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

JEFFREY ALAN KINDER,)	SA CV 16-1608-E
)	
Plaintiff,)	
)	
v.)	ORDER GRANTING MOTION FOR
)	
)	ATTORNEY FEES UNDER
NANCY A. BERRYHILL, ACTING)	
COMMISSIONER OF SOCIAL SECURITY,)	EQUAL ACCESS TO JUSTICE ACT
)	
Defendant.)	
)	

PROCEEDINGS

On June 21, 2017, counsel for Plaintiff filed a "Motion for Award of Attorney's Fees Pursuant to Equal Access to Justice Act, etc." (the "Motion"). Defendant did not file any timely opposition to the Motion. See Minute Order dated June 21, 2017. The Motion seeks an award of \$4,600 to be paid directly to Plaintiff's counsel.

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1 **BACKGROUND**

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3 On August 31, 2016, Plaintiff filed a complaint seeking review of
4 the Commissioner's denial of disability benefits. The parties
5 consented to a Magistrate Judge on October 24, 2016. After reviewing
6 the parties' cross-motions for summary judgment, the Court remanded
7 the matter for further administrative proceedings. See "Memorandum
8 Opinion and Order of Remand," filed March 23, 2017.

9
10 **APPLICABLE LAW**

11
12 The Equal Access to Justice Act ("EAJA") provides:

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14 Except as otherwise specifically provided by statute, a
15 court shall award to a prevailing party other than the
16 United States fees and other expenses, in addition to any
17 costs awarded . . . , incurred by that party in any civil
18 action . . . , including proceedings for judicial review of
19 an agency action, brought by or against the United States
20 . . . unless the court finds that the position of the United
21 States was substantially justified or that special
22 circumstances make an award unjust.

23
24 28 U.S.C. § 2412(d)(1)(A) (emphasis added). "[F]ees and other
25 expenses" include "reasonable attorney fees." 28 U.S.C. §
26 2412(d)(2)(A).

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1 "It is the government's burden to show that its position was
2 substantially justified or that special circumstances exist to make
3 the award unjust." Gutierrez v. Barnhart, 274 F.3d 1255, 1258 (9th
4 Cir. 2001). "'Substantially justified' means 'justified in substance
5 or in the main' – that is, justified to a degree that could satisfy a
6 reasonable person." Id. (quoting Pierce v. Underwood, 487 U.S. 552,
7 565 (1988)). In other words, where "reasonable people could differ as
8 to the appropriateness of the contested action," the Government's
9 position is substantially justified. Pierce v. Underwood, 487 U.S. at
10 565 (internal brackets, quotations and citations omitted).
11 Substantial justification requires that the Government's position have
12 a "reasonable basis both in law and in fact." Id. at 565-66; see also
13 Commissioner, I.N.S. v. Jean, 496 U.S. 154, 158 n.6 (1990); Thangaraja
14 v. Gonzales, 428 F.3d 870, 874 (9th Cir. 2005) (substantial
15 justification is equated with reasonableness).

16
17 In viewing the conduct of the Government, "the remedial purpose
18 of the EAJA is best served by considering the totality of the
19 circumstances." United States v. Gavilan Joint Community College
20 Dist., 849 F.2d 1246, 1248 (9th Cir. 1988) (citation omitted). The
21 Court must examine both the Government's pre-litigation and litigation
22 positions. Id.; see Corbin v. Apfel, 149 F.3d 1051, 1052 (9th Cir.
23 1998) ("The government's position must be 'substantially justified' at
24 each stage of the proceedings.") (quotations and citation omitted).
25 In the Social Security context, the Government's position includes
26 "both the government's litigation position and the underlying agency
27 action giving rise to the civil action." Meier v. Colvin, 727 F.3d
28 867, 870-72 (9th Cir. 2013); see also 28 U.S.C. § 2412(d)(2)(D)

1 (“position of the United States’ means, in addition to the position
2 taken by the United States in the civil action, the action or failure
3 to act by the agency upon which the civil action is based . . .”). In
4 evaluating the reasonableness of the Government’s position, the Court
5 must “focus on the remand issue[s] rather than the ultimate disability
6 determination.” Lewis v. Barnhart, 281 F.3d 1081, 1086 (9th Cir.
7 2002). When the ALJ’s decision is the final decision of the
8 Administration, the ALJ’s decision is the “action or failure to act by
9 the agency upon which the civil action is based.” Meier v. Colvin,
10 727 F.3d at 870-72. In this circumstance, the ALJ’s decision is the
11 decision reviewed for substantial justification. Id.

12
13 **DISCUSSION**
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15 For the reasons set forth in the “Memorandum Opinion and Order of
16 Remand,” filed March 23, 2017, the Government’s position was not
17 substantially justified. No special circumstances would make an award
18 unjust. The fees sought are reasonable.

19
20 An EAJA fee award generally is payable to the prevailing litigant
21 rather than to the prevailing litigant’s counsel. See Astrue v.
22 Ratliff, 560 U.S. 586, 596-97 (2010). However, Plaintiff assigned his
23 EAJA fees to his counsel. See “Plaintiff’s Affidavit and Assignment
24 of EAJA Fee,” appended to the Motion. If Plaintiff does not owe a
25 government debt that qualifies for an offset, payment may be made in
26 the name of Plaintiff’s counsel when the Government waives the Anti-
27 Assignment Act, 31 U.S.C. section 3727. See United States v. Kim, 806
28 F.3d 1161, 1169-70 (9th Cir. 2015) (to the extent the Anti-Assignment

1 Act may apply to EAJA fee awards, "[i]t is well established . . . that
2 the Government can waive coverage of the Anti-Assignment Acts.")
3 (citation omitted).
4

5 The Court construes the Government's failure to file timely
6 opposition to the Motion as a waiver of the Anti-Assignment Act. The
7 fees therefore are payable to Plaintiff's counsel, as Plaintiff's
8 assignee, absent offset by reason of any outstanding federal
9 indebtedness owing from Plaintiff under 31 U.S.C. section 3716. See,
10 e.g., Fambrough v. Commissioner of Social Security, 2016 WL 500605, at
11 *5 (E.D. Cal. Feb. 9, 2016) (finding that payment could be made
12 directly to counsel if Plaintiff does not owe a government debt and
13 the Government waives the Anti-Assignment Act's requirements; citing
14 district court cases finding same); Yesipovich v. Colvin, 2015 WL
15 5675869, at *8 (N.D. Cal. Sept. 28, 2015) (same).
16

17 **CONCLUSION AND ORDER**
18

19 For all of the foregoing reasons, IT IS ORDERED that Plaintiff is
20 awarded attorney fees under the EAJA in the amount of \$4,600. If the
21 Government determines that Plaintiff does not owe a federal debt, then
22 the Government shall cause the payment of the award to be made
23 directly to Barbara Arnold pursuant to the assignment executed by
24 Plaintiff. This award is without prejudice to the rights of Plaintiff
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