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

KARRIE ANN FRAZIER,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:13-CV-0756-GEB-DMC

ORDER

Plaintiff, who is proceeding with retained counsel, brought this action for judicial review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Final judgment remanding the matter was entered on September 26, 2014. Pending before the court is plaintiff’s motion for an award of \$16,457.76 in attorney’s fees plus \$253.05 in costs under the Equal Access to Justice Act (EAJA) (Doc. 25).

I. BACKGROUND

Plaintiff initiated this action by way of a complaint filed on April 18, 2013. The certified administrative record was served on plaintiff and lodged with the court on or about October 22, 2013, consisting of 367 pages. Thereafter, plaintiff filed a 40-page opening brief on the merits on December 2, 2013. In her brief, plaintiff argued: (1) the ALJ failed to properly

1 evaluate the severity of her migraine headaches; (2) the ALJ's finding regarding the Listing of
2 Impairments lacks substantial evidence; (3) the ALJ improperly rejected her treating and
3 examining physicians' opinions; (4) the ALJ improperly discredited plaintiff's testimony as well
4 as her lay witness; (5) the ALJ's RFC assessment lacked substantial evidence; (6) the ALJ's
5 determination of plaintiff's past relevant work was erroneous; and (7) the ALJ failed to obtain the
6 testimony from a vocational expert. The court found the ALJ erred with respect to the severity of
7 plaintiff's migraine headaches and evaluation of the credibility of plaintiff's statements and
8 testimony and remanded the matter for further proceedings.

10 II. DISCUSSION

11 Because this court issued a remand pursuant to sentence four of 42 U.S.C.
12 § 405(g), plaintiff is a prevailing party for EAJA purposes. See Flores v. Shalala, 42 F.3d 562
13 (9th Cir. 1995). Under the EAJA, an award of reasonable attorney's fees is appropriate unless the
14 Commissioner's position was "substantially justified" on law and fact with respect to the issue(s)
15 on which the court based its remand. 28 U.S.C. § 2412(d)(1)(A); see Flores, 42 F.3d at
16 569. No presumption arises that the Commissioner's position was not substantially justified
17 simply because the Commissioner did not prevail. See Kali v. Bowen, 854 F.2d 329 (9th Cir.
18 1988). The Commissioner's position is substantially justified if there is a genuine dispute. See
19 Pierce v. Underwood, 487 U.S. 552 (1988). The burden of establishing substantial justification is
20 on the government. See Gutierrez v. Barnhart, 274 F.3d 1255, 1258 (9th Cir. 2001).

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
23 in the litigation itself. See Barry v. Bowen, 825 F.2d 1324, 1331 (9th Cir. 1987), disapproved on
24 other grounds, In re Slimick, 928 F.2d 304 (9th Cir. 1990). For the government's position to be
25 considered substantially justified, however, it must establish substantial justification for both the
26 position it took at the agency level as well as the position it took in the district court. See Kali v.
27 Bowen, 854 F.2d 329, 332 (9th Cir. 1998). Where, however, the underlying government action
28 was not substantially justified, it is unnecessary to determine whether the government's litigation

1 position was substantially justified. See Andrew v. Bowen, 837 F.2d 875, 880 (9th Cir. 1988).
2 “The nature and scope of the ALJ’s legal errors are material in determining whether the
3 Commissioner’s decision to defend them was substantially justified.” Sampson v. Chater, 103
4 F.3d 918, 922 (9th Cir. 1996) (citing Flores, 49 F.3d at 570). If there is no reasonable basis in law
5 and fact for the government’s position with respect to the issues on which the court based its
6 determination, the government’s position is not “substantially justified” and an award of EAJA
7 fees is warranted. See Flores, 42 F.3d at 569-71. A strong indication the government’s position
8 was not substantially justified is a court’s “holding that the agency’s decision . . . was
9 unsupported by substantial evidence. . . .” Meier v. Colvin, 727 F.3d 867, 870 (9th Cir. 2013).

10 Under the EAJA, the court may award “reasonable attorney’s fees,” which are set
11 at the market rate. See 28 U.S.C. § 2412(d)(2)(A). The party seeking an award under the EAJA
12 bears the burden of establishing the fees requested are reasonable. See Hensley v. Eckerhart, 461
13 U.S. 424, 434 (1983); Atkins v. Apfel, 154 F.3d 988 (9th Cir. 1998); see also 28 U.S.C. §
14 2412(d)(1)(B) (“A party seeking an award of fees and other expenses shall . . . submit to the court
15 an application for fees and other expenses which shows . . . the amount sought, including an
16 itemized statement from any attorney . . . stating the actual time expended”). The court has an
17 independent duty to review the evidence and determine the reasonableness of the fees requested.
18 See Hensley, 461 U.S. at 433, 436-47. Finally, fees awarded under the EAJA are payable directly
19 to the client, not counsel. See Astrue v. Ratliff, 130 S.Ct. 2521 (2010).

20 In this case, defendant argues plaintiff is not entitled to fees and costs under the
21 EAJA because the Commissioner’s position was substantially justified. Defendant also argues
22 the amount of fees requested is unreasonable. Defendant does not challenge plaintiff’s counsel’s
23 claimed hourly rate, or raise any argument related to claimed costs.

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1 **A. Substantial Justification of Commissioners Position**

2 1. The ALJ’s Severity Finding

3 The court concluded the ALJ erred at Step 2 in finding plaintiff’s migraine
4 headaches do not constitute a severe impairment. The court stated:

5 Here, the ALJ found plaintiff’s migraine headaches were
6 not a severe impairment. He specifically found:

7 Although review of the entire record shows
8 intermittent treatment from headaches, most
9 treatment has been for depression and anxiety.
10 Treatment records show that headaches are
11 controlled with medication. Therefore, the
12 undersigned finds that the claimant’s migraine
13 headaches are not a severe impairment.

14 (CAR 17).

15 Plaintiff argues this determination is erroneous and not
16 supported by substantial evidence.

17 The medical records in this case are minimal, the most
18 detailed of which do show treatment for depression and anxiety. However,
19 contrary to the ALJ’s statement, the record contains numerous medical
20 visits where plaintiff sought treatment for her migraine headaches. The
21 record also indicates that plaintiff was routinely prescribed medication for
22 her migraines, but it would appear that she continued to suffer from
23 headaches despite the medication. Several of her office visits with Dr.
24 Budhram were for treatment of headaches. In addition, when she was
25 being seen for her anxiety and/or depression, there was often a notation in
26 the medical report as to plaintiff’s on-going headaches. (See e.g., CAR
27 210, 223, 288-97). Even if the medication she was prescribed was helpful
28 in controlling the headaches, the undersigned cannot find that there is
substantial evidence to support the ALJ’s determination that the medical
evidence *clearly* established that plaintiff’s headaches were not a severe
impairment, either alone or in combination with her other impairments.
Indeed, the record includes evidence of problems sufficient to pass the de
minimis threshold of step two.

As noted above, the ALJ’s conclusion that the claimant
lacks a medically severe impairment or combination of impairments is
valid only when the ALJ’s conclusion is “clearly established by medical
evidence.” Webb, 433 F.3d at 687. Here, the undersigned cannot say that
there was substantial evidence to find that the objective medical evidence
clearly established that plaintiff’s migraine headaches were not a
medically severe impairment. See id. at 688 (“There is not, in this
instance, the total absence of objective evidence of severe medical
impairment...”). As such, an order remanding this action for further
proceedings is recommended.

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Defendant argues the Commissioner’s position was substantially justified:

The Court remanded this case in part so that the agency can consider Plaintiff’s migraines at step two. The Court noted the evidence of migraines in the minimal medical record. D.E. 22, p. 5. The Commissioner was substantially justified to defend the ALJ’s consideration of Plaintiff’s migraines. First, legally, even if there was error with regard to what impairments the ALJ found severe at step two, error is harmless if the ALJ considered the impairments later in the sequential analysis. See Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir. 2007). Indeed, the ALJ specifically noted evidence of Plaintiff’s migraines in the step two analysis as well as the subsequent RFC analysis (Tr. 17, 19-26). Even if it was error to find that the migraines were not severe, the Commissioner was substantially justified in arguing that error was harmless because the ALJ considered migraines in the RFC determination (Tr. 17, 19-26).

Defendant’s argument of harmless error – raised for the first time here – is not well-taken. A review of defendant’s brief in opposition to plaintiff’s opening brief reflects defendant did not argue the ALJ’s error was harmless. Instead, defendant argued the ALJ did not err at Step 2. The court is not persuaded now by an argument defendant did not feel had enough merit to raise in response to plaintiff’s opening brief. The court’s holding in this case, that the ALJ’s Step 2 finding was not supported by substantial evidence to support the “clearly established” standard, indicates the Commissioner’s position was not substantially justified. See Meier, 727 F.3d at 870.

2. The ALJ’s Credibility Analysis

In finding the ALJ erred with respect to plaintiff’s credibility, the court stated:

Here, the ALJ simply determined that:

After careful consideration of the evidence, the undersigned finds that the claimant’s medically determinable impairments could reasonably be expected to cause the alleged symptoms; however, the claimant’s statements concerning the intensity, persistence and limiting effects of these symptoms are not credible to the extent they are inconsistent with the above residual functional capacity assessment.

(CAR 21).

The ALJ did not provide any reasons for discrediting plaintiff’s testimony, nor did he specify which portions of the testimony were discredited. While there is some discussion as to plaintiff’s complaints and symptoms, and perhaps some implied discrediting including a suggestion of malingering in one report, the ALJ fails to

1 articulate specific reasons for discrediting plaintiff. This analysis, or lack
2 thereof, is insufficient to meet the standard. Therefore, as an additional,
3 alternative finding, the undersigned finds the ALJ's credibility
4 determination to be erroneous, and an alternative grounds for remand.

5 According to defendant, the Commissioner's position was substantially justified
6 "given the not-entirely-clear parameters" of the law. Defendant contends:

7 In 1988, the Ninth Circuit stated that the "parameters" of the
8 requirement of "specific findings" for an ALJ's credibility ruling "are not
9 entirely clear." Varney v. Sec'y of HHS, 846 F.2d 581, 584 (9th Cir.
10 1988) (Varney I). Not much clarification has emerged since then. As
11 applied to the present case, the ALJ's adverse credibility determination,
12 and Defendant's decision to defend it, were reasonable given the not-
13 entirely-clear parameters of the "specific findings" requirement. See *id.*

14 Here, Plaintiff's own doctor noted she was only a mediocre
15 historian (Tr. 242). Furthermore, the ALJ notes several inconsistent
16 statement made to the agency, including where Plaintiff at times said
17 she had no friends, but other times states she talks on the phone and visits
18 with friends (Tr. 20-21, 49, 160-167). The Ninth Circuit has clearly held
19 that inconsistent statements like this may be considered in finding a person
20 not credible. See Light v. Soc. Sec. Admin., 119 F.3d 789, 792 (9th Cir.
21 1997) (inconsistencies in testimony and inconsistencies between testimony
22 and conduct may be considered in weighing a claimant's credibility).

23 Furthermore, the ALJ also specifically considered the testimony of
24 the third party witness. When rejecting a lay witness' testimony, an ALJ
25 need only provide germane reasons. See Greger v. Barnhart, 464 F.3d 968,
26 972 (9th Cir. 2006). Any failure of the ALJ's to expressly reject lay
27 witness statements is subject to harmless error. Molina v. Astrue, 674 F.3d
28 1104, 1117 (9th Cir. 2012). The ALJ's discussion of lay witness
statements shows numerous inconsistencies with Plaintiff's own
admissions, which the ALJ summarized in the same paragraph, where
Plaintiff admitted to being able to walk a few miles when she doesn't have
a headache and walking her children to school daily (Tr. 20, 160-169, 170-
177). Given these inconsistencies, the ALJ appropriately gave germane
reasons for not accepting lay witness statements and specific reason for
not accepting the testimony of Plaintiff (Tr. 20).

In sum, the ALJ's adverse credibility determination, and
Defendant's decision to defend the numerous arguments raised by Plaintiff
had reasonable bases in law and fact. See Hardisty, 592 F.3d at 1079-80
(upholding a denial of EAJA fees where the court had remanded on the
basis of a legal error in the ALJ's credibility ruling, but "all of the
inferences upon which [the credibility finding] rested had substance in the
record"). Even though the Court remanded, the "position of the United
States" was "substantially justified" within the meaning of the EAJA
because there was both evidentiary and legal support for the ALJ's
analyses. See 28 U.S.C. § 2412(d)(1)(A). Therefore, Plaintiff is not
entitled to attorney fees. See *id.*; Pierce, 487 U.S. at 556 n.2; Le, 529 F.3d
at 1201.

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1 Defendant's argument is unpersuasive. The issue in this case was not whether the
2 ALJ provided sufficient reasons consistent with the applicable legal standard, amorphous as it
3 may be. Rather, the ALJ erred in not providing any reasons. Because the ALJ's adverse
4 credibility finding was not supported by substantial evidence, the Commissioner's position was
5 not substantially justified. See Meier, 727 F.3d at 870.

6 **B. Reasonableness of Requested Fees**

7 Defendant argues the court should find the amount of fees requested is
8 unreasonable should it conclude the Commissioner's position was not substantially justified.
9 According to defendant:

10 In this case the fees requested are unreasonable. This case did not
11 present issues of significant novelty or difficulty. This case involved less
12 than 150 pages of medical records (Tr. 209-355). The medical evidence, as
13 the magistrate noted, "are minimal, the most detailed of which do show
14 treatment for depression and anxiety." D.E. 22, p. 5. The issues in this
15 case were routine as evidence[d] by Plaintiff's attorney billing only 2 ½
16 hours to research. D.E. 27-2, p. 4.

17 Despite the relatively routine nature of this case, Plaintiff's counsel
18 spent 75.6 hours of briefing alone, almost 2 full weeks of work. D.E. 27-2,
19 p. 3. No supplemental briefing, appeal work, or work following a remand
20 was done in this case.

21 Perhaps most egregious, the billing sheet shows how case and time
22 management was inefficient. Plaintiff's counsel spent 18 separate days of
23 work on the MSJ, often in piecemeal fashion of only 1 to 3 hours of work
24 in a single day. D.E. 27-2, p. 3. A further 7 separate days of work was
25 spent on the reply. D.E. 27-2, p. 3. Thus, 25 separate days of work were
26 billed to draft just two documents. D.E. 27-2, p. 3.

27 Beyond noting that each of these 25 days Plaintiff's counsel
28 worked on the MSJ or reply for one or more hours, the billing sheet is
unclear on what actual work happened on each of these individual 25
days. D.E. 27-2, p. 3. Work in this protracted and piecemeal fashion was
inefficient and unreasonable. Therefore, Defendant believes a reduction of
at least 55 hours is necessary in fees Plaintiff spent in briefing this case, as
well as a reduction of 3 hours in preparing the EAJA motion, as this
motion practice would likely be unnecessary if Plaintiff's billing practices
were reasonable.

Even with this reduction of hours, Plaintiff would still receive 30
hours of total fees, an amount that still includes 20.6 hours for drafting the
merits and reply briefs, and the additional 2.5 hours requested for research.
In addition to the clear inefficiencies above, Defendant believes this
reduction is also supported by other factors.

For example, Plaintiff's briefing is also overly long and bloated,
and often appears to be boilerplate. D.E. 16, 20. Instead of reviewing the
record and determining the most relevant issues, Plaintiff presented 10
issues for consideration, often with little citation to the record. D.E. 16.
Plaintiff's motion for summary judgment was 40 pages, with a 22 page
reply brief. D.E. 16, 20. In contrast, Defendants brief was 15 pages, most

1 of which was devoted to quickly disposing of the 10 issues brought by
2 Plaintiff. D.E. 19. Plaintiff declined magistrate jurisdiction, but the
3 Findings and Recommendation, which the Court adopted, was less than 10
4 pages. D.E. 22.

5 The court rejects defendant's argument that the subject fees are unreasonable
6 because time was expended over the course of any period of days. It is not for this court to
7 gainsay counsel's workload and time management. Nonetheless, exercising its discretion, the
8 court finds the fees claimed are unreasonable. Plaintiff claims over 80 hours of attorney time for
9 this appeal. Though plaintiff filed a lengthy opening brief discussing numerous issues, plaintiff's
10 counsel required relatively little time to review the ALJ's hearing decision and the record in this
11 case, which consisted of only 367 pages. Moreover, of the arguments raised, the court found only
12 two to be supported by the law and record. This case did not present the complexity of evidence
13 and issues as would be expected to support a claim for over 80 hours of attorney time, particularly
14 given the expertise of plaintiff's counsel. A reduction in the amount of fees requested by 20% is
15 appropriate in this case.

16 III. CONCLUSION

17 Accordingly, IT IS HEREBY ORDERED that:

- 18 1. Plaintiff's motion for an award of fees and costs under the EAJA (Doc. 25)
19 is granted, in part; and
- 20 2. Plaintiff is awarded \$13,166.21 in fees and \$253.05 in costs, payable to
21 plaintiff within 65 days of the date of this order.

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23 Dated: March 6, 2019

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25 DENNIS M. COTA
26 UNITED STATES MAGISTRATE JUDGE
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