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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

VALERIE ANN FRANCESCONI,)	Case No.: 1:17-cv-01391- JLT
Plaintiff,)	ORDER GRANTING IN PART PLAINTIFF’S
v.)	MOTION FOR ATTORNEY’S FEES PURSUANT
ANDREW M. SAUL ¹ ,)	TO THE EQUAL ACCESS TO JUSTICE ACT, 28
Commissioner of Social Security,)	U.S.C. § 2412
Defendant.)	(Doc. 23)

Valerie Francesconi seeks an award for fees pursuant to the Equal Access for Justice Act under 28 U.S.C. § 2412(d). (Doc. 23) The Commissioner of Social Security opposes the request, arguing the fees requested are excessive. (Doc. 25) Because the Administrative Law Judge’s decision was contrary to established standards set forth by the Regulations and the Ninth Circuit, the decision and the Commissioner’s defense thereof were not substantially justified.

For the reasons set forth, Plaintiff’s motion for attorney fees under the EAJA is **GRANTED** in the modified amount of **\$4,702.79**.

I. Background

In 2014, Plaintiff filed an application for a period of disability and disability insurance benefits under Title II of the Social Security Act. (Doc. 11-6 at 2) The Social Security Administration denied

¹ This action was originally brought against Carolyn W. Colvin in her capacity as then-Acting Commissioner. Andrew M. Saul, the newly appointed Commissioner, has been automatically substituted as the defendant in this action. *See* Fed. R. Civ. P. 25(d).

1 Plaintiff's application at the initial level and upon reconsideration. (*See generally* Doc. 11-4) She
2 requested an administrative hearing and testified before an ALJ on July 8, 2016. (Doc. 11-3 at 19) The
3 ALJ concluded Plaintiff was not disabled and issued an order denying benefits on October 27, 2016.
4 (*Id.* at 19-29) The Appeals Council denied review of the decision on August 14, 2017 (*id.* at 2-5), and
5 the ALJ's determination became the final decision of the Commissioner.

6 Plaintiff initiated the action before this Court on October 13, 2017, seeking judicial review of
7 the ALJ's decision. (Doc. 1) The Court determined the ALJ failed to apply the correct legal standards
8 in evaluating the credibility of Plaintiff's subjective complaints and remanded the matter for further
9 proceedings pursuant to sentence four of 42 U.S.C. § 405(g) on March 21, 2019. (Doc. 21) Thus,
10 judgment was entered in favor of Plaintiff and against the Commissioner. (Doc. 22)

11 On June 4, 2019, Plaintiff filed the motion for fees under the EAJA now pending before the
12 Court. (Doc. 23) The Commissioner filed an opposition to the motion on July 9, 2019. (Doc. 25)
13 Plaintiff did not file a brief in reply.

14 **II. Legal Standards for EAJA Fees**

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

21 The party seeking the award of EAJA fees has the burden to establish the requested fees are
22 reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 437 (1983); *Atkins v. Apfel*, 154 F.3d 988 (9th
23 Cir. 1998) (specifically applying these principles to fee requests under the EAJA). As a result, "[t]he
24 fee applicant bears the burden of documenting the appropriate hours expended in the litigation, and
25 must submit evidence in support of those hours worked." *Gates v. Deukmejian*, 987 F.2d 1392, 1397
26 (9th Cir. 1992); *see also* 28 U.S.C. § 2412(d)(1)(B) ("A party seeking an award of fees and other
27 expenses shall . . . submit to the court an application for fees and other expenses which shows ... the
28 amount sought, including an itemized statement from any attorney... stating the actual time expended").

1 Where documentation of the expended time is inadequate, the court may reduce the requested
2 award. *Hensley*, 461 U.S. at 433, 436-47. Further, “hours that were not ‘reasonably expended’ should
3 be excluded from an award, including “hours that are excessive, redundant, or otherwise unnecessary.”
4 *Id.* at 434. A determination of the number of hours reasonably expended is within the Court’s
5 discretion. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484-85 (9th Cir. 1988).

6 **III. Discussion and Analysis**

7 A claimant who receives a sentence four remand in a Social Security case is a prevailing party
8 for EAJA purposes. *Shalala v. Schaefer*, 509 U.S. 292, 301-02 (1993); *Flores v. Shalala*, 49 F.3d 562,
9 568 (9th Cir. 1995). Consequently, Plaintiff was the prevailing party.

10 **A. Whether Defendant’s position was substantially justified**

11 The Supreme Court has defined “substantially justified” as “justified to a degree that could
12 satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). In addition, “[a]
13 substantially justified position must have a reasonable basis in both law and fact.” *Gutierrez v.*
14 *Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001).

15 Establishing that a position was substantially justified is a two-step process. 28 U.S.C. §
16 2412(d)(2)(D). First, “the action or failure to act by the agency” must be substantially justified. *Id.*
17 Second, the Commissioner’s position taken in the civil action was substantially justified. *Id.* The
18 inquiry into whether the government had a substantial justification must be found on both inquiries.
19 *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1998). Thus, both the ALJ’s decision and the arguments of
20 the Commissioner to this Court in defense of the administrative decision must have been substantially
21 justified. To find a position was substantially justified when based on violations of the Constitution,
22 federal statute, or the agency’s own regulations, is an abuse of discretion. *Sampson v. Chater*, 103 F.3d
23 918, 921 (9th Cir. 1996).

24 The burden of proof that the position was substantially justified rests on the government.
25 *Scarborough v. Principi*, 54 U.S. 401, 403 (2004); *Gonzales v. Free Speech Coalition*, 408 F.3d 613,
26 618 (9th Cir. 2005). However, the Commissioner not made any effort to demonstrate either the ALJ’s
27 decision or the Commissioner’s defense of the position was substantially justified in its opposition to
28 the motion. (*See generally* Doc. 25 at 3-5)

1 The Court remanded Plaintiff’s case because the ALJ failed to identify legally sufficient reasons
2 to reject the credibility of Plaintiff’s subjective complaints. In particular, the Court found “the ALJ
3 offered little more than a summary of the medical evidence and boilerplate language to support her rejection
4 Plaintiff’s credibility, which is not sufficient to support the adverse credibility analysis.” (Doc. 21 at 8) In
5 addition, the Court found the ALJ failed to meet the burden to specifically identify what testimony was
6 credible and what evidence undermined Plaintiff’s complaints. (*Id.* at 9) Because the ALJ failed to
7 apply the proper legal standards in evaluating Plaintiff’s credibility, the government’s position in
8 defending the ALJ’s flawed opinion was no substantially justified.

9 **B. Reasonableness of the Fees Requested**

10 The Ninth Circuit determined courts may not apply de facto caps limiting the number of hours
11 attorneys can reasonably expend on “routine” social security cases. *See Costa v. Comm’r of Soc. Sec.*
12 *Admin.*, 690 F.3d 1132, 1133-37 (9th Cir. 2012) (“we question the usefulness of reviewing the amount
13 of time spent in other cases to decide how much time an attorney could reasonably spend on the
14 particular case before the court”). Instead, “courts should generally defer to the ‘winning lawyer’s
15 professional judgment as to how much time he was required to spend on the case.” *Id.* at 1136, quoting
16 *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Nevertheless, the Court has an
17 independent duty to review evidence of hours worked and tasks undertaken to determine the
18 reasonableness of the fees requested for the case. *Hensley*, 461 U.S. at 433, 436-47.

19 1. Time expended

20 Plaintiff asserts that in the judgment of her attorney, Kelsey Brown, “the time spent on this case
21 was the time required to properly research, draft and win the case. Plaintiff’s counsel raised focused on
22 one major point with the Defendant, the credibility finding.” (Doc. 23 at 4) According to Plaintiff, this
23 appeal “involved directly on point 9th circuit case, several eastern district cases and application of the
24 facts of this case.” (*Id.*) Plaintiff contends Ms. Brown “spent a reasonable amount of time on this
25 case,” with 28.35 hours on expended on “review of over 1000 pages of case records and ... a concise
26 and effective brief.” (*Id.* at 4-5) She argues, “Given the issues raised by Plaintiff, the Court’s remand
27 of the case, the amount of hours requested and the overall sense of this case, the amount requested is
28 reasonable for the effort expended and the results obtained.” (*Id.* at 5, citing *Costa v. Comm'r of Soc.*

1 *Sec.*, 690 F3d 1132, 1136 (9th Cir. 2012); *Fox v. Vice*, 131 S.Ct. 2205, 2216 (2001))

2 In response, the Commissioner argues that “Plaintiff cannot meet her burden to show that it was
3 reasonable to bill \$5,721.54 for counsel’s work on this case.” (Doc. 25 at 3) According to the
4 Commissioner:

5 In this case, Plaintiff made one argument – that the ALJ failed to provide clear and
6 convincing reasons to find Plaintiff not credible – and requested a remand for further
7 proceedings (CR 18, pgs. 7-13). There was no summary of the medical evidence, as
8 required by the Scheduling Order (CR 6), and the argument discusses only a few facts.
9 Plaintiff’s counsel, an experienced social security attorney, has made this argument
10 before. In fact, counsel essentially made the same credibility argument in another social
11 security case including the same standard of review statement (*Compare* CR 18, pgs. 6-
12 11 *with, e.g.*, Exhibit (Exh). A, pgs. 6-10, Exh. B, pgs. 12-15, 18). Counsel also
13 essentially made the same request for further proceedings with the same conclusion
14 (*Compare* CR 18, pgs. 12-13 *with* Exh. A, pgs. 10-12).

15 (Doc. 25 at 3) The Commissioner asserts that he “understands counsel’s need for efficiency,” but “it is
16 not reasonable to charge for hours that were not required.” (*Id.*, citing *Feeney v. Colvin*, 2014 WL
17 3966379 at *3 (E.D. Cal. Aug. 13, 2014)) Thus, the Commissioner requests the time for drafting the
18 confidential letter brief be reduced from 3.4 hours to 1.4 hours and the time on the opening brief be
19 reduced from 7.4 hours to 2.4 hours. (*Id.* at 3-4) The Commissioner asserts that, after these
20 deductions, the resulting award of \$4,229.70 “is a reasonable amount for Plaintiff to receive for
21 litigating this case.” (*Id.* at 4)

22 Notably, Plaintiff did not file a response to the Commissioner’s argument. Nevertheless, the
23 Court has reviewed the time sheet provided to determine the reasonableness of the time reported and
24 the tasks completed. Ms. Brown indicated that she expended 8.4 hours reviewing the administrative
25 record, outlining the issues, and reviewing case law prior to drafting Plaintiff’s confidential letter brief.
26 (Doc. 23-1 at 1) In addition, Ms. Brown indicated that she spent 3.4 hours “[d]rafting [the] confidential
27 brief re: credibility, pulling cites.” (*Id.*) As Plaintiff observes, the record in this action was more than
28 1,000 pages, and the time reported for the review appears reasonable. Likewise, the Court finds the
time expended on the confidential letter brief, which frames the issues in the action and should “set
forth the relevant issues and the reasons for ... remand” (*see* Doc. 6 at 2) was reasonable.

On the other hand, as the Commissioner asserts, the time reported for the preparation of the
opening brief appears excessive. As the Commissioner observes, Ms. Brown did not provide a

1 summary of the medical record in the opening brief, despite indicating in the time sheet that her tasks
2 on September 25, 2018—for which she billed 2.9 hours—included “Procedural sections (Medical
3 evidence, Testimony) draft...” (See Doc. 23-1 at 1) In addition, the Court reviewed the exhibits
4 provided, and noted the similarities between the documents filed by Ms. Brown. In Plaintiff’s opening
5 brief, there are summaries of the administrative hearing testimony and the ALJ’s findings, which are
6 total under four pages. The argument presented is nearly completely boilerplate standards—and
7 identical to the opening brief attached to the Commissioner’s opposition as Exhibit A—with the
8 exception of two paragraphs summarizing the Court’s holding in *Henshaw v. Colvin*, No. 1: 14-cv-
9 01788-SKO (E.D. Cal. Feb. 11, 2016) and identifying portions of Plaintiff’s testimony that were not
10 addressed by the ALJ. (See Doc. 18 at 10-11) Further, as the Commissioner asserts, the paragraph
11 summarizing *Henshaw* is duplicative of the summary in Exhibit B. (Compare Doc. 18 at 9-10 with Doc.
12 25-2 at 15) Thus, it appears Ms. Brown was only required to prepare summaries of the testimony, the
13 ALJ’s findings, and a single paragraph of argument in the opening brief filed on behalf of Plaintiff in
14 this action. The Court finds an award of 2.4 hours as requested by the Commissioner is appropriate in
15 light of the very limited work required for the opening brief. See *Feeney*, 2014 WL 3966379 at *3
16 (reducing the hours for Ms. Brown where she asserted that “she spent 6.7 hours drafting the lay witness
17 argument, which amounted to no more than 2.5 pages, including only a one paragraph summary of
18 facts, two paragraphs of law, and one paragraph of analysis”).

19 2. Requested Hourly Rate

20 Plaintiff’s counsel requests hourly rates of \$196.79 for work completed in 2017 and \$201.60
21 for work completed in 2018 and 2019 (Doc. 23-1 at 1), which are based upon the statutory maximums
22 set by the Ninth Circuit. See “Statutory Maximum Rates Under the Equal Access to Justice Act,”
23 available at http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last visited June 24,
24 2019). Because the hourly rates requested are equal to those identified by the Ninth Circuit, the Court
25 finds the rates requested are reasonable and appropriate.

26 3. Amount to be awarded

27 With the deductions set forth above, Ms. Brown expended a total of 23.35 hours of
28 compensable work in this action on behalf of Plaintiff, which includes 0.95 hour in 2017 and 22.4 hours

1 in 2017 and 2018. The Court finds these hours to be reasonable in light of the tasks performed by
2 counsel and results achieved. Thus, Plaintiff is entitled to a fee award in the amount of \$4,702.79.²

3 **C. Expenses**

4 Plaintiff seeks the amount of \$10.75 for “Service/Mailing.” (Doc. 23-1 at 1) Significantly,
5 however, the Court granted Plaintiff’s request to proceed *in forma pauperis* in this action and directed
6 the U.S. Marshal “serve a copy of the complaint, summons, and this order upon the defendant.” (Doc.
7 4 at 4) When a plaintiff proceeds *in forma pauperis* and the U.S. Marshal has been directed to
8 complete service, the plaintiff may not recover expenses related to service. *DeArmon v. Colvin*, 2013
9 U.S. Dist. LEXIS 137858 at *5 (E.D. Cal. Sept. 25, 2013). Consequently, Plaintiff’s request for
10 expenses is **DENIED**.

11 **D. Assignment of the Fee Award**

12 Plaintiff requests that the EAJA fee award be made payable to counsel, pursuant to a fee
13 agreement. (See Doc. 23 at 8) In *Astrue v. Ratliff*, 560 U.S. 586 (2010) the Supreme Court determined
14 that EAJA fees must be made payable to the “prevailing party.” As a result, the payment is subject to a
15 government offset to satisfy any pre-existing debt owed by a claimant. See *id.*, 560 U.S. at 592-93.

16 Notably, under the Anti-Assignment Act, a claim against “the United States may not be
17 assigned to a third party unless [certain] technical requirements are met.” *United States v. Kim*, 806
18 F.3d 1161, 1169 (9th Cir. 2015); 31 U.S.C. § 3727. “[I]n modern practice, the obsolete language of the
19 Anti-Assignment Act means that the Government has the power to pick and choose which assignments
20 it will accept and which it will not.” *Kim*, 806 F.3d at 1169-70. In addition, the Anti-Assignment Act
21 “applies to an assignment of EAJA fees in a Social Security Appeal for disability benefits.” *Yesipovich*
22 *v. Colvin*, 166 F.Supp.3d 1000, 1011 (N.D. Cal. 2015).

23 Because Plaintiff has assigned her rights to counsel, the EAJA fees should be made payable
24 directly to Plaintiff’s counsel, subject to any government debt offset and the government’s waiver of
25 the Anti-Assignment Act requirements. See *Yesipovich*, 166 F.Supp at 1011; see also *Beal v. Colvin*,
26 2016 WL 4761090 at*4 (N.D. Cal. Sept. 13, 2016) (holding where there was “no information on

27
28 ² This amount includes \$186.95 for the work completed by counsel in 2017 and \$4,515.84 for the work completed between 2018 and 2019.

1 whether plaintiff owes any debt to the government[,]. . . the EAJA fee shall be paid directly to
2 plaintiff's counsel, subject to any administrative offset due to outstanding federal debt and subject to
3 the government's waiver of the requirements under the Anti-Assignment Act"). If the government
4 chooses to not accept the assignment, payment shall be made to Plaintiff and mailed to his attorney.

5 **IV. Conclusion and Order**

6 As a prevailing party, Plaintiff is entitled to an award of attorney's fees under the EAJA because
7 the ALJ's decision and the Commissioner's position in defending it were not substantially justified.
8 *See* 28 U.S.C. § 2412(d)(2)(H). With the deductions set forth above, Ms. Brown expended a total of
9 23.35 hours on compensable work in this action, which is reasonable in light of the tasks performed on
10 Plaintiff's behalf and results achieved.

11 Based upon the foregoing, the Court **ORDERS**:

- 12 1. Plaintiff's motion for attorney's fees (Doc. 22) is **GRANTED** in part, in the modified
13 amount of **\$4,702.79**;
- 14 2. Plaintiff's request for expenses is **DENIED**;
- 15 3. Defendant **SHALL** determine whether Plaintiff's EAJA attorney fees are subject to any
16 offset and, if the fees are not subject to an offset, payment shall be made payable to
17 Plaintiff. If the Government decides to accept the assignment of fees, payment shall be
18 made payable to Counsel, Kelsey Brown; and
- 19 4. Payment **SHALL** be mailed to Plaintiff's counsel of record, Kelsey Brown.

20
21 IT IS SO ORDERED.

22 Dated: July 28, 2019

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE