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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TOMMY TROY GUTIERREZ,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:14-cv-1968-KJN

ORDER

Plaintiff Tommy Troy Gutierrez commenced this social security action on August 22, 2014. (ECF No. 1.) On October 15, 2015, the court granted plaintiff’s motion for summary judgment in part, denied the Commissioner’s cross-motion for summary judgment, remanded the action for further administrative proceedings pursuant to sentence four of 42 U.S.C. § 405(g), and entered judgment for plaintiff. (ECF Nos. 16, 17.)

Presently pending before the court is plaintiff’s motion for attorneys’ fees pursuant to the Equal Access to Justice Act (“EAJA”). (ECF No. 18.) The Commissioner filed an opposition to the motion, and plaintiff filed reply briefs. (ECF Nos. 20-22.) After carefully considering the parties’ briefing, the court’s record, and the applicable law, the court GRANTS IN PART plaintiff’s motion for EAJA fees.

1 The EAJA provides, in part, that:

2 Except as otherwise specifically provided by statute, a court shall
3 award to a prevailing party other than the United States fees and
4 other expenses, in addition to any costs awarded pursuant to
5 subsection (a), incurred by that party in any civil action (other than
6 cases sounding in tort), including proceedings for judicial review of
7 agency action, brought by or against the United States in any court
8 having jurisdiction of that action, unless the court finds that the
9 position of the United States was substantially justified or that
10 special circumstances make an award unjust.

11 A party seeking an award of fees and other expenses shall, within
12 thirty days of final judgment in the action, submit to the court an
13 application for fees and other expenses which shows that the party
14 is a prevailing party and is eligible to receive an award under this
15 subsection, and the amount sought, including an itemized statement
16 from any attorney or expert witness representing or appearing in
17 behalf of the party stating the actual time expended and the rate at
18 which fees and other expenses were computed. The party shall also
19 allege that the position of the United States was not substantially
20 justified. Whether or not the position of the United States was
21 substantially justified shall be determined on the basis of the record
22 (including the record with respect to the action or failure to act by
23 the agency upon which the civil action is based) which is made in
24 the civil action for which fees and other expenses are sought.

25 The court, in its discretion may reduce the amount to be awarded
26 pursuant to this subsection, or deny an award, to the extent that the
27 prevailing party during the course of the proceedings engaged in
28 conduct which unduly and unreasonably protracted the final
resolution of the matter in controversy.

28 U.S.C. § 2412(d)(1)(A)-(C).

19 Here, the Commissioner does not dispute that plaintiff is a prevailing party, because he
20 successfully obtained a remand for further proceedings under sentence four of 42 U.S.C. §
21 405(g). Shalala v. Schaefer, 509 U.S. 292, 300-02 (1993). Furthermore, plaintiff's application
22 for EAJA fees is timely, because it was filed within thirty days of final judgment in this action.¹

23
24 ¹ The term "final judgment" for purposes of the EAJA "means a judgment that is final and not
25 appealable..." 28 U.S.C. § 2412(d)(2)(G). The court entered judgment for plaintiff on October
26 15, 2015. (ECF No. 17.) The judgment became a non-appealable "final judgment" 60 days later
27 on December 14, 2015. See Fed. R. App. P. 4(a)(1)(B) (providing that the notice of appeal may
28 be filed by any party within 60 days after entry of the judgment if one of the parties is the United
States, a United States agency, or a United States officer or employee sued in an official
capacity). Accordingly, plaintiff was required to file an application for EAJA fees no later than
30 days after the "final judgment," i.e., by January 13, 2016. Plaintiff's November 19, 2015
application is therefore timely.

1 Nevertheless, the Commissioner argues that plaintiff is not entitled to an award of fees under the
2 EAJA, because the position of the Commissioner was substantially justified. See Flores v.
3 Shalala, 49 F.3d 562, 569 (9th Cir. 1995) (holding that claimant is entitled to attorneys’ fees
4 unless the government shows that its position “with respect to the issue on which the court based
5 its remand was ‘substantially justified’”).

6 The burden of establishing substantial justification is on the government. Gutierrez v.
7 Barnhart, 274 F.3d 1255, 1258 (9th Cir. 2001). In Pierce v. Underwood, 487 U.S. 552 (1988), the
8 Supreme Court defined “substantial justification” as:

9 “justified in substance or in the main” – that is, justified to a degree
10 that could satisfy a reasonable person. That is no different from the
11 “reasonable basis in both law and fact” formulation adopted by the
Ninth Circuit and the vast majority of other Courts of Appeals that
have addressed this issue.

12 Id. at 565. A position does not have to be correct to be substantially justified. Id. at 566 n.2; see
13 also Lewis v. Barnhart, 281 F.3d 1081, 1083 (9th Cir. 2002). In determining substantial
14 justification, the court reviews both the underlying governmental action being defended in the
15 litigation and the positions taken by the government in the litigation itself. Gutierrez, 274 F.3d at
16 1259.

17 The Commissioner’s argument that its position in this case was substantially justified is
18 unpersuasive. As the court previously found, the ALJ failed to provide specific and legitimate
19 reasons for discounting the opinion of the consultative examiner that plaintiff was limited to four
20 hours of standing and walking per day with normal breaks. The ALJ gave little weight to that
21 restriction, reasoning that: (1) during an intake interview, plaintiff was noted to have no problems
22 with sitting, standing, or walking; (2) plaintiff had 5/5 motor strength at certain treatment visits;
23 (3) plaintiff was able to go shopping and drive a car; and (4) one of the state agency physicians
24 found that plaintiff could stand and walk for 6 hours per day with normal breaks. However, as
25 the court explained, those reasons were clearly not specific and legitimate. First, the observation
26 of a layperson, made during a relatively brief interview with the claimant, is insufficient, by itself,
27 to discount the opinion of a medical provider. Second, the ALJ failed to explain why a finding of
28 full motor strength is necessarily inconsistent with a 4-hour per day walking restriction, which

1 may be necessitated by symptoms unrelated to strength, such as pain and numbness. Third, the
2 ALJ did not make any specific findings regarding the amount of time plaintiff spent shopping and
3 driving, and it is not implausible that a person limited to four hours of standing/walking would be
4 able to accomplish some driving and shopping. Finally, the ALJ could not solely rely on the
5 opinion of a non-examining state agency physician to discount the consultative examiner's
6 opinion, particularly given that another state agency physician found that plaintiff was capable of
7 standing and walking only about 2 hours per day with normal breaks. (See ECF No. 16.)

8 The Commissioner's reliance on Hardisty v. Astrue, 592 F.3d 1072 (9th Cir. 2010) is
9 misplaced. In Hardisty, the district court found that the ALJ's adverse credibility finding, which
10 rested on inferences regarding the claimant's criminal convictions, a report from a treating
11 physician that was inconclusive regarding malingering, and the claimant's purportedly
12 inconsistent testimony regarding his driving, was insufficient, but nonetheless concluded that the
13 Commissioner's position was substantially justified. Id. at 1079-80. The Ninth Circuit affirmed,
14 noting that all of the inferences on which the adverse credibility finding was premised were based
15 on specific evidence in the record which at least arguably cast doubt on the claimant's credibility.
16 Id. at 1080. Admittedly, the ALJ in this case also relied on specific evidence in the record to
17 discount the consultative examiner's opinion. However, unlike in Hardisty, the specific evidence
18 cited by the ALJ here does not plausibly cast doubt on the consultative examiner's opinion, at
19 least not without further findings and explanation by the ALJ.

20 To be sure, there are several ambiguities and inconsistencies in the record evidence, and
21 there may well be other reasons for discounting the consultative examiner's opinion, as discussed
22 in the court's remand order. For those reasons, the court declined to remand the case for payment
23 of benefits. Indeed, the court expressed no opinion regarding how the evidence should ultimately
24 be weighed within the confines of the applicable law. However, it is the ALJ's duty in the first
25 instance to set forth specific and legitimate reasons for discounting a consultative examiner's
26 opinion. Because the ALJ failed to discharge that duty, remand was warranted, and the
27 Commissioner's decision to defend the ALJ's error was not substantially justified.

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1 Therefore, having concluded that the Commissioner's position was not substantially
2 justified, and that there are no other special circumstances that would make an award of EAJA
3 fees unjust, the court finds that plaintiff is entitled to an award of fees pursuant to the EAJA.

4 The EAJA directs the court to award a reasonable fee. 28 U.S.C. § 2412(d)(2)(A). In
5 determining whether a fee is reasonable, the court considers the reasonable hourly rate, the hours
6 expended, and the results obtained. See Commissioner, INS v. Jean, 496 U.S. 154, 163 (1990);
7 Hensley v. Eckerhart, 461 U.S. 424, 437 (1983); Atkins v. Apfel, 154 F.3d 986, 988 (9th Cir.
8 1998). In this case, plaintiff's counsel seeks \$6,924.18 in attorneys' fees for prosecution of the
9 action, as well as an additional \$1,761.50 for pursuing his opposed application for EAJA fees, see
10 Jean, 496 U.S. 154, for a total award of \$8,685.68. (ECF Nos. 18, 22.)

11 The Commissioner has not challenged plaintiff's counsel's hourly rates, which are based
12 on the hourly rates for EAJA fees published on the Ninth Circuit's website—\$190.06 for 2014
13 and \$189.68 for 2015. See 28 U.S.C. § 2412(d)(2)(A); Thangaraja v. Gonzales, 428 F.3d 870,
14 876-77 (9th Cir. 2005); Ninth Circuit Rule 39-1.6.

15 However, the Commissioner objects to the reasonableness of the time plaintiff's counsel
16 spent on various tasks and activities. After independently reviewing the individual time entries
17 on the timesheets submitted by plaintiff's counsel (ECF Nos. 19-2, 22-2), the court makes the
18 following adjustments:

- 19 (1) The court deducts time spent in connection with seeking an extension of time to file
20 plaintiff's motion for summary judgment, because the extension was necessitated not
21 by plaintiff himself or the Commissioner, but instead by plaintiff's counsel's own
22 workload, and thus is not the type of cost that would reasonably be passed on to a
23 client or adversary. The court deducts 0.23 hours (0.2 hours from January 21, 2015
24 and 0.03 hours from January 22, 2015) at the 2015 rate of \$189.68, for a total
25 deduction of \$43.63.
- 26 (2) The court deducts time spent by plaintiff's counsel on a phone call with the referring
27 attorney after issuance of the court's remand order, because the phone call primarily
28 concerned the administrative proceedings following remand and not this civil action.

