

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
EUREKA DIVISION

JAMES NEILSEN,  
Plaintiffs,  
v.  
CAROLYN W. COLVIN,  
Defendants.

Case No. [13-cv-01737-NJV](#)

**ORDER RE PLAINTIFF'S MOTION  
FOR ATTORNEYS' FEES**

Re: Dkt. No. 25

**INTRODUCTION**

Plaintiff James Neilsen sought review of a final decision by the Commissioner of the Social Security Administration (“SSA”) denying his application for disability benefits under the Social Security Act. Plaintiff filed a motion for summary judgment. In part, Plaintiff argued that the denial should be reversed because opinion evidence which the administrative law judge relied upon in denying Plaintiff benefits had been omitted from the administrative record. See Doc. No. 14 (discussing Exhibit 14/F, an opinion by Dr. Katerina Christopoulos). Three months after Plaintiff filed his motion for summary judgment, the parties stipulated to remanding the case to the SSA for a new hearing, pursuant to Sentence 4 of 42 U.S.C. § 405(g). See Doc. No. 19. The parties stipulated that the action should be remanded “in light of the missing Exhibit 14F.” *Id.* Thus, the parties stipulated to remand the action on one of the grounds Plaintiff raised in his motion for summary judgment.

After the action was remanded to the Social Security Administration, Plaintiff requested attorneys’ fees under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d)(1)(A). Pursuant to this statute, “a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs . . . incurred by that party in any civil action (other

1 than cases sounding in tort), including proceedings for judicial review of agency action . . . unless  
2 the court finds that the position of the United States was substantially justified or that  
3 circumstances make an award unjust.” A party that has obtained a remand under sentence four of  
4 42 U.S.C. § 405(g) “certainly” is a prevailing party. See *Shalala v. Schaeffer*, 509 U.S. 292, 302  
5 (1993). Although the parties explored the possibility of stipulating to the amount of attorneys’  
6 fees sought by Plaintiff, they failed to reach agreement, and instead Plaintiff filed his motion for  
7 attorneys’ fees under the EAJA. Doc No. 25. The parties fully briefed the motion and argued it to  
8 the court on May 13, 2014.

## 9 DISCUSSION

### 10 **A. Plaintiff is entitled to recover the EAJA fees claimed in his petition.**

11 It is not clear why Defendant opposes Plaintiff’s motion for attorney’s fees. Defendant  
12 does not oppose Plaintiff’s fee petition on the ground that Plaintiff was not the prevailing party.  
13 See Doc. No. 28. Defendant does not argue that the Government’s position was “substantially  
14 justified.” *Id.* Defendant does not even argue that Plaintiff’s fees are unreasonable. *Id.* at 4-5  
15 (“the Commissioner does not contest the total requested fee of \$4058.33”). Instead, Defendant  
16 merely argues that Plaintiff has not submitted evidence to support the hours he claims to have  
17 worked. *Id.* Plaintiff’s counsel submitted a declaration attaching billing records for this case with  
18 his reply brief. See Doc. No. 30. The records establish that Plaintiff’s counsel billed 21.7 hours  
19 through 2013, for a total of \$4058.33, including all work performed on the motion for summary  
20 judgment and the stipulation for remand. *Id.* Plaintiff’s counsel billed an additional 11.8 hours in  
21 2014, including work performed to enter judgment, file a bill of costs, attempt to negotiate fees  
22 with defense counsel, and then file the present motion for fees after the parties failed to reach  
23 agreement on the issue. *Id.* In particular, the court notes that Plaintiff’s billing records itemize  
24 numerous phone calls, emails, and letters with counsel for Defendants regarding the stipulation to  
25 remand and the fee negotiations. *Id.*

26 While “not contest[ing] the total requested fee of \$4058.33” (Doc. No. 28 at 5), Defendant  
27 takes issue with the time that Plaintiff has billed after 2013, especially time billed in connection  
28 with his fee petition. Specifically, Defendant asks the court to disallow fees for time Plaintiff

1 spent on his reply brief in support of the fees motion. Id. Defendant fails to explain how time  
2 spent obtaining fees to which Plaintiff's counsel is entitled under the EAJA, and which Defendant  
3 refused to stipulate to, is not reasonable. Fees incurred in connection with EAJA fee litigation are  
4 recoverable. See *Nadarajah v. Holder*, 569 F.3d 906, 925 (9th Cir. 2009) (awarding more than  
5 \$13,000 in fees incurred in connection with EAJA fee petition); see also *Palomares v. Astrue*, 185  
6 Soc. Sec. Rep. Service 340, \*25 (N.D. Cal. Dec. 18, 2012) (4.3 hours billed on four-page EAJA  
7 fee petition reasonable and recoverable).

8 The court has reviewed Plaintiff's billing records. Plaintiff's counsel requests an hourly  
9 rate of \$187.02, the maximum EAJA rate allowed by the Ninth Circuit for work performed in  
10 2013. See Doc. No. 30-1; [http://www.ca9.uscourts.gov/content/view.php?pk\\_id=0000000039](http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039).  
11 Plaintiff's counsel submitted a declaration itemizing the time billed on the matter through April  
12 18, 2014: 33.5 hours. Doc. No. 30-1, Ex. 1. The time counsel billed was reasonable. See, e.g.,  
13 *Palomares*, 185 Soc. Sec. Rep. Service 340, at \*24 (finding 37.9 hours billed to social security  
14 disability case "reasonable" and listing cases in agreement). Counsel also estimated that he would  
15 bill an additional two hours after April 18, 2014. Doc. No. 30-1, Ex. 1. The court notes that much  
16 of the time counsel billed after 2013 is attributable to fruitless discussions with Defense counsel  
17 regarding Plaintiff's entitlement to EAJA fees. See *id.* Defendant's argument thus boils down to  
18 this: even though Defendant does not argue that Plaintiff's fees for work performed on the merits  
19 of this case are unreasonable, Plaintiff should not be allowed to recover fees for the work he was  
20 required to perform by Defendant's refusal to pay his attorneys' fees. Defendant's argument lacks  
21 merit. The court will award the full EAJA fees requested by Plaintiff's counsel.

22 Within seven days of this order, Plaintiff's counsel shall submit a supplemental declaration  
23 itemizing the reasonable time he billed after April 18, 2014.

24 **B. The court will not adopt Plaintiff's proposed order.**

25 The parties' second dispute concerns the form of Plaintiff's proposed order. See Doc. No.  
26 30, Proposed Order. Plaintiff assigned any EAJA fees he would recover to his attorney. *Id.*, Ex. 2  
27 at 2 (client "assigns all [EAJA] fees to attorney and agrees that said fees are the property of  
28 attorney and may be paid directly to the attorney, whether awarded by the Court or agreed to by

1 stipulation”). Plaintiff accordingly asks the court to direct payment of EAJA fees directly to his  
2 counsel, “upon verification that Plaintiff has no debt which qualifies for offset against the awarded  
3 fees pursuant to the U.S. Treasury Offset Program.” Doc. No. 25, Proposed Order. Plaintiff  
4 further proposes that the court order Defendant to notify him within 21 days if he owes any such  
5 debts. Id. Defendant objects to the form of the proposed order on the grounds that (1) EAJA fees  
6 belong to the Plaintiff, not his counsel; (2) it is the U.S. Treasury, not the Commissioner of Social  
7 Security, who will determine whether Plaintiff owes the Government a debt; and (3) the court  
8 lacks authority to order the Commissioner to disclose whether Plaintiff owes any debt. Doc. No.  
9 28 at 2-4. Defendant also notes that Plaintiff may obtain this information directly from the  
10 Treasury Department. Doc. No. 28 at 3. At the hearing, counsel for Plaintiff stated that he had not  
11 obtained the information from the Treasury Department.

12 Courts in this district squarely support Defendant’s position:

13 C. Pay Fees Directly to Attorney

14 The Commissioner also contests Mr. Palomares’s request to have  
15 the fees paid directly to counsel. In *Astrue v. Ratliff*, the Supreme  
16 Court confirmed the common practice that an EAJA fee award is  
17 payable to the litigant and not the attorney unless the party does not  
18 owe a debt to the government and assigns the right to receive fees to  
19 the attorney. 130 S. Ct. 2521, 2529, 177 L. Ed. 2d 91 (2010)[. ...]  
20 Since Mr. Palomares has already assigned any potential award to his  
21 attorney, the Court directs that attorney’s fees, subject to any debt  
22 offset, be paid directly to Mr. Palomares’s counsel.

19 D. Notice of Claimed Offset

20 Mr. Palomares is requesting an order requiring the  
21 Commissioner to disclose if it contends that Mr. Palomares has debt  
22 that qualifies for an offset against the awarded fees, as well as a  
23 basis for that contention. This language comes from a case called  
24 *Bender v. Astrue*, No. C 10-05333-MR, 2012 U.S. Dist. LEXIS  
25 3966, 2012 WL 113357, at \*4 (N.D. Cal. Jan. 12, 2012), in which  
26 the court ordered the Commissioner to notify the Plaintiff within  
27 twenty-one days if the Commissioner contended there was debt to  
28 offset the award. The court in *Bender* did not cite any legal authority  
for issuing this order. See Id. Mr. Palomares is essentially seeking  
notice of any claimed offset and argues that if the Commissioner is  
going to use an offset by the Treasury Department to excuse  
payment, that Mr. Palomares is entitled to proper notice and an  
opportunity to defend such offset. Mr. Palomares further contends  
that he has already assigned this award to counsel without being  
notified of any offset. (Id.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

There is no law stating that the Court must order the Commissioner to notify a plaintiff of an offset. Under 31 U.S.C. § 3716, the head of an administrative agency may collect a debt by administrative offset only after giving the debtor written notice. 31 U.S.C. § 3716(a)(1). In *Astrue v. Ratliff*, the Social Security Administration notified the Plaintiff of an offset according to § 3716. 130 S. Ct. 2521, 2522, 177 L. Ed. 2d 91 (2010). In *McCarty v. Astrue*, the Treasury Department sent Plaintiff notice of its intent to collect a debt by offsetting the EAJA award. 505 F. Supp. 2d 624, 632 (N.D. Cal. 2007). The court in *McCarty* held that Plaintiff's due process rights were not violated by Defendant's failure to give notice that Plaintiff's EAJA award was eligible for an offset. *Id.* There is no dispute that notice must be given under § 3716 before an EAJA award can be offset. Since § 3716 applies, the Court declines to order the Commissioner to give special notice within twenty-one days if it contends the awarded EAJA amount is subject to an offset.

Palomares, 185 Soc. Sec. Rep. Services 340, \*27-\*29; see also *Lloyd v. Astrue*, 2013 U.S. Dist. LEXIS 99329, \*11-\*12 (N.D. Cal. July 16, 2013) (while EAJA fee award is ordinarily payable to litigant and not attorney, "this does not prevent payment of a fee award directly to the attorney where there has been a valid assignment and the plaintiff does not owe a debt to the government . . . Plaintiff has attached an agreement for legal services in which he assigned all fees to his attorney, and the government has identified no debt owed by Plaintiff that would give rise to an offset. Payment is thus properly made to Plaintiff's counsel directly"); *Metters v. Astrue*, 2013 U.S. Dist. LEXIS 4245, \*11-\*12 (N.D. Cal. Jan 10, 2013) (declining to order Commissioner to provide information re Treasury offset to Social Security plaintiff).

Consistent with these decisions, this court (1) will not order the Commissioner to provide notice of any offset to Plaintiff, and (2) will order Defendant to pay the full amount of the EAJA fees awarded directly to Plaintiff's counsel, subject to any debt offset.

**IT IS SO ORDERED.**

Dated: May 13, 2014

  
NANDOR J. VADAS  
United States Magistrate Judge