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

HENRY SPITZER,	)	Case No.: 1:17-cv-01736 DAD JLT
	)	
Plaintiff,	)	FINDINGS AND RECOMMENDATIONS
	)	GRANTING IN PART PLAINTIFF’S MOTION FOR
v.	)	ATTORNEY’S FEES PURSUANT TO THE EQUAL
	)	ACCESS TO JUSTICE ACT, 28 U.S.C. § 2412(d)
ANDREW M. SAUL <sup>1</sup> ,	)	
Acting Commissioner of Social Security,	)	(Doc. 29)
	)	
Defendant.	)	
	)	

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Henry Spitzer seeks an award for attorney’s fees and expenses pursuant to the Equal Access for Justice Act under 28 U.S.C. § 2412(d). (Doc. 29) Andrew M. Saul, Commissioner of Social Security opposes the motion, asserting the fees requested are excessive. (Doc. 31) For the reasons set forth below, the Court recommends Plaintiff’s motion for attorney fees under the EAJA be **GRANTED** in part, in the modified amount of \$6,564.62.

**I. Background**

Plaintiff initiated the action before this Court on December 20, 2017, seeking judicial review of the decision denying his application for benefits under the Social Security Act. (Doc. 1) The Court found the ALJ erred in evaluating the medical evidence related to Plaintiff’s ability to use his right

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<sup>1</sup> This action was originally filed against Nancy A. Berryhill in her capacity as then-Acting Commissioner of Social Security. The Court has substituted Andrew M. Saul, who has since been appointed the Commissioner of Social Security, as the defendant. *See* Fed. R. Civ. P. 25(d).

1 hand, the evidence related to Plaintiff’s mental abilities, and the credibility of Plaintiff’s subjective  
2 complaints. (Doc. 26; Doc. 27) Therefore, the Court remanded the action for further proceedings  
3 pursuant to sentence four of 42 U.S.C. § 405(g).

4 Following the entry of judgment, Plaintiff filed the application for fees under the Equal Access  
5 to Justice Act now pending before the Court. (Doc. 29) Defendant agrees Plaintiff is entitled to fees,  
6 but asserts the amount requested is excessive and unreasonable. (Doc. 31) Plaintiff filed a reply,  
7 asserting the fees requested should not be reduced. (Doc. 32) Including time spent on the reply,  
8 Plaintiff seeks a total award of \$13,972.70. (*Id.* at 6)

9 **II. Requests for EAJA Fees**

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

16 The party seeking the award of EAJA fees has the burden of proof that fees requested are  
17 reasonable. *See Hensley v. Eckerhart*, 461 U.S. 424, 434, 437 (1983); *see also Atkins v. Apfel*, 154 F.3d  
18 988 (9th Cir. 1998) (specifically applying these principles to fee requests under the EAJA). As a result,  
19 “[t]he fee applicant bears the burden of documenting the appropriate hours expended in the litigation,  
20 and must submit evidence in support of those hours worked.” *Gates v. Deukmejian*, 987 F.2d 1392,  
21 1397 (9th Cir. 1992); *see also* 28 U.S.C. § 2412(d)(1)(B) (“A party seeking an award of fees and other  
22 expenses shall . . . submit to the court an application for fees and other expenses which shows . . . the  
23 amount sought, including an itemized statement from any attorney . . . stating the actual time  
24 expended”). The court has an independent duty to review the evidence to determine the reasonableness  
25 of the hours requested in each case. *Hensley*, 461 U.S. at 433, 436-47.

26 Where documentation of the expended time is inadequate, the court may reduce the requested  
27 award. *Hensley*, 461 U.S. at 433, 436-47. Further, “hours that were not ‘reasonably expended’ should  
28 be excluded from an award, including “hours that are excessive, redundant, or otherwise unnecessary.”

1 *Id.* at 434. A determination of the number of hours reasonably expended on an action is within the  
2 Court’s discretion. *Cunningham v. County of Los Angeles*, 879 F.2d 481, 484-85 (9th Cir. 1988).

3 **III. Discussion and Analysis**

4 A claimant who receives a sentence four remand in a Social Security case is a prevailing party  
5 for EAJA purposes. *Shalala v. Schaefer*, 509 U.S. 292, 301-02 (1993); *Flores v. Shalala*, 49 F.3d 562,  
6 568 (9th Cir. 1995). Consequently, Plaintiff was the prevailing party because the Court ordered a  
7 remand of the matter for further proceedings pursuant 42 U.S.C. § 405(g). (Doc. 27) Defendant does  
8 not dispute that Plaintiff is a prevailing party for the purposes of an award of EAJA fees and does not  
9 argue the position of the Commissioner was substantially justified. (Doc. 31 at 2) Rather, Defendant  
10 asserts the fees requested are unreasonable because of duplicative work between the letter brief and  
11 opening brief. (*Id.* at 2-6)

12 **A. Consideration of Plaintiff’s Letter Brief**

13 The Commissioner has submitted Plaintiff’s letter brief support of the assertion that the hours  
14 sought by Plaintiff’s counsel, Andrew Koenig, are unreasonable due because “Plaintiff’s opening brief  
15 copied word for word from the settlement letter for nearly the entire argument.” (Doc. 31 at 4) In  
16 doing so, the Commissioner asserts that while settlement discussions should generally confidential, “the  
17 Ninth Circuit has expressly authorized disclosure of settlement discussions in fee litigation to assist a  
18 district court in determining a reasonable fee.” (*Id.* at 4, n. 2, citing, *e.g.*, *A.D. v. State of Cal. Highway*  
19 *Patrol*, 712 F.3d 446, 460-61 (9th Cir. 2013), following *Kekauoha-Alisa v. Ameriquest Mortg. Co.*, 674  
20 F.3d 1083, 1093-94 (9th Cir. 2012); *Ingram v. Oroudjian*, 647 F.3d 925, 927 (9th Cir. 2011).

21 Plaintiff objects to the submission of the letter brief as evidence supporting the opposition.  
22 (Doc. 32 at 2-4) Mr. Koenig asserts it has always been his “understanding and practice that settlement  
23 correspondence was confidential and not to be shared with the court due to concerns about a ‘chilling  
24 effect.’” (*Id.* at 3, n.1) Plaintiff observes that in the Court’s scheduling order, the parties are informed  
25 that the letter briefs “shall NOT be filed with the court and ... shall be marked ‘confidential.’” (*Id.* at 3,  
26 quoting Doc. 8 at 2) Thus, Plaintiff argues his letter brief should not have been submitted by and  
27 should not be considered by the Court in evaluating his request for fees. (*Id.* at 2-3)

28 Notably, the letter briefs exchanged by the parties are not designated “settlement” documents in

1 the Scheduling Order. The briefing procedure directed by the Court gives the Commissioner an  
2 opportunity to determine whether the matter should be remanded for further administrative proceedings  
3 without judicial review. Nevertheless, this Court has treated the letter briefs exchanged between  
4 claimants and the Commissioner as “settlement” documents. *See, e.g., Belcher v. Astrue*, 2010 WL  
5 5111435 at \*1 (E.D. Cal. Dec. 8, 2010) (observing “[t]he Confidential Letter Brief is for settlement  
6 purposes”). As such, this Court previously declined to compare the content of confidential letter briefs  
7 submitted to the Commissioner with opening briefs filed with the Court. *See id.*, 2010 WL 5111435 at  
8 \*1 (striking the letter brief submitted in opposition to a motion for fees and holding the brief would  
9 “not be used as evidence against a party to these proceedings”); *see also Stairs v. Astrue*, 2011 WL  
10 2946177 at \*3 (E.D. Cal. July 21, 2011) (cautioning the Commissioner “against continuing to make  
11 comparisons between the Confidential Letter Brief and the Opening Brief in an effort to undermine the  
12 time spent on the Opening Brief” because the letter brief was “for settlement purposes only”).

13         However, as the Commissioner observes, the Ninth Circuit has since determined a “district  
14 court did not err by considering settlement negotiations for the purpose of deciding a reasonable  
15 attorney fee award.” *Ingram*, 674 F.3d at 928. Following *Ingram*, the Court determined in *Kekauoha-*  
16 *Alisa* that Rule 408 of the Federal Rules of Evidence does not preclude a court from considering a  
17 settlement “for the purpose of calculation of attorneys’ fees.” *Kekauoha-Alisa*, 674 F.3d at 1094.  
18 Consequently, the Ninth Circuit held courts “may consider evidence of a settlement offer to the degree  
19 such evidence is relevant to the calculation of reasonable attorney’s fees...” *Id.* With this framework  
20 in mind, it was not improper for the Commissioner to submit Plaintiff’s letter brief to challenge the  
21 reasonableness of the fees requested by Plaintiff. *See Ingram*, 674 F.3d at 928; *Kekauoha-Alisa*, 674  
22 F.3d at 1094.

23         **B. Time Expended by Counsel**

24         Mr. Koenig reports that he spent 41.2 hours on the action through the filing of the motion for  
25 attorney fees, with an additional 2.4 hours on the reply to Defendant’s opposition. (Doc. 29 at 8-10;  
26 Doc. 32 at 6) In support of this, Mr. Koenig submitted a declaration that included a time sheet  
27 indicating the number of hours expended on tasks that included reviewing the administrative record,  
28 court notices, and related documents; preparation of the briefs filed in this action; and time related to

1 the motion now pending before the Court. (Doc. 29 at 8-10)

2 1. Clerical work

3 As an initial matter, the Court notes that several of the entries for Mr. Koenig include clerical  
4 tasks, such as filing and calendaring. (See Doc. 29 at 8-10) However, work that is “clerical in nature...  
5 should [be] consumed in firm overhead rather than billed.” *Nadarajah v. Holder*, 569 F.3d 906, 921  
6 (9th Cir. 2009); see also *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 985 (4th Cir. 1997) (approving the  
7 court’s elimination of hours spent on clerical tasks from the lodestar calculation); *Kirk v. Berryhill*,  
8 2017 U.S. Dist. LEXIS 41832 at \*12 (E.D. Cal. Mar. 22, 2017) (“clerical tasks are typically considered  
9 overhead expenses reflected in an attorney’s hourly billing rate, and are not properly reimbursable”).

10 Courts have determined tasks such as preparing service documents, filing documents,  
11 completion of the form related to magistrate judge jurisdiction, and reviewing document receipts from  
12 the Court are clerical in nature. See, e.g., *Em v. Astrue*, 2012 WL 691669 at \*4 (E.D. Cal. Mar. 2,  
13 2012) (“clerical tasks, such as mailing and calendaring, are not typically compensable under the  
14 EAJA”); *Santiago v. CACH LLC*, 2013 WL 5945805 at \*4, n.2 (N.D. Cal. Nov. 4, 2013) (declining to  
15 award time for preparation of service documents and reviewing documents for calendar deadlines);  
16 *Garcia v. Colvin*, 2013 WL 5347494 at \*8 (E.D. Cal. July 5, 2016) (identifying e-filing and completion  
17 of the form regarding magistrate judge consent “is clerical... even to the extent the completion of that  
18 form has been delegated to a paralegal”). Thus, such tasks should be omitted from the fee award.

19 Mr. Koenig’s records include entries for filing several documents including the complaint, civil  
20 cover sheet, amended request to proceed *in forma pauperis*, consent form, notice regarding service  
21 documents, the opening brief, the reply brief, and the EAJA motion. (Doc. 29 at 9-10) In billing for  
22 filing the amended IFP request, Mr. Koenig indicated the filing took 0.1 hour. (See *id.*) Thus, the  
23 Court recommends a deduction of 0.7 hour from the lodestar—which includes 0.1 hour in 2017, 0.5  
24 hour in 2018 and 0.1 hour in 2019—is appropriate due to the clerical nature of filing of each of the  
25 documents identified. See *Nadarajah*, 569 F.3d at 921; *Garcia*, 2013 WL 5347494 at \*8.

26 Further, Mr. Koenig billed 0.5 hour for the review of several Court notices such as the “action  
27 required” notice from the Clerk, assignment to Judge Drozd, and notice of receipt of the administrative  
28 record. (Doc. 29 at 9-10) Because the review of such notices and receipts is clerical work, the Court

1 recommends the lodestar calculation be reduced by 0.5 hour, which includes 0.2 hour in 2017 and 0.3  
2 hour in 2018.<sup>2</sup> *See e.g., Garcia*, 2013 WL 5347494 at \*7 (declining to award fees under the EAJA for  
3 receipt and review of notices from the Court).

4 2. Duplicative work

5 As noted above, the Commissioner asserts the fee award should be reduced due to duplicative  
6 work between Plaintiff’s confidential letter brief and the opening brief. (Doc. 31 at 2, at 5-6) The  
7 Commissioner observes the letter brief “was single-spaced and 16 pages,” and asserts “Plaintiff’s  
8 opening brief copied word for word from the settlement letter for nearly the entire argument.” (*Id.* at  
9 3-4) Further, the Commissioner observes that “the documents continue along nearly identical lines,  
10 often copied word-for-word, throughout the argument section.” (*Id.* at 5) The Commissioner asserts  
11 the claim that Plaintiff’s counsel “more than 17 hours to write the 14-page statement of facts and this  
12 half-page discussion of obesity is unreasonable,” particularly because “counsel wrote the letter brief in  
13 9.9 hours.” (*Id.*)

14 Plaintiff does not dispute the assertion that significant portions of the letter brief were copied  
15 into the opening brief. (Doc. 32 at 4) Indeed, Plaintiff acknowledges this was done, observing “[t]he  
16 technology allowing attorneys to cut and paste legal arguments from one document to another has  
17 existed for many years,” and this is “a good and common practice... in the name of efficiency and to  
18 minimize billed hours.” (*Id.* at 5) Further, Plaintiff asserts that after the Commissioner rejected a  
19 voluntary remand, “plaintiff’s attorney was then tasked with reorienting his knowledge of the facts of  
20 the case over two months later in September of 2018, which required another review of the Certified  
21 Administrative Record (“CAR”) and resulted in over 14 pages in the opening brief covering a detailed  
22 summary of hundreds of pages of medical, testimonial, and other evidence...” (*Id.*)

23 Significantly, in the billing records, Mr. Koenig included entries for drafting arguments—  
24 despite the acknowledgement that these were pulled from the opening brief. For example, he indicated  
25 that on September 13, 2018, he reviewed the record, began drafting the brief, wrote the case summary,  
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27 <sup>2</sup> Moreover, counsel would not spend six minutes reviewing each notice, as the notices identified were each one  
28 sentence long, or shorter. The Court has criticized the practice of billing for such tasks as overbilling because “[a]n  
experienced practitioner should not take six minutes to review a notice of lodging transcript, an acknowledgement of  
receipt of transcript, or certified mail receipts.” *Cathey v. Comm’r of Soc. Sec.*, 2013 WL 1694950 at \*8 (E.D. Cal. Apr. 18,  
2013) (recommending the denial of fees for such tasks under the EAJA), *adopted by* 2013 WL 1904711 (May 6, 2013).

1 and “Argument A.” (Doc. 39 at 10) The following date, Mr. Koenig indicates that he continued to  
2 draft the brief, including Arguments A-C. (*Id.*) Because the arguments were copied from the letter  
3 brief—which Plaintiff does not dispute— it appears Mr. Koenig bills for duplicative work. For this  
4 reason, the Court recommends a deduction of the time spent on the confidential letter brief from the  
5 total reported on the opening brief. This results in a reduction of 9.9 hours of reported work from 2018.  
6 The remaining 7.6 hours appear reasonable for new work completed on the opening brief, including the  
7 summary of the medical record, hearing testimony, and table of authorities.

8 3. Calculation of fees for compensable hours

9 With the deductions set forth above, the Court recommends fees be awarded for 32.5 hours of  
10 work on this action, which includes 1.4 hours in 2017, 25.8 hours in 2018, and 5.3 hours in 2019. For  
11 this work, Mr. Koenig requests the statutory hourly rates with adjustments for costs of living identified  
12 by the Ninth Circuit, which established the following rates: \$196.79 in 2017, \$201.60 in 2018, and  
13 \$205.25 for the first half of 2019. *See* “Statutory Maximum Rates Under the Equal Access to Justice  
14 Act,” available at [http://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000039](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039) (last visited April  
15 23, 2020; *see also Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir. 2005) (approving of the  
16 prescribed EAJA rate, which includes increases tied to the consumer price index). This results in a fee  
17 award of \$6,564.62.

18 **IV. Findings and Recommendations**

19 As a prevailing party, Plaintiff is entitled to an award of attorney’s fees under the EAJA because  
20 the ALJ’s decision and the Commissioner’s position in defending it to this Court were not substantially  
21 justified. *See* 28 U.S.C. § 2412(d)(2)(H). With the reductions recommended above, counsel is entitled  
22 to compensation for 32.5 hours of work. The Court finds these hours are reasonable in light of the tasks  
23 performed by counsel in this action, from the drafting of the complaint through the filing of the reply  
24 brief on the motion now pending. Accordingly, the Court **RECOMMENDS:**

- 25 1. Plaintiff’s motion for attorney’s fees be **GRANTED** in the modified amount of  
26 **\$6,564.62;**
- 27 2. Defendant be directed to determine whether Plaintiff’s EAJA attorney fees are subject  
28 to any offset and, if the fees are not subject to an offset, make the payment payable to

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Plaintiff. If the Government decides to accept an assignment of fees, payment be made payable to Counsel; and

3. Payment be mailed to Plaintiff's counsel of record, Andrew Koenig.

These Findings and Recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within fourteen days after being served with these Findings and Recommendations, any party may file written objections. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be filed within seven days of the date of service of the objections.

The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991); *Wilkerson v. Wheeler*, 772 F.3d 834, 834 (9th Cir. 2014).

IT IS SO ORDERED.

Dated: April 23, 2020

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE