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**UNITED STATES DISTRICT COURT**

EASTERN DISTRICT OF CALIFORNIA

JULIA MCCLELLAN,	)	1:05cv00050 JMD
	)	
	)	
Plaintiff,	)	ORDER REGARDING PLAINTIFF’S MOTION
	)	FOR ATTORNEY’S FEES
v.	)	(Documents 22 and 23)
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security	)	
	)	
Defendant.	)	

This matter is before the Court on a petition for attorney’s fees and costs under the Equal Access to Justice Act (EAJA), [28 U.S.C. § 2412\(d\)](#), filed on September 12, 2007, by Plaintiff’s attorney, Henry Reynolds.

The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable John M. Dixon, Jr., United States Magistrate Judge.<sup>1</sup>

**BACKGROUND**

Plaintiff commenced the instant action on January 10, 2005. On June 25, 2007, the Court granted the Commissioner’s motion to remand the action pursuant to sentence four of 42 U.S.C. § 405(g).

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<sup>1</sup> The parties consented to the Jurisdiction of the United States Magistrate Judge. On May 13, 2005, the Honorable Anthony W. Ishii reassigned the case to the Honorable Sandra M. Snyder for all purposes. On June 8, 2007, the Honorable David F. Levi reassigned the case to the undersigned for all purposes.

1 On September 12, 2007, the Plaintiff filed a motion requesting attorney’s fees pursuant to  
2 the EAJA. Subsequently, Mr. Henry Reynolds, Plaintiff’s counsel, filed a first amended motion  
3 on November 29, 2007, requesting \$8,214.38 in attorney’s fees pursuant to the EAJA. The  
4 Commissioner opposed the motion on December 13, 2007, arguing that the request was  
5 unreasonable.

6 **DISCUSSION**

7 A. Reasonableness of Request

8 Under the EAJA, a prevailing party will be awarded reasonable attorney fees, unless the  
9 government demonstrates that its position in the litigation was “substantially justified,” or that  
10 “special circumstances make an award unjust.” [28 U.S.C. § 2412](#) (d)(1)(A). An award of  
11 attorney fees must be reasonable. [Sorenson v. Mink, 239 F.3d 1140, 1145 \(9th Cir. 2001\)](#).  
12 “[E]xcessive, redundant, or otherwise unnecessary” hours should be excluded from a fee award,  
13 and charges that are not properly billable to a client are not properly billable to the government.  
14 [Hensley v. Eckerhart, 461 U.S. 424, 434 \(1983\)](#).

15 In his application, Mr. Reynolds requests attorney’s fees in the amount of \$ 8,214.38 (for  
16 52.90 hours<sup>2</sup>). In support of his request, he attaches an itemization of time spent from January  
17 25, 2007, through April 3, 2008 (“Schedule of Hours”).

18 The Commissioner does not dispute that Mr. Reynolds is entitled to fees as the prevailing  
19 party. However, the Commissioner points to specific entries and contends that they are improper  
20 requests and/or excessive. The Commissioner also generally argues that the total request is  
21 unreasonable given that the Commissioner was forced to file a motion to remand because the  
22 parties could not agree.

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26 <sup>2</sup> For civil actions commenced on or after March 29, 1996, the EAJA provides for an hourly rate of  
27 \$125.00, unless the court determines that an adjustment for cost of living or a special factor justifies a higher fee. [28](#)  
28 [U.S.C. § 2412\(d\)\(2\)\(A\)](#). Mr. Reynolds calculates the cost of living increases as providing for an hourly rate of  
\$152.70 in 2004, an hourly rate of \$157.89 in 2005, an hourly rate of \$161.88 in 2006 and an hourly rate of \$166.27  
in 2007. The Commissioner does not contest these hourly rates.

1           1.       *Motion for Summary Judgment*

2           In seeking a fee reduction, the Commissioner first argues that Mr. Reynolds' expenditure  
3 of 31.5 hours in drafting and editing the summary judgment motion is an excessive amount of  
4 time for experienced counsel.

5           Mr. Reynolds supports his request by explaining that he was not counsel at the  
6 administrative level and therefore needed additional hours to review the administrative  
7 proceedings.

8           In opposition, the Commissioner contends that Plaintiff's case was routine. A review of  
9 the motion for summary judgment reveals briefing regarding the use of a consultative  
10 examination, Plaintiff's credibility, side effects of medication, residual functional capacity,  
11 vocational hypothetical and medical expert testimony. Based on the routine nature of the case  
12 and the experience of Mr. Reynolds<sup>3</sup>, the Commissioner asserts that a reasonable compensation  
13 would include no more than 20 hours for the summary judgment motion.

14           Rather than arbitrarily reduce the overall request, the Court will focus on the amount of  
15 time spent reviewing the administrative record and preparing the opening brief. Attorney Brian  
16 Zeiden indicates that he spent 5.5 hours reviewing the record, .50 hours conducting legal research  
17 and 17.5 hours drafting and editing the opening brief. Declaration of Brian Aaron Zeiden,  
18 attached to Motion. Mr. Reynolds spent an additional 8.0 hours editing the opening brief.  
19 Schedule of Hours, attached to Motion. In balancing the relatively routine nature of the claims  
20 with counsel's experience, the Court finds that counsel is entitled to 5.5 hours for reviewing the  
21 record and conducting research and 16 hours for preparing the opening brief. The 31.5 requested  
22 hours are therefore reduced to 21.5 hours.

23           2.       *Pre-Complaint Activity*

24           The Commissioner argues that Mr. Reynolds should not be compensated under EAJA for  
25 time spent *prior* to filing the complaint in this Court. Citing [Mendenhall v. NTSB, 213 F.3d 464,](#)  
26 [469 \(9th Cir. 2000\)](#), the Commissioner contends that 3.7 hours of time spent between November

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28           <sup>3</sup>Mr. Reynolds' declaration indicates that he has been engaged in the active practice of law since 1992 and  
he handles exclusively social security disability cases. Declaration of Henry Reynolds, ¶¶ 1-2.

1 1, 2004 through December 14, 2005<sup>4</sup>, should not be compensated because it occurred prior to the  
2 filing of the complaint in this matter.

3         Although the time requested between November 1, 2004, and December 13, 2005, was  
4 for activity completed prior to the filing of this action, the Court finds that a portion of the time  
5 was spent in preparation for this action and is therefore compensable. The EAJA defines “fees  
6 and other expenses” as including “reasonable expenses of expert witnesses, the reasonable cost  
7 of any study, analysis, engineering report, test or project which is found by the court to be  
8 necessary for the preparation of the party’s case, and reasonable attorney fees. . .” [28 U.S.C. §](#)  
9 [2412](#) (d)(2)(A). Obviously, the EAJA recognizes that legal work *must* be done in preparation for  
10 the filing of a civil action. Mendenhall does not hold otherwise. There, the issue was not  
11 whether attorneys’ fees incurred in preparation for, but prior to, filing were compensable.  
12 Rather, the court determined that work done before the administrative agency, prior to the filing  
13 of a civil suit, was not compensable under section 2412. [Mendenhall, 213 F.3d 464, 468-469.](#)

14         Unlike Mendenhall, Mr. Reynolds’ work prior to the filing of this action was not  
15 performed before the administrative agency. The work done on November 1, 2004, and  
16 November 22, 2004, although done prior to the filing of this action, was done in preparation for  
17 filing the action. On November 1, 2004, Mr. Reynolds spent 3 hours reviewing the case and  
18 deciding to take it. On November 22, he spent .4 hours in a conference with his client. *See*  
19 Schedule of Hours attached to Motion. The Court will not extend the holding of Mendenhall to  
20 prohibit payment for work done in preparation for, but prior to, the filing of a civil action.  
21 Accordingly, the time on November 1, 2004, and November 22, 2004, will not be disallowed on  
22 this basis.

23         Insofar as the Commissioner argues that the 3 hours of review should be disallowed  
24 because counsel spent almost 5.5 more hours to review the record in drafting the brief, this  
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26         <sup>4</sup>The Schedule of Hours provided by Mr. Reynolds identifies the dates as November 1, 2004, November 22,  
27 2004 and December 14, 2005. The December 2005 date appears incorrect. The complaint was filed on January 10,  
28 2005, and counsel purportedly completed this work *prior* to the filing of the complaint. Therefore, the December 14,  
2005 entry likely should be December 14, **2004**. However, the Court will refer to the 2005 date as designated in  
Plaintiff’s moving papers.

1 argument is without merit. Counsel was certainly reasonable in reviewing the record upon which  
2 the Complaint and action is based prior to accepting and filing this matter. Therefore, the time  
3 will not be disallowed on this basis.

4 However, the time spent on December 14, 2005, which is designated as .3 hours to “draft  
5 signup material,” appears to be time spent drafting an agreement with the client and not work  
6 done in preparation for the filing of the civil action. Accordingly, this time will be disallowed.

### 7 3. *Miscellaneous Items*

8 The Commissioner next argues that 72 minutes (1.2 hours) of time spent by Mr.  
9 Reynolds, which is itemized as 18 minutes in 2005 communicating the status of Plaintiff’s claim  
10 to her divorce attorney and an additional 54 minutes in 2005, 2006 and 2007 to provide status  
11 reports to the referring attorney are not properly compensable. These hours appear unnecessary  
12 to the resolution of Plaintiff’s case. Hensley, 461 U.S. at 434 (counsel has an obligation to make  
13 a “good faith effort to exclude from a fee request hours that are excessive, redundant, or  
14 otherwise unnecessary”). Accordingly, this time will be disallowed.

### 15 4. *Opposition to Motion to Remand*

16 The Commissioner also objects to the 3.4 hours of time Plaintiff’s attorney spent rejecting  
17 the Commissioner’s offer to voluntarily remand the case and drafting an opposition to the  
18 Commissioner’s motion to remand. The Commissioner contends that Plaintiff did not prevail on  
19 the motion and, thus, unnecessarily prolonged the order and judgment of remand.

20 A fee award may be limited or denied where the Court finds that special circumstances  
21 make an award unjust, or where the prevailing party engaged in conduct that unduly and  
22 unnecessarily delayed a resolution. 28 U.S.C. §§ 2412(d)(1)(A), (C).

23 The Court, however, finds no merit in the Commissioner’s contention that Plaintiff  
24 “unnecessarily prolonged” this matter. The Commissioner did not file its motion for remand  
25 until three months after Plaintiff filed her summary judgment motion. Plaintiff did not delay in  
26 filing an opposition, submitting it the day immediately after the Commissioner filed the remand  
27 motion. Moreover, by the remand motion, the Commissioner essentially conceded that there  
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1 were deficiencies in the administrative proceedings prior to Plaintiff's filing of this action in  
2 federal court. Accordingly, the 3.4 hours of time at issue will not be disallowed.

3 5. *Preparation of EAJA Motion*

4 Finally, the Commissioner opposes 5 hours that Mr. Reynolds seeks in connection with  
5 preparation of the instant motion. However, a review of the record reveals that his request is  
6 broken down into 2.0 hours for "draft EAJA settlement letter" and 3.0 hours for "Draft EAJA  
7 application." Thus, Mr. Reynolds appears to have spent only 3.0 hours in preparation of this  
8 motion.

9 Attorney's fees for attorney fee litigation are compensable. [Love v. Reilly, 924 F.2d](#)  
10 [1492, 1497 \(9th Cir. 1991\)](#). However, the request must be reasonable. The Commissioner  
11 contends that given Mr. Reynolds' assertion that he is experienced in Social Security litigation, it  
12 is unlikely that the bulk of the EAJA petition and supporting declaration were drafted anew. The  
13 Commissioner suggests that the Court award 1.5 hours for preparation of the motion.

14 The Court agrees with the Commissioner that the time spent in preparation of the  
15 application is unreasonable. The motion, as well as the supporting documentation, contains  
16 mainly boilerplate-type language, with some customization relating to Plaintiff's action.  
17 Accordingly, the Court will allow 1.5 hours for preparation of this motion. However, the Court  
18 will not reduce the amount of time spent in preparation of the draft EAJA settlement letter.

19 **AWARD**

20 Mr. Reynolds' motion is therefore GRANTED. He is awarded fees in the total amount of  
21 \$5,788.41 ([33.1 hours spent in 2005 at \$157.89 per hour] + [.7 hours spent in 2006 at \$161.88  
22 per hour] + [2.7 hours spent in 2007 at \$166.27 per hour]).

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25 IT IS SO ORDERED.

26 **Dated: February 13, 2009**

**/s/ John M. Dixon**  
**UNITED STATES MAGISTRATE JUDGE**