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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MARIO ARENAS MERCADO,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No. 16-cv-04200-BLF

**ORDER GRANTING IN PART
PLAINTIFF’S UNOPPOSED MOTION
FOR EAJA FEES**

[Re: ECF 21]

Plaintiff Mario Arenas Mercado seeks attorneys’ fees in the amount of \$6,907.23 under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), following remand of his social security case for further administrative proceedings. Defendant Nancy A. Berryhill (“the Government”) has not filed an opposition.

For the reasons discussed below, the Court finds that Mr. Mercado is entitled to attorneys’ fees, but that due to a clerical error in his application the appropriate amount of fees is \$6,815.68 rather than the \$6,907.23 which is requested. Accordingly, Mr. Mercado’s motion is GRANTED IN PART in the amount of \$6,815.68.

I. BACKGROUND

A detailed factual and procedural background is provided in the Court’s remand order. *See Mercado v. Berryhill*, No. 16-cv-04200-BLF, 2017 WL 4029222 (N.D. Cal. Sept. 13, 2017). In brief, Mr. Mercado was diagnosed with thyroid cancer in 2001 and had a total thyroidectomy followed by radioactive iodine treatment. He received disability insurance benefits from January 2002 through November 2013, at which point benefits were terminated for reasons not explained in this record. He thereafter filed applications for disability insurance benefits and supplemental security income based on his thyroid condition and claimed mental impairments. The Administrative Law Judge (“ALJ”) found that Mr. Mercado was not disabled and denied benefits in a written decision which was affirmed by the Appeals Council.

1 Mr. Mercado filed this action to obtain judicial review of the ALJ’s adverse decision
2 pursuant to 42 U.S.C. § 405(g). On cross-motions for summary judgment, this Court reversed the
3 denial of benefits after concluding that the ALJ had failed to: consider all of the relevant medical
4 evidence; resolve conflicts in the medical evidence; and make a credibility finding with respect to
5 Mr. Mercado’s testimony. The Court remanded the case for further administrative proceedings
6 pursuant to sentence four of § 405(g).

7 **II. LEGAL STANDARD**

8 Subject to exceptions not relevant here, the EAJA requires that “a court shall award to a
9 prevailing party other than the United States fees and other expenses . . . unless the court finds that
10 the position of the United States was substantially justified or that special circumstances make an
11 award unjust.” 28 U.S.C. § 2412(d)(1)(A). A “party” under the EAJA is defined to include “an
12 individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed.” 28
13 U.S.C. § 2412(d)(2)(B)(i). A party is “prevailing” under the EAJA “if the denial of her benefits is
14 reversed and remanded regardless of whether disability benefits ultimately are awarded.”
15 *Gutierrez v. Barnhart*, 274 F.3d 1255, 1257 (9th Cir. 2001). “Fees and other expenses” include
16 “reasonable attorney fees.” 28 U.S.C. § 2412(d)(2)(A).

17 “The ‘position of the United States’ includes both the government’s litigation position and
18 the underlying agency action giving rise to the civil action.” *Meier v. Colvin*, 727 F.3d 867, 870
19 (9th Cir. 2013). It is the Government’s burden to show that its position “was, *as a whole*,
20 substantially justified.” *Gutierrez*, 274 F.3d at 1258-59 (internal quotation marks and citation
21 omitted). Substantial justification requires “a reasonable basis both in law and fact.” *Meier*, 727
22 F.3d at 870 (internal quotation marks and citation omitted). Absent a showing that its position
23 was substantially justified, the Government must show that “special circumstances exist to make
24 an award unjust” in order to defeat a motion for fees under the EAJA. *Gutierrez*, 274 F.3d at
25 1258.

26 If it determines that a plaintiff is entitled to attorneys’ fees, the Court must decide whether
27 the requested fees are reasonable. *See* 28 U.S.C. § 2412(d)(2)(A); *Perez-Arellano v. Smith*, 279
28 F.3d 791, 793 (9th Cir. 2002). “The most useful starting point for determining the amount of a

1 reasonable fee is the number of hours reasonably expended on the litigation multiplied by a
2 reasonable hourly rate.” *Sorenson v. Mink*, 239 F.3d 1140, 1145 (9th Cir. 2001) (quoting *Hensley*
3 *v. Eckerhart*, 461 U.S. 424, 433 (1983)). A district court that awards attorneys’ fees need not set
4 forth “elaborate mathematical equations,” but it “must ‘provide a concise but clear explanation of
5 its reasons for the fee award.’” *Id.* (quoting *Hensley*, 461 U.S. at 437).

6 **III. DISCUSSION**

7 To summarize the legal standard set forth above, “[f]or the court to award attorney’s fees
8 and costs pursuant to the EAJA, it must be shown that (1) the plaintiff is the prevailing party; (2)
9 the government has not met its burden of showing that its positions were substantially justified or
10 that special circumstances make an award unjust; and (3) the requested attorney’s fees and costs
11 are reasonable.” *Perez-Arellano*, 279 F.3d at 793.

12 **A. Mr. Mercado is the Prevailing Party**

13 Mr. Mercado satisfies the statutory definition of “party,” as his net worth was less than
14 \$2,000,000 when he filed this case. Mercado Affidavit ¶ 2, ECF 21-2. He is the “prevailing”
15 party because the denial of benefits was reversed and remanded for further administrative
16 proceedings. *See Gutierrez*, 274 F.3d at 1257.

17 **B. The Government’s Position was not Substantially Justified**

18 It is the Government’s burden to show that its position was substantially justified or that
19 special circumstances exist which would make an award of attorneys’ fees unjust. *Gutierrez*, 274
20 F.3d at 1258-59. The Government has not met its burden, as it has not opposed Mr. Mercado’s
21 motion.

22 Moreover, while a plaintiff’s success on the merits of a social security appeal is not
23 dispositive of an EAJA application, “it will be only a decidedly unusual case in which there is
24 substantial justification under the EAJA even though the agency’s decision was reversed as
25 lacking in . . . substantial . . . evidence in the record.” *Decker v. Berryhill*, 856 F.3d 659, 664 (9th
26 Cir. 2017) (internal quotation marks and citations omitted). This Court identified a number of
27 significant defects in the ALJ’s decision, based on well-established Ninth Circuit authority, which
28 warranted remand for further administrative proceedings. *See Mercado*, 2017 WL 4029222, at *4-

1 7. Under these circumstances, the Court concludes that neither the underlying agency decision,
2 nor the Government’s defense of that decision in this litigation, was substantially justified.

3 **C. Reasonable Fees**

4 As noted above, the starting point for determining an appropriate attorneys’ fee award is
5 multiplying the number of reasonable hours expended on the litigation by a reasonable hourly rate.
6 *Sorenson*, 239 F.3d at 1145.

7 **1. Number of Hours**

8 A party seeking attorneys’ fees under the EAJA has the burden of submitting evidence of
9 the hours expended in the action and establishing that those hours were appropriate. *Yesipovich v.*
10 *Colvin*, 166 F. Supp. 3d 1000, 1006 (N.D. Cal. 2015). “Appropriate hours include all time
11 reasonably expended pursuing the result achieved, i.e., success on the merits and seeking recovery
12 of attorney’s fees under the EAJA.” *Swan v. Colvin*, No. 15-CV-03558-JCS, 2016 WL 7048984,
13 at *3 (N.D. Cal. Dec. 5, 2016).

14 Mr. Mercado seeks fees for 35.25 hours which his counsel spent on this case in 2016 and
15 2017. LaPorte Decl., ECF 21-1. Counsel has provided a declaration itemizing the hours worked
16 on each task, beginning with 1.5 hours spent on initial review of the case prior to filing the
17 complaint and concluding with .50 hours spend drafting a letter to Mr. Mercado following the
18 Court’s issuance of its remand order. *Id.* Courts in this district have approved fees for all of the
19 listed tasks, including fees accrued prior to the filing of the complaint. *See, e.g., Swan*, 2016 WL
20 7048984, at *3-4; *Yesipovich*, 166 F. Supp. 3d at 1006-11. The hours expended on each task are
21 appropriate, and there does not appear to be any duplication of fees or tasks. The number of hours
22 claimed is well within the range of hours found by courts in this district to be reasonable for
23 litigation of a social security appeal. *See, e.g., Swan*, 2016 WL 7048984, at *3-4 (approving 69.6
24 hours); *Yesipovich*, 166 F. Supp. 3d at 1011 (approving 86.77 hours).

25 Accordingly, the Court finds that Mr. Mercado’s counsel reasonably expended 35.25 hours
26 on this case.

27 **2. Hourly Rate**

28 “The EAJA caps the [] maximum hourly rate at \$125, but provides for increases based on

1 the cost of living.” *Franklin v. Colvin*, No. 12-CV-03503-PJH, 2016 WL 4137588, at *1 (N.D.
 2 Cal. Aug. 4, 2016) (citing 28 U.S.C. § 2142 (d)(2)(A)). The Ninth Circuit maintains a table of the
 3 statutory maximum hourly rates under the EAJA, adjusted for increases in the cost of living, for
 4 each year. See https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last visited
 5 Jan. 12, 2018). The adjusted statutory rate is \$192.68 for 2016 and \$195.95 for 2017. See *id.* The
 6 Court concludes that those rates are appropriate in this case, where counsel demonstrated expertise
 7 in social security law and obtained a good result for Mr. Mercado. The courts in this district
 8 generally award fees based on the Ninth Circuit’s adjusted statutory maximum rates. See, e.g.,
 9 *Swan*, 2016 WL 7048984, at *3 & n.3; *Castillo v. Colvin*, No. 14-CV-03140-JCS, 2016 WL
 10 5680162, at *4 (N.D. Cal. Oct. 3, 2016); *Franklin*, 2016 WL 4137588, at *1.

11 **3. Appropriate Fee Award**

12 Mr. Mercado seeks compensation for all 35.25 hours expended by counsel at the rate of
 13 \$195.95, which is the 2017 adjusted statutory rate. However, most of counsel’s work on the case
 14 was performed in 2016. The Court presumes that the failure to distinguish between hours worked
 15 in 2016 and hours worked in 2017 is the result of a clerical error. Because counsel’s declaration
 16 clearly states the dates of all hours worked, however, the Court has no difficulty calculating
 17 reasonable attorneys’ fees based on the appropriate statutory rates.

18 Counsel spent 28 hours on the case in 2016, which, when multiplied by the 2016 statutory
 19 rate of \$192.68, results in a fee award of \$5,395.04 for work performed in 2016. Counsel spent
 20 7.25 hours on the case in 2017, which, when multiplied by the 2017 statutory rate of \$195.95,
 21 results in a fee award of \$1,420.64 for work performed in 2017. The Court therefore concludes
 22 that Mr. Mercado is entitled to an award of reasonable attorneys’ fees in the total amount of
 23 \$6,815.68.

24 **4. Mr. Mercado’s Assignment of EAJA Fees to Counsel**

25 Mr. Mercado submits an assignment of any attorneys’ fees recoverable under the EAJA
 26 and requests that such fees be paid directly to his counsel. Mercado Affidavit ¶¶ 3-4, ECF 21-2.
 27 While the Court generally is amenable to payment of the attorneys’ fees award to counsel
 28 directly, certain issues must be resolved before direct payment would be appropriate.

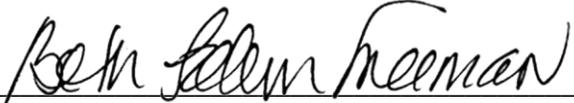
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In *Astrue v. Ratliff*, 560 U.S. 586 (2010), the Supreme Court held that EAJA fees are subject to offset if the prevailing party owes a government debt. Consequently, when a pre-existing government debt exists, EAJA fees are payable to the plaintiff rather than the plaintiff’s attorney to ensure that the plaintiff’s debt is satisfied. *Id.* at 591-97. Additionally, the Anti-Assignment Act, 31 U.S.C. 3727, prohibits assignment of “any part of a claim against the United States Government” unless certain requirements are met. Thus while courts in this district generally honor a plaintiff’s assignment of EAJA fees to counsel, they generally order that the fee award is payable directly to counsel subject to any offset and conditioned on the Government’s waiver of applicable requirements under the Anti-Assignment Act. This Court follows suit.

IV. ORDER

Mr. Mercado’s motion for an award of attorneys’ fees under the EAJA is GRANTED IN PART in the amount of \$6,815.68, which amount shall be paid directly to Mr. Mercado’s counsel subject to offset of any debt that Mr. Mercado owes to the Government and conditioned on the Government’s waiver of applicable requirements under the Anti-Assignment Act.

Dated: January 12, 2018


BETH LABSON FREEMAN
United States District Judge