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

JAMES D.A. SMITH,

No. 2:13-CV-0665-CMK

Plaintiff,

vs.

ORDER

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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Plaintiff, who is proceeding with retained counsel, brings this action under 42 U.S.C. § 405(g) for judicial review of a final decision of the Commissioner of Social Security. Pending before the court is plaintiff’s motion (Doc 29) and supplemental application (Doc. 33) for fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d) (“EAJA”).<sup>1</sup>

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<sup>1</sup> Also before the court is defendant’s motion (Doc. 29) to strike plaintiff’s EAJA fees motion or to hold the motion in abeyance pending expiration of the time to appeal the court’s final judgment. Because the time to appeal has now passed and defendant has filed an opposition to plaintiff’s EAJA motion, defendant’s motion will be denied as unnecessary.

1           Because this court issued a remand pursuant to sentence four of 42 U.S.C.  
2 § 405(g), plaintiff is a prevailing party for EAJA purposes. See Flores v. Shalala, 42 F.3d 562  
3 (9th Cir. 1995). Under the EAJA, an award of reasonable attorney’s fees is appropriate unless  
4 the Commissioner’s position was “substantially justified” on law and fact with respect to the  
5 issue(s) on which the court based its remand. 28 U.S.C. § 2412(d)(1)(A); see Flores, 42 F.3d at  
6 569. No presumption arises that the Commissioner’s position was not substantially justified  
7 simply because the Commissioner did not prevail. See Kali v. Bowen, 854 F.2d 329 (9th Cir.  
8 1988). The Commissioner’s position is substantially justified if there is a genuine dispute. See  
9 Pierce v. Underwood, 487 U.S. 552 (1988). The burden of establishing substantial justification  
10 is on the government. See Gutierrez v. Barnhart, 274 F.3d 1255, 1258 (9th Cir. 2001).

11           In determining substantial justification, the court reviews both the underlying  
12 governmental action being defended in the litigation and the positions taken by the government  
13 in the litigation itself. See Barry v. Bowen, 825 F.2d 1324, 1331 (9th Cir. 1987), disapproved on  
14 other grounds, In re Slimick, 928 F.2d 304 (9th Cir. 1990). Where the underlying government  
15 action was not substantially justified, it is unnecessary to determine whether the government’s  
16 litigation position was substantially justified. See Andrew v. Bowen, 837 F.2d 875, 880 (9th Cir.  
17 1988). “The nature and scope of the ALJ’s legal errors are material in determining whether the  
18 Commissioner’s decision to defend them was substantially justified.” Sampson v. Chater, 103  
19 F.3d 918, 922 (9th Cir. 1996) (citing Flores, 49 F.3d at 570).

20           In this case, plaintiff argued: (1) the ALJ failed to provide reasons for tacitly  
21 rejecting limitations assessed by Drs. Hsia and Johnson; and (2) the ALJ erred by failing to fully  
22 develop the record. As to Dr. Hsia, the court held:

23           The court agrees with plaintiff. There are several areas in  
24 which the ALJ’s residual functional capacity assessment reflects a silent  
25 rejection of Dr. Hsia’s opinions despite the ALJ having given such  
26 opinions significant weight. Most notably, Dr. Hsia concluded that  
plaintiff is precluded from sitting more than 60 minutes and made no  
mention of normal breaks, yet the ALJ determined that plaintiff can sit for  
six hours with normal break but provided no reasoning to support the less-

1 restrictive limitation. The ALJ likewise rejected Dr. Hsia's opinion that  
2 plaintiff is precluded from standing more than 15 minutes.

3 As to Dr. Johnson, the court held:

4 Again, the court agrees. In particular, the ALJ erred by  
5 failing to discuss Dr. Johnson's assessed limitations to climbing.  
6 According to Dr. Johnson, plaintiff cannot climb. Dr. Johnson does not  
7 limit this restriction to only ladders, ropes, or scaffolds. The ALJ,  
8 however, concluded that plaintiff can occasionally climb stairs, thereby  
9 appearing to reject without explanation Dr. Johnson's more restrictive  
10 opinion.

11 Finally, regarding development of the record, the court held: "As discussed above, the evidence  
12 regarding Dr. Johnson's climbing limitation is ambiguous in that it is not clear whether the  
13 limitation applies to stairs."

14 Restating the arguments raised in earlier briefs, defendant contends that plaintiff is  
15 not entitled to EAJA fees because its position was substantially justified. The underlying  
16 government action in this case, however, was not substantially justified because the  
17 Commissioner's failure to properly evaluate the medical opinions of Drs. Hsia and Johnson  
18 violated the Commissioner's own regulations. See Shafer v. Astrue, 518 F.3d 1067 (9th Cir.  
19 2008); Gutierrez. V. Barnhart, 274 F.3d 1255 (9th Cir. 2001); Corbin v. Apfel, 149 F.3d 1051  
20 (9th Cir. 1998).

21 Plaintiff seeks a total award of \$8,249.78 (\$6,129.08 in original motion and  
22 \$2,120.70 in supplemental application). Defendant contends the amount sought in the original  
23 motion is not reasonable because: (1) 2.14 hours are claimed for work done prior to filing the  
24 action; (2) .28 hours are claimed for clerical tasks; and (3) .49 hours are claimed for work  
25 necessitated by counsel's error or delay.<sup>2</sup> Upon review of the declarations submitted by  
26 plaintiff's counsel relating to these specific hours claimed, the court finds defendant's arguments

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<sup>2</sup> Defendant has not filed any opposition to plaintiff's supplemental application, in which plaintiff seeks compensation for attorney's fees associated with litigating the instant motion.

1 unpersuasive and somewhat petty.

2           The final issue involved in this fee dispute is to whom the EAJA award should be  
3 paid. Plaintiff requests payment of attorney fees directly to counsel; defendant argues payment  
4 must be made to plaintiff personally, unless it is determined that plaintiff does not owe a  
5 government debt. In fact, defendant apparently concedes that once a fee award has been  
6 determined, the Treasury will determine whether plaintiff owes a federal debt, and if not the  
7 government will accept the assignment of fees and will pay counsel directly.

8           The undersigned agrees that Astrue v. Ratliff, 130 S. Ct. 2521, 2526-27 (2010),  
9 holds that an EAJA fee award is payable to the prevailing party, not the attorney, and is thus  
10 subject to offset for any debt owed to the government. To the extent plaintiff argues payment  
11 should be made directly to counsel as a representative payee, the court finds it unnecessary to  
12 reach such an argument given the Commissioner’s concession that if no governmental debt is  
13 owed, payment may be made directly to counsel. The Commissioner states “[i]f, after an EAJA  
14 fee is awarded to Plaintiff, Treasury determines that Plaintiff does not owe a federal debt, the  
15 government will accept the assignment of EAJA fees and pay fees directly to Plaintiff’s counsel.”  
16 The court accepts this assurance, and once the determination is made as to whether there is an  
17 outstanding government debt, payment will be made to counsel.

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Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for EAJA fees (Doc. 29) and supplemental application (Doc. 33) are granted in the amount of \$8,249.78;
2. Following the issuance of this order, the government shall determine whether this award is subject to any offset for debts owed to the government; and
3. Pursuant to the Commissioner's assurance, if no debt is owed, the assignment of EAJA fees will be accepted and payment will be made directly to plaintiff's counsel.

DATED: July 18, 2016

  

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CRAIG M. KELLISON  
UNITED STATES MAGISTRATE JUDGE