

1 On October 7, 2017, Ms. Wall filed a second application on behalf of J.W. (Doc. 12-8 at 65)
2 The Social Security Administration denied the claim initially and upon reconsideration. (Doc. 12-5 at
3 7-10, 13-15) After requesting a hearing, Ms. Wall and J.W. appeared before an ALJ on July 26, 2012.
4 (See Doc. 12-3 at 41-42) The ALJ determined J.W. was not disabled as defined by the Social Security
5 Act and issued an order denying benefits on September 7, 2012. (Doc. 12-4 at 31)

6 The Appeals Council reviewed the decision and remanded it to an ALJ for further consideration
7 on October 17, 2013. (Doc. 12-4 at 56-68) The Appeals Council directed the ALJ to obtain additional
8 evidence regarding J.W.'s impairments, including evidence "from a pediatric and/or psychological
9 medical expert;" evaluate medical source opinions "and explain the weight given to such opinion
10 evidence;" further evaluate J.W.'s "subjective complaints, lay witness testimony, and third party
11 statements;" and "give further consideration to the child's ability to function in an age appropriate
12 manner for the entire period at issue." (*Id.* at 57-58)

13 On February 11, 2015, another ALJ held a hearing at which J.W. and Ms. Wall testified. (See
14 Doc. 12-3 at 73) The ALJ determined Plaintiff was not disabled under the Social Security Act and
15 issued an order denying benefits on September 25, 2015. (*Id.* at 11-32) Plaintiff again requested a
16 review by the Appeals Council of Social Security, which declined to review the second ALJ's decision.
17 (*Id.* at 2) Thus, the ALJ's determination became the decision of the Commissioner.

18 Plaintiff initiated the action before this Court on May 27, 2016, seeking judicial review of the
19 ALJ's decision. (Doc. 1) The Court determined the ALJ failed to address a conflict in the medical
20 record and erred in evaluating the record. (Doc. 26 at 1, 8-9) The Court remanded the action for further
21 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) on March 2, 2018. (*Id.* at 9-10)

22 Following the entry of judgment on March 2, 2018 (Doc. 27), Plaintiff filed the motion for fees
23 under the EAJA now pending before the Court on June 1, 2018. (Doc. 28) The Commissioner filed its
24 opposition to the motion on June 28, 2018. (Doc. 30) The Commissioner argues Plaintiff's motion
25 should be denied as untimely. (*Id.* at 2)

26 **II. Legal Standards**

27 The EAJA provides that "[a] party seeking an award of fees and other expenses shall, *within*
28 *thirty days* of final judgment in the action, submit to the court an application for fees and other

1 expenses” 28 U.S.C. § 2412(d)(1)(B) (emphasis added). In Social Security actions where the
2 Court remands the action pursuant to sentence four of Section 405(g), “the filing begins after the final
3 judgment . . . is entered by the court and the appeal period has run, so that the judgment is no longer
4 appealable.” *Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991); *see also Akopyan v. Barnhart*, 296 F.3d
5 852, 854 (9th Cir. 2002) (holding a remand pursuant sentence four of Section 405(g) becomes a final
6 judgment for purposes of attorney fees under the EAJA upon expiration of the time for appeal).

7 The time for appeal in a civil case in which the federal government is a party ends sixty days
8 after the entry of judgment. Fed.R.App.P. 4(a); *Shalala v. Schaefer*, 509 U.S. 292, 302-03 (1993).
9 Judgment is considered entered under Rule 4(a) when it is entered in compliance with Rule 58 of the
10 Federal Rules of Civil Procedure, which, in turn, provides that judgment is deemed entered when set
11 out in a separate document on the Court’s docket. Fed. R. App. P. 4(a); *see also* Fed. R. Civ. P. 58(c).

12 The time limits for submitting EAJA fee applications are strictly construed because the EAJA
13 is a waiver of sovereign immunity. *Arulampalam v. Gonzales*, 399 F.3d 1087, 1089 (9th Cir. 2005).
14 Thus, untimeliness of a motion is a statutory bar that requires denial of the EAJA fee application. *See*
15 *id.* at 1090.

16 **III. Discussion and Analysis**

17 The Court entered judgment in this case on March 2, 2018. (Doc. 27) As the Commissioner
18 observes, the judgment became final and “[t]he sixty-day appeal period ended on May 1, 2018.” (Doc.
19 30 at 2, citing *Melkonyan*, 501 U.S. at 102) Therefore, Plaintiff’s motion for any attorney fees under the
20 EAJA was to be filed within thirty days, or no later than May 31, 2018. *See* 28 U.S.C. § 2412(d)(1)(B).
21 Plaintiff filed the motion now pending before the Court on June 1, 2018.

22 Significantly, courts have repeatedly determined that a motion for EAJA fees filed even one day
23 late are barred. *See, e.g., Monark Boat Co. v. N.L.R.B.*, 708 F.2d 1322, 1328-29 (8th Cir.1983) (finding
24 “strict compliance not merely substantial compliance” with the filing deadlines of the EAJA was
25 required, and there was no error for the denial of an application for fees that was submitted one day
26 late); *Hernandez-Garcia v. Nicholson*, 485 F.3d 651, 652 (Fed. Cir. 2007) (affirming the dismissal of
27 an EAJA application, filed one day late, as untimely); *SAI Indus. Corp. v. United States*, 421 F.3d 1344,
28 1346 (Fed. Cir. 2005) (affirming the dismissal of an EAJA application, filed one day late, as untimely);

1 *Brossard v. Astrue*, 152 Soc. Sec. Rep. Service 110, 2010 WL 1734836 at *2 (W.D. Wash. Apr. 8,
2 2010) (observing that while denial of a motion as untimely “may be a harsh result for filing a pleading
3 one day late, it is the result the law compels”).

4 Similarly, this Court determined in *Moua v. Colvin* that a motion for EAJA fees filed thirty-one
5 days after the appeal period was untimely and should be denied. *Id.*, 2015 WL 3991170 at *3-4 (E.D.
6 Cal. June 30, 2015) In so holding, the Court observed that the Supreme Court of the United States had
7 indicated, “If 1-day late filings are acceptable, 10-day late filings might be equally acceptable, and so
8 on in a cascade of exceptions that would engulf the rule erected by the filing deadline.” *Id.*, citing
9 *United States v. Locke*, 471 U.S. 84, 100-101 (1985). Because the plaintiff did not argue that he was
10 entitled to equitable tolling of the statutory deadline, the Court determined the deadline for filing an
11 EAJA motion should not be equitably tolled, and must be denied as untimely.

12 Inexplicably, Plaintiff asserted that the motion was filed “within thirty days of entry of final
13 judgment as required by ... statute.” (Doc. 28 at 2) After the Commissioner opposed the motion as
14 untimely, Plaintiff did not file a brief in response. As such, Plaintiff offers no explanation for the
15 untimely filing and presents no argument that the filing deadline should be equitably tolled. The Court
16 cannot speculate as to the reason the motion was not timely and cannot manufacture arguments on
17 Plaintiff’s behalf. Accordingly, the deadline should not be equitably tolled, and the motion for attorney
18 fees must be denied as untimely. *See Monark Boat Co.*, 708 F.2d at 1328-29; *Moua*, 2015 WL
19 3991170 at *3-4.

20 **IV. Conclusion and Order**

21 Based upon the foregoing, the Court finds Plaintiff’s motion for EAJA fees was not filed
22 within the timeframe required by 28 U.S.C. § 2412(d)(1)(B). Accordingly, the Court **ORDERS**:
23 Plaintiff’s motion for attorney’s fees (Doc. 28) is **DENIED**.

24
25 IT IS SO ORDERED.

26 Dated: July 28, 2018

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE