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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

Matt A. Ferrando,)	
)	2:08-cv-02470-GEB-CMK
Plaintiff,)	
)	
v.)	<u>ORDER GRANTING MOTION FOR</u>
)	<u>ATTORNEYS' FEES AND COSTS</u>
Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Matt A. Ferrando moves for \$21,921.54 in attorneys' fees and costs under the Equal Access to Justice Act ("EAJA"), prescribed in 28 U.S.C. § 2412(d). (Pl.'s Appl., ECF No. 50, 2:12.) Defendant Commissioner of Social Security ("Commissioner") originally opposed Plaintiff's motion on the ground that it did not include an "itemized statement . . . stating the actual time expended and the rate at which fees and other expenses were computed" as required by § 2412(d)(1)(B). (Def.'s Opp'n, ECF No. 54, 2:4-8.) However, Plaintiff has since filed an itemized statement, (Decl. of Andrew P. Ragnes ("Ragnes Decl."), ECF No. 55), and the Commissioner has not responded to that filing.

I. BACKGROUND

On October 17, 2008, Plaintiff filed suit under 42 U.S.C. § 405(g) for judicial review of the Commissioner's final decision denying Plaintiff's application for disability benefits. (ECF No. 1.)

1 The Commissioner subsequently prevailed on its summary judgment motion,
2 resulting in the denial of disability benefits being upheld. (ECF No.
3 38.) The Ninth Circuit reversed and remanded, directing that the
4 Commissioner "determine when [Plaintiff's] mental impairments became so
5 severe as to render him disabled." Ferrando v. Comm'r, 449 Fed. App'x
6 610, 612 (9th Cir. 2011). It also disapproved of the Commissioner's
7 argument that Plaintiff's treating psychiatrist's opinion was entitled
8 to less weight since it was based only on Plaintiff's subjective
9 allegations. Id. at 612 n.2. On November 17, 2011, the district court
10 remanded the action to the Commissioner and closed the case. (ECF No.
11 48.) On December 5, 2011, Plaintiff filed the instant motion for EAJA
12 attorneys' fees, and on March 27, 2012, Plaintiff supplemented his
13 application with an itemized statement. (ECF Nos. 50, 55.)

14 **II. STANDARD**

15 To recover attorneys' fees from the Commissioner under the
16 EAJA, a plaintiff must show that "(1) [he] is the prevailing party; (2)
17 the government has not met its burden of showing that its positions were
18 substantially justified or that special circumstances make an award
19 unjust; and (3) the requested attorney's fees and costs are reasonable."
20 Perez-Arellano v. Smith, 279 F.3d 791, 793 (9th Cir. 2002) (citing 28
21 U.S.C. § 2412(d)(1)(A)). A successful EAJA fee applicant must also file
22 a fee application within thirty days of entry of final judgment, and
23 support the application with an itemized statement of fee rates and
24 attorney time expended. 28 U.S.C. § 2412(d)(1)(B); Poole v. Rourke, 779
25 F. Supp. 1546, 1560 (E.D. Cal. 1991). In addition, a plaintiff must
26 satisfy a net worth requirement, by showing he is "an individual whose
27 net worth did not exceed \$2,000,000 at the time the civil action was
28 filed." 28 U.S.C. § 2412(d)(2)(B).

1 **III. DISCUSSION**

2 **A. Eligibility for Fees**

3 Plaintiff satisfies the net worth and timeliness requirements
4 of the EAJA. Plaintiff's proof that he possessed a net worth of under
5 \$2,000,000 at the time the action was initiated is undisputed, and his
6 initial fee application was timely since it was filed eighteen days
7 after judgment entered. However, Plaintiff failed to support his
8 application with an itemized statement during the thirty-day statutory
9 period for EAJA fee applications. In response to the Commissioner's
10 objection concerning this omission, Plaintiff submitted an itemized
11 statement, which is considered since the Commissioner neither contests
12 its sufficiency nor argues that the Commissioner suffered prejudice. See
13 United States v. Hristov, 396 F.3d 1044, 1048 (9th Cir. 2005) ("When the
14 government can show no prejudice from allowing an amendment to a fees
15 application, it is unduly harsh not to allow an amendment to bring the
16 application in conformity with a technical pleading requirement."); id.
17 at 1047-48 (permitting addition of itemized statement after expiration
18 of thirty-day EAJA period under statute incorporating the filing
19 requirements of EAJA § 2412).

20 Plaintiff is also the prevailing party in the litigation since
21 he obtained an order remanding the Commissioner's decision and
22 "terminat[ing] the litigation with victory for the plaintiff." Shalala
23 v. Schaefer, 509 U.S. 292, 301, 300 (1993) (ruling that a plaintiff such
24 as Ferrando "who won a remand order, pursuant to sentence four of [42
25 U.S.C.] § 405(g)" is a prevailing party). Therefore, Plaintiff is
26 entitled to attorneys' fees "unless the court finds that the position of
27 the United States was substantially justified or that special
28 circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A).

1 Plaintiff bears the initial burden of pleading that the Commissioner's
2 position was not substantially justified. Scarborough v. Principi, 541
3 U.S. 401, 414 (2004); accord In re Application of Mgndichian, 312 F.
4 Supp. 2d 1250, 1255 (C.D. Cal. 2003). If Plaintiff makes this
5 allegation, the burden shifts to the Commissioner to prove either that
6 its position in the underlying litigation was substantially justified or
7 that special circumstances make an award unjust. Scarborough, 541 U.S.
8 at 416. Plaintiff alleges the Commissioner's position was unjustified
9 since Defendant improperly sought to discredit Plaintiff's treating
10 psychiatrist's diagnosis, as was recognized by the Ninth Circuit, which
11 criticized the Commissioner's position and rejected it. (See Pl.'s Appl.
12 5:5-20; Def.'s Mot. for Summ. J., ECF No. 33, 9:21-22, 10:1-2; Ferrando,
13 449 Fed. App'x at 611-12 & n.2.) Plaintiff has thus met his pleading
14 burden. The Commissioner does not oppose this portion of Plaintiff's
15 attorneys' fees motion, and has not shown that its position was
16 substantially justified or that special circumstances make an award
17 unjust. Accordingly, Plaintiff is entitled to reasonable attorneys' fees
18 and costs.

19 **B. Reasonable Fees and Costs**

20 Since Plaintiff is entitled to fees, "[i]t remains for the
21 district court to determine what fee is 'reasonable.'" Hensley v.
22 Eckerhart, 461 U.S. 424, 437 (1983) (setting forth this rule in fee
23 shifting case under 42 U.S.C. § 1988); Costa v. Comm'r of Soc. Sec.
24 Admin., 690 F.3d 1132, 1135 (9th Cir. 2012) (per curiam) (recognizing
25 that the principles set forth in § 1988 cases apply to reasonable fee
26 determinations under the EAJA). As the fee applicant, Plaintiff "bears
27 the burden of establishing entitlement to an award and documenting the
28 appropriate hours expended and hourly rates." Hensley, 461 U.S. at 437.

1 Further, "even absent defense objections," the district court is
2 "required to independently review [Plaintiff's] fee request." Gates v.
3 Deukmejian, 987 F.2d 1392, 1401 (9th Cir. 1992); see also 28 U.S.C.
4 § 2412(d)(2)(A) (limiting awards to "reasonable" attorneys' fees). "'The
5 most useful starting point for determining the amount of a reasonable
6 fee is the number of hours reasonably expended on the litigation
7 multiplied by a reasonable hourly rate.'" Sorenson v. Mink, 239 F.3d
8 1140, 1145 (9th Cir. 2001) (quoting Hensley, 461 U.S. at 433); see also
9 Gengler v. United States ex rel. Dep't of Def. & Navy, 682 F. Supp. 2d
10 1117, 1139 (E.D. Cal. 2010) (explaining that the figure generated from
11 this computation is presumed to represent a reasonable fee award).
12 Accordingly, Plaintiff's requested hourly rates and hours expended are
13 assessed in turn.

14 **1. Hourly Rates**

15 Plaintiff requests fees for work Sammis and Weems performed as
16 experienced attorneys at the adjusted statutory maximum hourly rate of
17 \$172.85 in 2008; \$172.24 in 2009; \$175.06 in 2010; and \$179.51 in 2011.
18 (Ragnes Decl. ¶ 2.) "The government does not object to the requested
19 adjusted statutory maximum hourly rate, and [Plaintiff] has calculated
20 the rate correctly." Nadarajah v. Holder, 569 F.3d 906, 918 (9th Cir.
21 2009); see also Thangaraja v. Gonzales, 428 F.3d 870, 876-77 (9th Cir.
22 2005) (detailing how this rate is calculated); Animal Lovers Volunteer
23 Ass'n, Inc. v. Carlucci, 867 F.2d 1224, 1227 (9th Cir. 1989) (noting
24 that a cost of living adjustment should be granted except in unusual
25 circumstances), *abrogated on other grounds by* Sorenson, 239 F.3d at
26 1149. "Accordingly, [Plaintiff] is awarded the requested [statutory
27 maximum] hourly rate" for Sammis and Weems's work. Nadarajah, 569 F.3d
28 at 918.

1 Plaintiff requests fees for Ragnes, a law clerk, at an hourly
2 rate of \$100 in 2008 and 2009, and \$110 in 2010 and 2011. Plaintiff
3 requests fees for Hull's work as a non-attorney representative at a rate
4 of \$150 per hour for 2008, 2009, and 2010. Non-attorney representatives,
5 such as Hull, are "known as 'agents,'" and "assist parties with the
6 presentation of their cases" before the Commissioner. Richlin Sec. Serv.
7 Co. v. Chertoff, 553 U.S. 571, 575 n.2 (2008); see 42 U.S.C. § 406(a) (1)
8 (enabling non-attorney representatives to "represent[] claimants before
9 the Commissioner").

10 Section 2412 has been construed as authorizing fee awards for
11 the work of paralegals and law clerks. E.g., Richlin, 553 U.S. at 572
12 (2008) (declaring it "self-evident" that the EAJA's provision for
13 attorneys' fees "embrace[s] paraglegal fees as well"); Nadarajah, 569
14 F.3d at 918 (approving of EAJA fees for paralegals and law clerks under
15 § 2412). However, § 2412 does not encompass fees for non-attorney
16 representatives such as Hull. See Richlin, 553 U.S. at n.2 & n.10
17 (noting that § 2412(d) (2) (A) "makes no provision for agent fees" such as
18 those of non-attorney representatives, since the statute authorizes fees
19 for federal court litigants, and non-attorneys are typically not
20 permitted to practice in federal court); 28 U.S.C. § 2412(d) (2) (A)
21 (explicitly omitting references to compensable agent fees found in 5
22 U.S.C. § 504(b) (1) (A) of the EAJA); see also Cato v. United States, 70
23 F.3d 1103, 1105 n.1 (9th Cir. 1995) (recognizing that in this circuit
24 non-attorneys cannot practice on behalf of others). Accordingly, Hull's
25 work as a non-attorney representative is not compensable under § 2412.
26 However, Plaintiff also requests fees for Hull's performance of work
27 that is paralegal in nature, which is apart from her work as a non-
28 attorney representative appearing before the Commissioner, to which

1 Plaintiff is entitled to compensation for Hull's services at the
2 approved rate for paralegals. See generally Moreno v. City of
3 Sacramento, 534 F.3d 1106, 1114 n.2 (9th Cir. 2008).

4 Plaintiff's proposed rates of \$100 and \$110 per hour for
5 Ragnes's law clerk work are "'in line with those [rates] prevailing in
6 the community for similar services by [law clerks or paralegals] of
7 reasonably comparable skill, experience and reputation.'" Nadarajah, 569
8 F.3d at 918 (quoting Blum v. Stenson, 465 U.S. 886, 895 & n.11 (1984));
9 see Koerner v. Astrue, No. CIV S-09-2240 LKK GGH, 2012 WL 530194, at *1
10 (E.D. Cal. Feb. 17, 2012) (permitting EAJA fees for Ragnes at rate of
11 \$110 per hour); Stratton v. Glacier Ins. Adm'rs, Inc., No. 1:02-CV-06216
12 OWW DLB, 2007 WL 1989097, at *4 (E.D. Cal. July 3, 2007) (awarding law
13 clerks fees at rate of \$100 per hour); Soda Mountain Wilderness Council
14 v. Norton, No. Civ. S-04-2583 LKK/CMK, 2006 WL 2054062, at *4 n.7 (E.D.
15 Cal. July 21, 2006) (noting that "the Supreme Court, and lower courts,
16 have approved the inclusion of fees for law clerks and law students in
17 fee awards under EAJA and analogous fee-shifting statutes"); Lucas v.
18 White, 63 F. Supp. 2d 1046, 1060 nn.16-17 (N.D. Cal. 1999) (awarding
19 fees at rate of \$100 per hour for law clerks). Therefore, "[t]he
20 requested hourly rates for the paralegal[and law clerk work] are
21 awarded." Nadarajah, 569 F.3d at 918.

22 Plaintiff also requests fees at a rate of \$70 per hour for
23 clerical work performed by Ragnes. However, these requests are not
24 approved since fees for "purely clerical tasks" should be subsumed in a
25 law firm's overhead, not separately compensated. Neil v. Comm'r of Soc.
26 Sec., No. 11-35996, 2012 WL 5462568, at *1 (9th Cir. Nov. 9, 2012)
27 (affirming denial of fees for "purely clerical tasks" for this reason);
28 see also Nadarajah, 569 F.3d at 925 ("disallow[ing]" fees for clerical

1 work); Shinn v. Astrue, No. 1:04-cv-6050 TAG, 2008 WL 2073980, at *7
2 (E.D. Cal. May 14, 2008) (finding clerical tasks are "not compensable"
3 under the EAJA).

4 **2. Number of Hours**

5 Taking into account this court's "overall sense of [the]
6 suit," Plaintiff is largely entitled to the reasonable attorneys' fees
7 that he seeks. Fox v. Vice, 131 S. Ct. 2205, 2216 (2011) (exhorting
8 trial courts shifting fees not to "become green-eyeshade accountants,"
9 but instead to award reasonable fees based on an "overall sense of a
10 suit"). Further, although the fees Plaintiff requests from 2010 and 2011
11 largely concern Plaintiff's appeal to the Ninth Circuit, under the EAJA,
12 Plaintiff is entitled to attorneys' fees for "all levels of the
13 litigation," including fees incurred prosecuting his appeal. Nat'l Res.
14 Def. Council, Inc. v. Winter, 543 F.3d 1152, 1164 (9th Cir. 2008).
15 Accordingly, the portions of Plaintiff's fee application based upon his
16 Ninth Circuit appeal are "properly filed in the district court," Ninth
17 Circuit Rule 39-1.6 notwithstanding. Id.

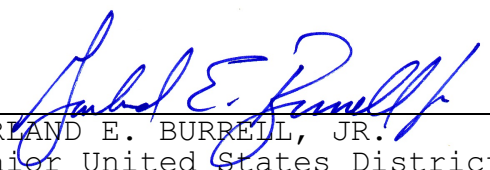
18 Thus for attorney Sammis's work, Plaintiff is entitled to
19 \$3,054.32 based upon Sammis's fees for .8 hours in 2008; 5.8 hours in
20 2009; 8.9 hours in 2010; and 2 hours in 2011. For attorney Weems's work,
21 Plaintiff is entitled to \$8,862.02 based upon Weems's fees for 25.5
22 hours in 2010 and 24.5 hours in 2011. For Ragnes's work as a law clerk,
23 Plaintiff is entitled to \$8,765 based upon Ragnes's fees for 32.1 hours
24 in 2008 and 2009, and 50.5 hours in 2010 and 2011. None of Ragnes's
25 clerical work (primarily filing and Pacer downloads) is compensable. For
26 Hull's paralegal work, Plaintiff is entitled to \$385 based upon her fees
27 for 1.1 hours in 2008 and 2009, and 2.5 hours in 2010. Plaintiff is
28 additionally entitled to \$463.20 in costs connected with the case. See

1 Int'l Woodworkers of Am., AFL-CIO, Local 3-98 v. Donovan, 792 F.2d 762,
2 767 (9th Cir. 1985) (approving of EAJA cost shifting for travel,
3 postage, and other expenses such as those billed here); Catholic Soc.
4 Servs., Inc., 837 F. Supp. 2d at 1076-77 (same). Accordingly, in sum,
5 Plaintiff is entitled to \$21,529.54 in attorneys' fees and costs.

6 **VI. CONCLUSION**

7 For the stated reasons, Plaintiff is awarded \$21,529.54 in
8 EAJA attorneys' fees and costs. The Commissioner shall pay this sum to
9 Plaintiff within sixty (60) days from the date on which this Order is
10 filed.

11 Dated: March 14, 2013

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14 GARLAND E. BURRELL, JR.
15 Senior United States District Judge
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