

|   |    |                                      |
|---|----|--------------------------------------|
| MAI CHANG,                              | )  | Case No.: 1:10-cv-01097-JLT          |
|   | )  |                                      |
| Plaintiff,                              | )  | ORDER DENYING PLAINTIFF’S MOTION FOR |
|   | )  | ATTORNEY’S FEES AND COSTS PURSUANT   |
| v.                                      | )  | TO THE EQUAL ACCESS TO JUSTICE ACT   |
|   | )  |                                      |
| CAROLYN W. COLVIN,                      | )  | (Doc. 29)                            |
| Acting Commissioner of Social Security, | )  |                                      |
|   | )  |                                      |
| Defendant.                              | )  |                                      |
|   | )  |                                      |
|   | )– |                                      |

Plaintiff Mai Chang seeks an award for attorney’s fees and costs pursuant to the Equal Access for Justice Act pursuant to 28 U.S.C. §§ 1920 and 2412. (Doc. 24). The Acting Commissioner of Social Security (“Defendant”) opposes the motion, asserting Defendant’s position was substantially justified. (Doc. 25). For the following reasons, Plaintiff’s motion for fees is **DENIED**.

## **I. Factual and Procedural History**

Plaintiff filed an application for supplemental security income on April 18, 2005, which was denied by the Social Security Administration initially and upon reconsideration. AR at 19, 77. After requesting a hearing, Plaintiff testified before an administrative law judge (“ALJ”) on July 2, 2007. *Id.* at 47. The ALJ determined Plaintiff was not disabled, and issued an order denying benefits on July 19, 2007. *Id.* at 19-25. Plaintiff’s request for review by the Appeals Council of Social Security was denied, and the ALJ’s determination became the final decision of the Commissioner on May 13, 2010.

1 On June 15, 2010, Plaintiff initiated this action for judicial review of the administrative  
2 decision denying her application for benefits. (Doc. 1). Plaintiff asserted the ALJ erred in evaluating  
3 the opinion of an examining physician, Dr. Hirokawa. (Doc. 14 at 7-8). According to Plaintiff, the  
4 ALJ misinterpreted the meaning of the word “fair” as used in the report, and failed to reject portions of  
5 Dr. Hirokawa’s opinion in a proper manner. *Id.* The Court determined the definition of the word  
6 “fair” and evaluation of the opinion was proper. (Doc. 18). Accordingly, the Court denied Plaintiff’s  
7 appeal of the administrative decision on April 7, 2011, and judgment was entered in favor of the  
8 defendant. (Docs. 18-19).

9 Plaintiff appealed to the Ninth Circuit, asserting “the ALJ (1) misinterpreted the word “fair” in  
10 Hirokawa’s report; and (2) provided an inadequate explanation for rejecting Hirokawa’s finding that  
11 Chang had a “poor” ability to complete a normal workday or workweek without interruption.” (Doc.  
12 25 at 2). The Ninth Circuit determined Plaintiff’s first contention was meritless, but found “the ALJ  
13 failed to state specific and legitimate reasons supported by the record for rejecting Hirokawa’s  
14 findings.” *Id.* at 4. Accordingly, the Court remanded the decision for reconsideration by the ALJ. *Id.*

15 Plaintiff filed a timely application for EAJA fees on April 9, 2013. (Doc. 29). Defendant filed  
16 an opposition to the motion on May 23, 2013 (Doc. 34), to which Plaintiff replied on May 31, 2013.  
17 (Doc. 35).

## 18 **II. Legal Standards**

19 The EAJA provides that a court shall award fees and costs incurred by a prevailing party “in  
20 any civil action . . . including proceedings for judicial review of agency action, brought by or against  
21 the United States . . . unless the court finds that the position of the United States was substantially  
22 justified or that special circumstances make an award unjust.” 28 U.S.C. § 2412 (d)(1)(A). A party  
23 eligible to receive an award of attorney fees under the EAJA must be the prevailing party who received  
24 a final judgment in the civil action. 28 U.S.C. § 2412(d)(2)(H).

25 The burden of proof that the position was substantially justified rests on the government.  
26 *Scarborough v. Principi*, 54 U.S. 401, 403 (2004); *Gonzales v. Free Speech Coalition*, 408 F.3d 613,  
27 618 (9th Cir. 2005). The Supreme Court has defined “substantially justified” as “justified to a degree  
28 that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In addition,

1 “[a] substantially justified position must have a reasonable basis in both law and fact.” *Gutierrez v.*  
2 *Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001); *see also Renee v. Duncan*, 686 F.3d 1002, 1017 (9th  
3 Cir. 2012) (explaining the Court has “interpreted the term substantial justification as describing a  
4 position that has a reasonable basis in both law and fact”).

### 5 **III. Discussion and Analysis**

6 A claimant who receives a remand in a Social Security case is a prevailing party for EAJA  
7 purposes. *Shalala v. Schaefer*, 509 U.S. 292, 301-02 (1993); *Flores v. Shalala*, 49 F.3d 562, 568 (9th  
8 Cir. 1995). Plaintiff is a prevailing party because the Ninth Circuit ordered a remand of the matter for  
9 further proceedings. (Doc. 25). Defendant does not dispute that Plaintiff is a prevailing party for the  
10 purposes of an award of EAJA fees, but argues the position of the Commissioner was substantially  
11 justified. (Doc. 34).

12 Establishing that a position was substantially justified is a two-step process. 28 U.S.C. §  
13 2412(d)(2)(D). Defendant must show “the action or failure to act by the agency” was substantially  
14 justified. *Id.* In addition, Defendant must demonstrate the position taken in the civil action was  
15 substantially justified. *Id.* Thus, the Court must consider both the original action taken and the  
16 Commissioner’s position in defense thereof. *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1998). A  
17 finding that a position was substantially justified when based on violations of the Constitution, federal  
18 statute, or the agency’s own regulations, is an abuse of discretion. *Sampson v. Chater*, 103 F.3d 918,  
19 921 (9th Cir. 1996).

20 Importantly, to determine whether fees should be awarded under the EAJA, the Court should  
21 consider only the issues upon which the decision was reversed and remanded. *Hardisty v. Astrue*, 592  
22 F.3d 1072 (9th Cir. 2010) *cert. denied* 131 S. Ct. 2443 (2011). As noted above, the Ninth Circuit  
23 remanded this action upon finding “the ALJ failed to state specific and legitimate reasons supported by  
24 the record for rejecting Hirokawa’s findings.” (Doc. 25 at 4). The Ninth Circuit observed:

25 The ALJ rejected Hirokawa’s finding that Chang had a “poor” ability to  
26 complete a normal workday or workweek because, according to the ALJ, Hirokawa  
27 based this finding on Chang’s “poor motivation.” The Commissioner argues that what  
28 the ALJ intended to communicate with this delphic statement was that Hirokawa should  
have discredited Chang’s subjective complaints because the ALJ himself found Chang  
not credible. *See Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir.1989) (ALJ may disregard  
a physician’s opinion that is based on the claimant’s subjective complaints where ALJ

1 has already properly discredited claimant's subjective complaints). But because we  
2 cannot engage in "*post hoc* rationalizations that attempt to intuit what the [ALJ] might  
3 have been thinking," *Bray v. Comm'r*, 554 F.3d 1219, 1226 (9th Cir. 2009), we cannot  
4 affirm based on a rationale the ALJ never specifically articulated. Hirokawa concluded  
5 Chang's depression prevented her from completing a normal workweek, and found  
6 Chang was "open and honest" and did not seem to be "exaggerating symptoms." If the  
7 ALJ wishes to reject those findings, he himself must articulate specific and legitimate  
8 reasons for doing so.

9 The ALJ also concluded Hirokawa erroneously based his finding on "cultural  
10 differences," this statement is even less clear than the ALJ's statement about Chang's  
11 "poor motivation." Hirokawa did indeed find that Chang's difficulty performing  
12 cognitive tests during the evaluation might have been due to "cultural issues," but there  
13 is no support for the conclusion that Hirokawa based the particular finding at issue—  
14 Chang's poor ability to get through a workweek—on "cultural differences." *Cf. Saelee*  
15 *v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996) (ALJ referred to cultural tendencies because  
16 physicians themselves suggested those tendencies might explain a not credible  
17 claimant's symptoms).

18 (Doc. 25 at 3-4). Therefore, the Court must determine whether Defendant was substantially justified  
19 in defending this action based upon the ALJ's rejection of Dr. Hirokawa's opinion.

20 Defendant argues that this Court's affirmance of the administrative decision and partial  
21 affirmance by the Ninth Circuit demonstrates "that her position was reasonably based in law and fact."  
22 (Doc. 34 at 3) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). As Defendant notes, this Court  
23 found the ALJ gave specific and legitimate reasons for rejecting Dr. Hirokawa's opinion "that the  
24 claimant would have poor ability to complete a normal workday/workweek and deal with changes in a  
25 work setting." (Doc. 11 at 9) (quoting AR at 24). The Court observed: "[T]he ALJ noted Plaintiff 'has  
26 not received the type of medical treatment one would expect for a totally disabled individual.'  
27 Likewise, the ALJ determined that Dr. Hirokawa appeared to base his conclusion that Plaintiff had a  
28 'poor' ability to complete a workday/workweek without interruption and deal with changes at work, on  
the her poor motivation and cultural differences." *Id.* Because the ALJ determined Dr. Hirokawa's  
opinion was founded upon Plaintiff's subjective complaints which lacked credibility, the Court found  
the ALJ properly rejected the opinion. *Id.* (citing *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir.  
1995); *Fair*, 885 F.2d at 605).

Notably, this determination was supported in the dissenting opinion issued by Senior Circuit  
Judge Kleinfeld, who opined: "The record allows for the interpretation that the claimant is unable to  
work, but also for the interpretation that she could do something like the work she did before she came

1 to the United States, on a farm, and prefers not to. Because the record as a whole could be read either  
2 way, we are required to accept the ALJ's decision." (Doc. 26 at 1). Judge Kleinfeld observed, "Dr.  
3 Hirokawa does not clearly state that Chang is medically disabled," and "[h]e attributes Chang's  
4 limitations to 'limited education,' 'cultural issues' by which he seems to mean ignorance of things  
5 most Americans know (like what 'birds of a feather flock together' means), and depression." *Id.* at 2-  
6 3. Reviewing the evidence, Judge Kleinfeld found substantial evidence in the record supported the  
7 ALJ's determination, and opined the administrative decision should have been affirmed. *Id.* at 3.

8 Although Plaintiff argues the ALJ's decision was "unreasonably defended" by Defendant, the  
9 fact that this Court and Judge Kleinfeld found the opinion should be affirmed supports a finding that  
10 the ALJ's decision and the defense thereof by the Commissioner had a reasonable basis in law. The  
11 Ninth Circuit has explained a position is substantially justified where "there is a dispute over which  
12 'reason-able minds could differ.'" *Gonzales*, 408 F.3d at 618 (9th Cir. 2005) (quoting *League of*  
13 *Women Voters of Cal. v. FCC*, 798 F.2d 1255, 1260 (9th Cir. 1986)). Because the ALJ's decision was  
14 affirmed by the District Court, partially affirmed by the Ninth Circuit, and there is a dissenting opinion  
15 regarding the remand, the Court finds the action taken by the ALJ and Commissioner's defense thereof  
16 were substantially justified. *See Yang v. Comm'r of Soc. Sec.*, 2013 U.S. Dist. LEXIS 51799 (E.D.  
17 Cal. Apr. 9, 2013).

#### 18 **IV. Conclusion and Order**

19 Although Plaintiff was a prevailing party, Defendant has carried the burden of proof to  
20 demonstrate the position of the Commissioner was substantially justified. *See Scarborough v.*, 54 U.S.  
21 403; *Gonzales*, 408 F.3d at 618. Accordingly, **IT IS HEREBY ORDERED**: Plaintiff's motion for an  
22 award of attorney fees and costs under the Equal Access to Justice Act is **DENIED**.

23  
24 IT IS SO ORDERED.

25 Dated: **June 5, 2013**

**/s/ Jennifer L. Thurston**  
UNITED STATES MAGISTRATE JUDGE