

1 A. Substantial Justification

2 The EAJA provides that the prevailing party in a civil action against the United States
3 may apply for an order for attorneys' fees and expenses within thirty days of final judgment in the
4 action. An applicant for Social Security benefits receiving a remand under sentence four of 42
5 U.S.C. § 405(g) is a prevailing party, regardless of whether the applicant later succeeds in
6 obtaining the requested benefits. Shalala v. Schaefer, 509 U.S. 292 (1993). In this case, the
7 matter was remanded under sentence four for further proceedings pursuant to the order of the
8 court on cross-motions for summary judgment. See ECF No. 62. Plaintiff thus is entitled to an
9 award of fees under the EAJA. The court must allow the fee award unless it finds that the
10 position of the United States was substantially justified. Flores v. Shalala, 49 F.3d 562, 568-69
11 (9th Cir. 1995).

12 The burden of establishing substantial justification is on the government. Gutierrez v.
13 Barnhart, 274 F.3d 1255, 1258 (9th Cir. 2001). In Pierce v. Underwood, 487 U.S. 552 (1988), the
14 Supreme Court defined "substantial justification" as 'justified in substance or in the main' -- that
15 is, justified to a degree that could satisfy a reasonable person. That is no different from the
16 'reasonable basis in both law and fact' formulation adopted by the Ninth Circuit and the vast
17 majority of other Courts of Appeals that have addressed this issue. Id. at 565. A position does
18 not have to be correct to be substantially justified. Id. at 566 n.2; see also Russell v. Sullivan, 930
19 F.2d 1443, 1445 (9th Cir. 1991), receded from on other grounds, Sorenson v. Mink, 239 F.3d
20 1140 (9th Cir. 2001); Lewis v. Barnhart, 281 F.3d 1081, 1083 (9th Cir. 2002).

21 In determining substantial justification, the court reviews both the underlying
22 governmental action being defended in the litigation and the positions taken by the government in
23 the litigation itself. Barry v. Bowen, 825 F.2d 1324, 1331 (9th Cir. 1987), disapproved on other
24 grounds, In re Slimick, 928 F.2d 304 (9th Cir. 1990). Where the underlying government action
25 was not substantially justified, it is unnecessary to determine whether the government's litigation
26 position was substantially justified. Andrew v. Bowen, 837 F.2d 875, 880 (9th Cir. 1988).

27 Defendant contends the government's position was substantially justified. In support of
28 this contention, defendant argues that the complex procedural history of this case, in which the

1 District Court initially upheld the decision of the Commissioner but then remanded the matter
2 pursuant to the mandate of the United States Court of Appeals for the Ninth Circuit, along with
3 the medical record containing ambiguous evidence which was, in the government's view,
4 unlikely to be resolved by further development of the record, demonstrates that the government's
5 position was substantially justified. This court does not agree. As noted in the order granting
6 plaintiff's second motion for summary judgment, the ALJ specifically ignored the mandate of the
7 appellate court and found the new evidence from Dr. Galanopoulos was not probative. Although
8 defendant is correct that the government can lose on the merits and its position still be
9 substantially justified for purposes of EAJA, defendant's argument in this instance is unavailing.
10 In reviewing the entire evidentiary record, briefing on the cross-motions for summary judgment
11 and order granting remand in this case, the court has determined defendant's position had no
12 reasonable basis in either law or fact. In failing to properly consider the additional evidence, as
13 directed by the appellate court, the Commissioner's position was not substantially justified. See,
14 e.g., Sampson v. Chater, 103 F.3d 918 (9th Cir. 1996) (position not justified where ALJ
15 mischaracterized medical evidence); see also Roe v. Commissioner of Social Security, 2016 WL
16 3064645 (9th Cir. May 31, 2016) (court must evaluate procedural error in determining substantial
17 justification). Fees under the EAJA will therefore be awarded.

18 B. Reasonable Fee

19 The EAJA directs the court to award a reasonable fee. In determining whether a fee is
20 reasonable, the court considers the hours expended, the reasonable hourly rate, and the results
21 obtained. See Commissioner, INS v. Jean, 496 U.S. 154 (1990); Hensley v. Eckerhart, 461 U.S.
22 424 (1983); Atkins v. Apfel, 154 F.3d 986 (9th Cir. 1998). Defendant does not contest the hourly
23 rate claimed but challenges several of the entries as not properly charged to defendant, or
24 otherwise excessive, unreasonable or insufficiently documented. Defendant first contests \$2,030
25 in fees claimed for non-attorney representative Shirley Hull. Defendant contends EAJA does not
26 authorize fees for non-attorney representatives. In the circumstances of this case, defendant is
27 correct. The billing records, fee agreement between Ms. Hull and plaintiff, and the appointment
28 of representative demonstrate that Ms. Hull was not working under the supervision of an attorney

1 while representing plaintiff at the administrative level. See ECF No. 65-1, Administrative
2 Transcript (“AT 379-380). Plaintiff is accordingly not entitled to EAJA fees for Ms. Hull’s
3 representation. See Ferrando v. Comm’r, 2013 WL 1087800, at *3 (E.D.Cal. Mar. 14, 2013); see
4 also Cook v. Brown, 6 Vet. App. 226 (1994) (in context of veteran appeal, EAJA fees not
5 recoverable for non-attorney representative unsupervised by attorney). The amount of \$2,030
6 will therefore be deducted from the fee award.

7 Defendant also contests a claim of \$439.04 in fees spent on addressing an order to show
8 cause and an order to dismiss for failure to prosecute. Plaintiff does not oppose this reduction.
9 The court finds that these fees are not reasonably charged to defendant and this amount will be
10 deducted as well. The court finds the remainder of defendant’s challenges to be unwarranted.
11 Upon review of the entire record, the court is satisfied that plaintiff’s counsel has not engaged in
12 duplicative billing, claimed excessive hours for legal research, or improperly claimed fees for
13 clerical tasks. A total of \$2,469.04 will therefore be deducted from the amount claimed. In
14 addition, the court will award \$1,917 for fees incurred in connection with the reply.²

15 The EAJA award must be made by this court to plaintiff, and not to counsel. See Astrue
16 v. Ratliff, 560 U.S. 586 (2010).

17 Accordingly, IT IS HEREBY ORDERED that fees pursuant to the EAJA are awarded to
18 plaintiff in the amount of \$22,336.78.

19 Dated: October 14, 2016

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21 CAROLYN K. DELANEY
22 UNITED STATES MAGISTRATE JUDGE

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27 _____
28 ² The court finds the 10 hours claimed by counsel is reasonable. The statutory maximum rate
under EAJA for work performed in the first half of 2016 is \$191.70/hour.