26 Act, the fees will be made payable to Plaintiff’s attorney. However, if there is a debt owed  
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1 under the Treasury Offset Program, the remaining EAJA fees after offset shall be paid by  
2 check made out to Plaintiff but delivered to Plaintiff's attorney.

3 **IT IS FURTHER ORDERED** that Plaintiff's Attorney's Motion for Attorney Fees  
4 Under 42 U.S.C. § 406(b) (Doc. 40) is granted to the extent that counsel is awarded \$20,000  
5 in attorney's fees.

6 **IT IS FURTHER ORDERED** that Plaintiff's counsel shall refund to Plaintiff the  
7 lesser of the fees awarded under 42 U.S.C. § 406(b) and the Equal Access to Justice Act.

8 DATED this 3<sup>rd</sup> day of November, 2016.

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11 **CHARLES R. PYLE**  
12 **UNITED STATES MAGISTRATE JUDGE**

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