



1 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this  
2 court has conducted a de novo review and carefully considered defendant’s objections.

3 Defendant raises two objections to the findings and recommendations. First, defendant  
4 objects to the magistrate judge’s determination that the government’s position was not  
5 “substantially justified” within the meaning of EAJA and controlling case law. ECF No. 38 at 2-  
6 5. Specifically, defendant argues the magistrate judge “has not properly addressed” the  
7 substantial justification standard. ECF No. 38 at 3. Second, defendant objects to the magistrate  
8 judge’s failure to address certain specific billing entries the government contends are  
9 unreasonable or should reduce the time spent by plaintiff’s counsel on the reply brief. *Id.* at 5-8.  
10 After review, defendant’s second objection is overruled. The first objection is addressed below.

11 Under the EAJA, the court is required to award attorney fees to a prevailing party unless it  
12 finds the position of the government “was substantially justified or that special circumstances  
13 make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). “A position is ‘substantially justified’ if it  
14 has a ‘reasonable basis in law and fact.’” *Hardisty v. Astrue*, 592 F.3d 1072, 1079 (9th Cir. 2010)  
15 (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The government has the burden of  
16 showing that its position was substantially justified. *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258  
17 (9th Cir. 2001).

18 “The plain language of the EAJA” makes clear that the government’s position includes  
19 both the challenged agency action and the decision to defend that action in court. *Id.* For that  
20 reason, the court focuses first on whether there was substantial justification for the challenged  
21 agency action and second on whether the government was substantially justified in defending that  
22 action in court. *Id.* (quoting *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988)). The focus of the  
23 inquiry is on “the government’s position regarding the specific issue” on which, in this case,  
24 remand was based, not on whether the claimant ultimately received benefits. *Gardner v.*  
25 *Berryhill*, 856 F.3d 652, 656 (9th Cir. 2017); *see also Hardisty*, 592 F.3d at 1078 (citing *Flores v.*  
26 *Shalala*, 49 F.3d 562, 569 (9th Cir. 1995) (same); *see also Lewis v. Barnhart*, 281 F.3d 1081,  
27 1086 (9th Cir. 2002) (in analyzing fees, court looks at whether government was “substantially  
28 justified” in taking position contrary to the basis for remand).

1 Here, the issue on which plaintiff prevailed, and which formed the basis for the order of  
2 remand, was the failure of the Administrative Law Judge (ALJ)<sup>1</sup> “to provide specific and  
3 legitimate reasons supported by substantial evidence in the record for rejecting the opinion of  
4 plaintiff’s treating physician.” ECF No. 23 at 7.<sup>2</sup> Specifically, the court found the ALJ had failed  
5 to cite any evidence in support of the conclusions she reached concerning the treating physician’s  
6 opinion. *Id.* at 5. The court also found it was “unclear” how several pieces of specific evidence  
7 cited in an earlier part of the ALJ’s order undermined the treating physician’s opinion, that the  
8 ALJ had failed to explain how the treating physician’s opinion was inconsistent with either the  
9 medical record or the treating physician’s notes, and that this inconsistency was “not apparent.”  
10 *Id.* at 6. Whether plaintiff ultimately was entitled to benefits was left unanswered by the court. In  
11 fact, while the matter was remanded for further proceedings to correct the errors the court  
12 identified, the court also found that “the record as a whole creates serious doubts as to whether  
13 plaintiff is, in fact, disabled within the meaning of the Social Security Act.” *Id.* at 7.

14 Thus, the ALJ’s failure here was a failure to identify specific evidence in the record or to  
15 explain how such evidence supported the decision to reject the treating physician’s opinion. This  
16 distinguishes the case before this court from both *Hardisty* and *Lewis*, on which the government  
17 relies.

18 In *Hardisty*, the ALJ had “based his decision on an adverse credibility finding against  
19 *Hardisty*.” *Hardisty*, 592 F.3d at 1074. The district court reversed, finding the ALJ “had not  
20 provided clear and convincing reasons for discrediting” the testimony as required by applicable  
21 case law. *Id.* In *Hardisty*, the ALJ had given three specific reasons for the adverse credibility  
22 finding; the district court found the reasons did not meet the “clear and convincing reasons”  
23 standard. *Id.* In *Lewis*, the district court determined the ALJ had failed to properly characterize

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25 <sup>1</sup> Both defendant and the magistrate judge have used the pronoun “he” to refer to the ALJ. In  
26 fact, the record reflects the ALJ is female. See ECF No. 12-3 at 41. Citations in this record to  
27 page numbers in documents in the court record are to page numbers assigned by the court’s  
28 Electronic Case Filing (ECF) system.

<sup>2</sup> ECF No. 23 is the magistrate judge’s findings and recommendations on the merits of plaintiff’s  
claim, which were adopted in full by this court in ECF No. 25.

1 the claimant's testimony at step four of the disability benefits determination process. *Lewis*, 281  
2 F.3d at 1083. At that stage, the claimant has "the burden of showing that she [can] no longer  
3 perform her past relevant work." *Id.* The duty of the ALJ at this stage is "'to make the requisite  
4 factual findings to support his conclusion.'" *Id.* (quoting *Pinto v. Massanari*, 249 F.3d 840, 844  
5 (9th Cir. 2001)). Again, the ALJ reviewed the claimant's testimony and "resolved ambiguities in  
6 the testimony" against the claimant. *Id.* at 1084. The district court disagreed with the ALJ's  
7 characterization of the claimant's testimony, *id.* at 1083, but at the EAJA fees stage of the  
8 proceeding found that the ALJ's position had both a reasonable basis in law, because the ALJ was  
9 required to evaluate the claimant's testimony and did so, as well as a reasonable basis in fact  
10 because there "was testimony in the record that" could have been viewed as casting doubt on  
11 relevant statements by the claimant. *Id.* at 1084.

12 Thus, in both *Hardisty* and *Lewis* the ALJ made specific findings as required by the law  
13 and cited to evidence in support of those findings. Here, by contrast, the ALJ did not cite to any  
14 specific evidence nor did she explain how specific evidence in the record supported her rejection  
15 of the treating physician's testimony. As the court found on the merits of plaintiff's claim, "[t]he  
16 uncontradicted opinion of a treating or examining physician may be rejected only for clear and  
17 convincing reasons, while the opinion of a treating or examining physician that is controverted by  
18 another doctor may be rejected only for specific and legitimate reasons supported by substantial  
19 evidence in the record." *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995)). It is  
20 the ALJ who has the "burden of giving specific, legitimate reasons based on substantial evidence"  
21 for rejecting a treating physician's opinion in favor of a non-treating physician. *Andrews v.*  
22 *Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995). "The ALJ can meet this burden by setting out a  
23 detailed and thorough summary of the facts and conflicting clinical evidence, stating [her]  
24 interpretation thereof, and making findings." *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th  
25 Cir.1989) (citation omitted).

26 As discussed, the ALJ did not meet this burden. The court does not find substantial  
27 justification for the ALJ's failure to comply with this well-settled rule. Given the absence of  
28 substantial justification for the ALJ's error, the court need not look at whether the government's

1 defense of that failure in this litigation was substantially justified because “[t]he government’s  
2 position must be substantially justified at each stage of the proceedings.” *Meier v. Colvin*, 727  
3 F.3d 867, 872 (9th Cir. 2013) (quoting *Shafer v. Astrue*, 518 F.3d 1067, 1071 (9th Cir. 2008)).

4 For the foregoing reasons, defendant’s first objection also is overruled. The findings and  
5 recommendations will be adopted as supplemented by this order.

6 Findings and Recommendations Filed February 6, 2018

7 Finally, on February 6, 2018, the magistrate judge filed findings and recommendations on  
8 plaintiff’s motion for an award of attorney’s fees under 42 U.S.C. §406(b). The findings and  
9 recommendations were served on all parties and contained notice to all parties that any objections  
10 to the findings and recommendations were to be filed within fourteen days after service of the  
11 findings and recommendations. The fourteen-day period has expired and no party has filed  
12 objections to the findings and recommendations.

13 The court presumes that any findings of fact are correct. *See Orand v. United States*, 602  
14 F.2d 207, 208 (9th Cir. 1979). The magistrate judge’s conclusions of law are reviewed de novo.  
15 *See Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9th Cir. 1983). Having reviewed  
16 the file, the court finds the findings and recommendations to be supported by the record and by  
17 the proper analysis. Accordingly, the February 6, 2018 findings and recommendations will be  
18 adopted in full.

19 In accordance with the above, IT IS HEREBY ORDERED that:

20 1. The findings and recommendations filed January 19, 2017, ECF No. 37, are adopted as  
21 supplemented by this order;

22 2. Plaintiff’s motion for attorney fees under the Equal Access to Justice Act, ECF No. 27,  
23 is granted;

24 3. Plaintiff is awarded \$6,556.99 in attorney fees and \$400 in costs under 28 U.S.C.  
25 §2412(d);

26 4. Defendant is directed to determine whether plaintiff’s EAJA attorney fees are subject  
27 to any offset permitted under the United States Department of the Treasury’s Offset Program and,

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1 if the fees are not subject to an offset, shall cause payment of fees to be made directly to plaintiff  
2 unless the government decides to accept the assignment of fees;

3 5. Defendant is directed to mail the payment of EAJA fees to plaintiff's counsel;

4 6. The findings and recommendations filed February 6, 2018, ECF No. 42, are adopted in  
5 full;

6 7. Plaintiff's November 6, 2017 motion for attorney fees under 42 U.S.C. § 406(b), (ECF  
7 No. 39), is granted;

8 8. Counsel for plaintiff is awarded \$17,028.75 in attorney fees under § 406(b). The  
9 Commissioner is directed to pay the fee forthwith and remit to plaintiff the remainder of any  
10 withheld benefits; and

11 9. Upon receipt of the \$17,028.75 in attorney fees pursuant to § 406(b), counsel is  
12 directed to reimburse plaintiff any amount previously paid by the government under the EAJA or,  
13 if payment of the EAJA fees is received after payment of the § 406(b) fees, to reimburse plaintiff  
14 upon receipt of the EAJA fee award.

15 DATED: March 30, 2018.

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19 UNITED STATES DISTRICT JUDGE  
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