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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

NANCY R. LUALHATI,

No. C-10-0341 EMC

Plaintiff,

v.

**ORDER GRANTING PLAINTIFF'S
MOTION FOR AN AWARD OF FEES
AND COSTS PURSUANT TO THE
EQUAL ACCESS TO JUSTICE ACT**

MICHAEL J. ASTRUE,

Defendant.

(Docket No. 23)

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An administrative law judge (“ALJ”) denied Plaintiff Nancy Lualhati’s application for social security disability benefits on March 16, 2009. This decision became final when Plaintiff’s request for review was denied by the Appeals Council on September 2, 2009. Plaintiff then sought judicial review pursuant to 28 U.S.C. § 405(g). On July 29, 2010, this Court entered its judgment, remanding the action to the Social Security Administration for further proceedings. Plaintiff now seeks an award of attorney’s fees in the amount of \$9,168.60 and costs in the amount of \$604.84 under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d)(1)(A). The government disputes Plaintiff’s entitlement to EAJA fees. The matter was taken under submission with oral arguments heard on November 24, 2010. Having considered parties’ briefs and accompanying submissions, as well as the entire record of this case, the Court hereby **GRANTS** Plaintiff’s motion for attorney’s fees and costs.

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1 **I. FACTUAL AND PROCEDURAL BACKGROUND**

2 Pursuant to the EAJA, a prevailing party in an action in which the United States is a party
3 may recover attorney’s fees and costs unless the Court finds that the government’s position was
4 substantially justified or that special circumstances exist which would render an award of fees and
5 costs unjust.¹ See 28 U.S.C. § 2412(d)(1)(A). “[I]t is the government’s burden to show that its
6 position was substantially justified.” See *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir.
7 2001); see also *Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir. 1995).

8 The government’s “position” includes, “in addition to the position taken by the United States
9 in the civil action, the action or failure to act by the agency upon which the civil action is based . . .
10 .” 28 U.S.C. § 2412(d)(2)(D). That position must be substantially justified at each stage of the
11 proceedings. See *Corbin v. Apfel*, 149 F.3d 1051, 1052 (9th Cir. 1998). Its position at each stage
12 must have a “reasonable basis in both law and fact” and is “justified to a degree that could satisfy a
13 reasonable person.” See *Pierce v. Underwood*, 487 U.S. 552, 564, 565 (1988); *Johnson v. Gonzalez*,
14 416 F.3d 205, 210-11 (3d Cir. 2005).

15 **II. DISCUSSION**

16 The government contends Plaintiff is not entitled to attorney’s fees and costs because its
17 position was substantially justified. Citing *Carmickle v. Comm., Soc. Sec. Admin.*, 533 F.3d 1155
18 (9th Cir. 2008), the government first argues that the sole error found in the litigation phase regarding
19 Plaintiff’s credibility was harmless. *Carmickle* held that “so long as there remains substantial
20 evidence supporting the ALJ’s conclusion on credibility and the error does not negate the validity of
21 the ALJ’s ultimate credibility conclusion, the error is harmless and does not warrant reversal.” See
22 *Carmickle*, 533 F.3d 1155, 1162 (internal quotation marks omitted). But *Carmickle* is inapposite at
23 this stage of the proceedings. The government neglected to raise a harmless error argument in their
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25 ¹ A party is “prevailing,” and eligible for attorneys fees under EAJA, if they win a remand at
26 any stage of the proceedings. See *Gutierrez*, 274 F.3d at 1257 (“An applicant for disability benefits
27 becomes prevailing party for purposes of the EAJA if the denial of her benefits is reversed and
28 remanded regardless of whether disability benefits are ultimately awarded.”); see also *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998) (“In other words, a party is eligible for fees under the EAJA if he wins at any intermediate stage in the proceedings . . .”). The government does not dispute Plaintiff’s status as a prevailing party.

1 cross-motion for summary judgment, and cannot reasonably claim that a position never asserted at
2 the merits phase of the litigation was “substantially justified.” *Cf. Johnson*, 416 F.3d at 211 (3d Cir.
3 2005) (finding argument that agency-level proceedings were substantially justified to be waived
4 where not raised in the government’s response to motion).

5 The government next argues that its position was substantially justified based on the ALJ’s
6 analysis of Plaintiff’s daily activities. Citing *Orn v. Astrue*, the government points out that an
7 analysis of the claimant’s daily activities may be relevant to credibility in two ways: (1) to contradict
8 the claimant’s testimony as to the severity of their disability with their actual ability, and (2) to show
9 that the claimant’s activities are transferable to the workplace such that the claimant is still capable
10 of working. 495 F.3d 625, 639 (9th Cir. 2007) (“the two grounds for using daily activities to form
11 the basis of an adverse credibility determination are...[to] contradict [claimant’s] other testimony”
12 and “transferability to conclude that claimant’s daily activities warrant an adverse credibility
13 determination.”). Here, the ALJ described Plaintiff’s activities as being inconsistent with the degree
14 of limitation she had alleged. A.R. 26. In support of the ALJ’s analysis, the government argued that
15 Plaintiff’s activities “are exactly the type of activities the Ninth Circuit holds are inconsistent with
16 complaints of disability.” Def.’s Cross-Mot. at 7 (Docket No. 19). This position was reiterated in
17 oral arguments before this Court on November 24, 2010. However, the ALJ referred to daily
18 activities with regard to transferability, not as contradicting Plaintiff’s testimony, and concluded that
19 “the claimant’s symptoms are not credible to the extent they are inconsistent with the [] residual
20 functioning capacity assessment.” AR 26.² The ALJ continued: “[t]hus the objective medical
21 evidence does not demonstrate abnormalities which would interfere with the claimant’s ability to
22 perform the range of work identified above.” *Id.* By inferring from Plaintiff’s daily activities that
23 she could still perform her normal work functions, the ALJ analyzed Plaintiff’s apparent capabilities
24 for their transferability to the workplace. The ALJ did not find that the daily activities internally

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26 ² A residual functional capacity assessment is a determination of the claimants ability to
27 work. “We use our residual functional capacity . . . to determine if you can do your past relevant
28 work.” 20 C.F.R § 404.1520(e). “[W]e will compare our residual functional capacity assessment . . .
with the physical and mental demands of your past relevant work. . . . If you can still do this kind of
work, we will find that you are not disabled.” *Id.* at § 404.1520(f).

1 contradicted the claimant’s own factual testimony. Although the government now argues that
2 Plaintiff’s testimony was in fact contradicted by evidence of her daily activities, the Ninth Circuit
3 has held that the government is bound by the ALJ’s reasoning. *See Connett v. Barnhart*, 340 F.3d
4 871, 874 (9th Cir. 2003) (stating “[w]e are constrained to review the reasons the ALJ asserts” and
5 “[i]t was error for the district court to affirm the ALJ’s credibility decision based on evidence that
6 the ALJ did not discuss.”); *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) (stating “we
7 cannot affirm the decision of an agency on a ground that the agency did not invoke in making its
8 decision.”). Also, as noted above, to be substantially justified, the government’s decision must be
9 justified at *both* the agency level and in the litigation on appeal. Because the government relied
10 upon reasoning not adopted by the ALJ, its position was not substantially justified for purposes of
11 the EAJA. Nor was the agency’s position as expressed in the ALJ’s decision substantially justified
12 in finding the claimant’s activities were transferable to the workplace because the ALJ did not, as
13 this Court noted in ordering the remand, find Ms. Lualhati engaged in those activities for a
14 substantial part of her day as *Orn* requires under the second test. *See* Docket No. 21 at p. 16.

15 Plaintiff requests an award, payable to her attorney, of \$174.64 per hour for 45.75 hours of
16 work on this case (plus additional time for preparation of the reply brief). The requested rate
17 exceeds the EAJA’s prescribed hourly maximum \$125 per hour, but amounts to the current
18 maximum permissible rate as adjusted for inflation/cost-of-living increases. 28 U.S.C. §
19 2412(d)(2)(A); Ninth Cir. Rule 39-1.6; *Thangaraja v. Gonzales*, 428 F.3d 870, 876-77 (9th Cir.
20 2005); *Sorenson v. Mink*, 239 F.3d 1140, 1147-48 (9th Cir. 2001). Plaintiff also requests an award
21 of \$604.84 in costs. Based on the time that the work was performed, the favorable result obtained,
22 the absence of a challenge to the amounts requested, and the declaration of Plaintiff’s counsel (Doc.
23 Nos. 24, 30), the Court finds Plaintiff’s requested award to be reasonable. *See Hensley v.*
24 *Eckerhart*, 461 U.S. 424, 429-30 (1983) (discussing factors relevant to consideration of requested
25 award). Subject to a determination that Plaintiff is not subject to an offset for a federal debt, the
26 Court will direct payment to Plaintiff’s counsel, as the government has dropped, by stipulation (Doc.
27 No. 28), its request that any award to be paid to Ms. Lualhati as the prevailing party based on *Astrue*
28 *v. Ratcliff*, 130 S. Ct. 2521, 2010 WL 23447 (June 14, 2010).

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III. CONCLUSION

The Government has failed to meet its burden of establishing that its position was substantially justified. Accordingly, Plaintiff's motion for attorney's fees is **GRANTED** in the amount requested. The Court hereby orders payment of **\$9,773.24** (\$9,168.60 in fees plus \$604.84 in costs) to Plaintiff pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. The award shall be made payable to Plaintiff, unless the Department of the Treasury determines that she does not owe a federal debt. If no debt is owed, the government shall instead direct payment to Barbara M. Rizzo, pursuant to the assignment executed by Plaintiff. Any payment shall be delivered to Plaintiff's counsel.

This order disposes of Docket No. 23.

IT IS SO ORDERED.

Dated: January 7, 2011



EDWARD M. CHEN
United States Magistrate Judge