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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

HOWARD NICHOLAS,)	Case No. CV 12-2124-JPR
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
vs.)	GRANTING IN PART PLAINTIFF'S
)	COUNSEL'S PETITION FOR EAJA FEES
CAROLYN W. COLVIN, Acting)	AND COSTS
Commissioner of Social)	
Security,)	
)	
Defendant.)	

Plaintiff's counsel filed a petition for attorney's fees and costs under the Equal Access to Justice Act on November 18, 2013. The government filed opposition on December 10, 2013; Plaintiff himself has not filed any position. In his reply, Plaintiff's counsel claims entitlement to \$4538.01 in attorney's fees, which includes \$466.37 to prepare the reply, and \$60 in costs.

DISCUSSION

The EAJA provides in relevant part:
Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses . . . incurred by that party in any civil action (other than

1 cases sounding in tort), including proceedings for
2 judicial review of agency action, brought by or against
3 the United States in any court having jurisdiction of
4 that action, unless the court finds that the position of
5 the United States was substantially justified or that
6 special circumstances make an award unjust.

7 28 U.S.C. § 2412(d)(1)(A).

8 An application for fees and other expenses must be submitted
9 to the Court within 30 days of final judgment. See
10 § 2412(d)(1)(B). The government does not contend that
11 Plaintiff's counsel's request is untimely or challenge
12 Plaintiff's status as a prevailing party. Nor does the
13 government argue that special circumstances here make an EAJA
14 award unjust. Finally, the government does not contest the
15 hourly rates Plaintiff's counsel has applied. Instead, the
16 government argues that his EAJA request should be denied in its
17 entirety because the government's position was substantially
18 justified. Alternatively, the government contends that if the
19 Court decides to award EAJA fees and costs, the requested amount
20 should be reduced because it is unreasonable. Finally, the
21 government asserts that if fees are awarded, they must be made
22 payable to Plaintiff and not his attorney.

23 **A. The Government's position was not substantially justified**

24 The term "position" as used in the EAJA applies to the
25 underlying agency action and the government's arguments during
26 litigation. See Andrew v. Bowen, 837 F.2d 875, 878 (9th Cir.
27 1988). Although the burden is on the government to prove
28 substantial justification, Barry v. Bowen, 825 F.2d 1324, 1330

1 (9th Cir. 1987), abrogation on other grounds recognized by In re
2 Slimick, 928 F.2d 304, 310 n.8 (9th Cir. 1990), Congress has made
3 clear that no presumption exists that the government's position
4 was not substantially justified merely because it lost the case.
5 See United States v. Marolf, 277 F.3d 1156, 1162 (9th Cir. 2002);
6 Kali v. Bowen, 854 F.2d 329, 334 (9th Cir. 1988).

7 In Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541,
8 2550, 101 L. Ed. 2d 490 (1988), the Supreme Court held that the
9 statutory phrase "substantially justified" does not mean
10 "justified to a high degree." Rather, it means "justified in
11 substance or in the main" or "justified to a degree that could
12 satisfy a reasonable person." Id. The Supreme Court further
13 held that this interpretation of the phrase was equivalent to the
14 formula adopted by the Ninth Circuit: "a reasonable basis both in
15 law and fact." See id.; see also Le v. Astrue, 529 F.3d 1200,
16 1201 (9th Cir. 2008).

17 The government's position was not substantially justified
18 for the reasons set forth in the Court's prior Memorandum Opinion
19 and Order remanding the underlying action.

20 The government contests the Court's finding that the case
21 had to be remanded because the VE did not make a finding that a
22 sufficient number of jobs existed that Plaintiff could perform,
23 arguing that because the ALJ concluded that Plaintiff could
24 perform his past relevant work, no such finding was necessary.
25 (Opp'n at 3.) But the ALJ concluded that Plaintiff could perform
26 his past relevant work not as actually or generally performed but
27 as it existed at a different exertional level altogether. Cf.
28 Perez v. Astrue, 247 F. App'x 931, 933 (9th Cir. 2007) (claimant

1 not disabled if he can perform past work either as actually or as
2 generally performed); Valencia v. Heckler, 751 F.2d 1082, 1086
3 (9th Cir. 1985) ("Every occupation consists of a myriad of tasks,
4 each involving different degrees of physical exertion. To
5 classify an applicant's 'past relevant work' according to the
6 least demanding function of the claimant's past occupations is
7 contrary to the letter and spirit of the Social Security Act.");
8 Prieto v. Astrue, No. CV 08-2690-CT, 2008 WL 4196640, at *6 (C.D.
9 Cal. Sept. 3, 2008) (reversing and remanding step-four finding
10 that plaintiff could perform past relevant work when ALJ relied
11 on job with lighter exertional level and different job duties
12 than past relevant work). Indeed, the ALJ specifically relied on
13 the VE's testimony that Plaintiff had transferrable skills (AR
14 35), which would likely not have been necessary had he been found
15 capable of performing his past relevant work as he actually
16 performed it or as it was generally performed. Thus, the ALJ was
17 required to engage in the step-five analysis, and the
18 government's position was not substantially justified.

19 The government also argues that its position that the ALJ's
20 error in failing to consider the opinion of one doctor was
21 harmless was substantially justified. For the reasons detailed
22 in the Court's underlying Memorandum Opinion, it was not.
23 Moreover, given that "position" includes the agency's actions and
24 the government concedes that the ALJ erred in failing to consider
25 the doctor's report, its overall position necessarily was not
26 substantially justified.

1 **B. A reduction in the number of hours is not warranted, with**
2 **one exception**

3 In Commissioner, I.N.S. v. Jean, 496 U.S. 154, 161, 110 S.
4 Ct. 2316, 2320, 110 L. Ed. 2d 134 (1990), the Supreme Court made
5 clear that the standards for an award of fees to a prevailing
6 party set forth in Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct.
7 1933, 76 L. Ed. 2d 40 (1983), apply to EAJA cases. See also
8 Atkins v. Apfel, 154 F.3d 986, 988-89 (9th Cir. 1998). Under
9 Hensley, hours that are not "reasonably expended" or which are
10 "excessive, redundant, or otherwise unnecessary" are not
11 compensable. See 461 U.S. at 434. The Court has wide discretion
12 in determining the number of reasonable hours claimed by the
13 prevailing party. Gates v. Deukmejian, 987 F.2d 1392, 1398 (9th
14 Cir. 1992). "[T]he district court is required to articulate . .
15 . the reasons for its findings regarding the propriety of the
16 hours claimed or for any adjustments it makes.'" In re Smith,
17 586 F.3d 1169, 1173-74 (9th Cir. 2009) (quoting Gates, 987 F.2d
18 at 1398).

19 The government nitpicks some of counsel's requested fees,
20 saying that he should have spent a half-hour less here and an
21 hour less there. (Opp'n at 5-6.) The Court declines to involve
22 itself in parsing fees to such a fine extent. See Costa v.
23 Comm'r of Soc. Sec. Admin., 690 F.3d 1132, 1136 (9th Cir. 2012)
24 (noting that Social Security contingency-fee lawyers unlikely to
25 inflate fees). None of Plaintiff's counsel's requested fees are
26 unreasonable; indeed, the government concedes that "the total
27 number of hours billed in this case is not necessarily an
28 unreasonable amount of time." (Opp'n at 5.)

1 Because the Court finds, however, as explained below, that
2 Plaintiff's counsel's requested costs are not justified, counsel
3 should not be compensated for the portions of the briefing
4 seeking to justify them. See Jean, 496 U.S. at 163 n.10. Thus,
5 the Court reduces the total compensable attorney hours expended
6 by 1.5.

7 Accordingly, Plaintiff is awarded \$4258.19 in total
8 attorney's fees.

9 **C. Counsel's request for costs is denied**

10 The government argues that counsel's request for \$60 in
11 costs should be disallowed because he has submitted no receipts
12 justifying it and because service of the Complaint and related
13 documents is a clerical task, for which costs are not allowed.
14 (See Opp'n at 6-7.) Counsel explains in his briefing that \$13.08
15 of the amount was for postage (Pet. at 7) and the rest
16 constituted a flat fee for service of process by his office (id.
17 at 7-8). But although counsel states in argument that \$13.08 was
18 for postage, which would be a recoverable cost, he has not
19 attached a receipt, nor has he even attested to that amount in
20 any of the numerous declarations he filed in support of his
21 request.¹ Thus, the Court disallows that portion of the costs
22 sought. As to the rest, Counsel provides no authority allowing

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24 ¹Counsel asserts that "[t]he proof of service in this matter
25 documents the total charge of \$60.00 as including approximately
26 \$13.08 in charges paid to the U.S. Postal Service for certified
27 mail." (Reply at 7, 9.) What the proof of service actually says
28 is, "The charge for service including the charges for certified
mail (typically \$13.08) is \$60.00 as costs advanced on behalf of
the plaintiff in this action." (Docket No. 8 at 1.) This
statement is not terribly intelligible, but in any event it does
not even purport to show the costs actually expended in this case.

1 for a flat fee to cover an in-house service. Accordingly, the
2 Court disallows the entire \$60 in costs sought.

3 **D. The EAJA award, less any offset to which the government**
4 **legally is entitled, should be paid directly to Plaintiff**

5 Under Astrue v. Ratliff, 560 U.S. 586, 130 S. Ct. 2521,
6 2528, 177 L. Ed. 2d 91 (2010), the awarded EAJA fees should
7 generally be paid directly to Plaintiff, not Plaintiff's counsel.
8 Further, the award should be offset by any debt Plaintiff owes
9 the government. See id.

10 In United States v. \$186,416.00 in U.S. Currency, 722 F.3d
11 1173, 1176 (9th Cir. 2013), the court held that a fee award was
12 properly paid to the attorney who prevailed in the underlying
13 civil forfeiture proceeding, not the plaintiff, because there was
14 an assignment from the client to the attorney. In that case,
15 however, the government had neither raised the issue of the
16 Anti-Assignment Act, 31 U.S.C. § 3727, nor asserted any offset
17 claim. 722 F.3d at 1176 & n.1 ("The government has waived any
18 argument that the . . . assignment of the award to [counsel] was
19 invalid under the Anti-Assignment Act, 31 U.S.C. § 3727. The
20 government only mentions the Act in its reply brief and even then
21 does not explain its application to this case." (citations
22 omitted)).

23 Here, although Plaintiff has assigned the right to receive
24 EAJA fees to his attorney (Pet. Ex. C), the Commissioner asserts
25 that she has not waived the requirements of the Anti-Assignment
26 Act and contends that Plaintiff may owe a federal debt (Opp'n at
27 7-8). Under these circumstances, the Court declines to order
28 that the EAJA fee award be made payable to Plaintiff's counsel.

1 If Plaintiff does not owe a government debt, however, this Order
2 shall not preclude payment directly to Plaintiff's counsel if the
3 government waives the requirements of the Act.

4 **ORDER**

5 IT IS THEREFORE ORDERED AS FOLLOWS: (1) Plaintiff's
6 counsel's EAJA Petition is granted in part and (2) Plaintiff is
7 awarded EAJA fees in the amount of \$4258.19, to be paid directly
8 to him and offset by any debt he owes the government.

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11 DATED: December 26, 2013



JEAN P. ROSENBLUTH
U.S. MAGISTRATE JUDGE