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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ANTONINO SANFILIPPO,  
  
vs.  
  
MICHAEL J. ASTRUE,  
  
Plaintiff,  
  
Defendant.

CASE NO. 06cv0086 BTM (RBB)

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
ATTORNEY'S FEES**

Plaintiff has filed a motion for attorney's fees under the Equal Access to Justice Act. For the reasons discussed below, Plaintiff's motion is **GRANTED IN PART** and **DENIED IN PART**.

**I. BACKGROUND**

In this action, Plaintiff sought judicial review of the Commissioner's denial of her application for Disability Insurance Benefits under Title II of the Social Security Act. In an order dated August 14, 2006, the Court denied Plaintiff's motion for summary judgment and granted Defendant's cross-motion for summary judgment. The Court found that the Administrative Law Judge ("ALJ") did not commit legal error because substantial evidence supported his decision to deny Plaintiff benefits.

Plaintiff appealed the Court's decision to the Ninth Circuit Court of Appeals. In an order filed on April 18, 2008, the Ninth Circuit concluded that the ALJ failed to identify

1 “specific and legitimate” reasons for rejecting Plaintiff’s treating physician’s opinion and  
2 applied the wrong standard to Plaintiff’s treating chiropractor’s opinion. Accordingly, the  
3 Ninth Circuit reversed the Court’s decision and ordered that the case be remanded to the  
4 Commissioner for further proceedings consistent with its opinion. On November 3, 2008,  
5 the Court filed an order remanding the case to the Commissioner pursuant to Sentence Four  
6 of 42 U.S.C. § 405(g). On October 11, 2008, Plaintiff brought the instant Motion for  
7 Attorney’s Fees [Docket No. 22].

## 8 9 **II. DISCUSSION**

10 The Equal Access to Justice Act (“EAJA”) entitles a prevailing party, other than the  
11 United States, to attorney’s fees unless the government’s position was substantially justified  
12 or special circumstances exist that render the award of fees unjust. 28 U.S.C. §  
13 2412(d)(1)(A). Defendant does not dispute that Plaintiff is the “prevailing party,” nor does  
14 Defendant contend that the Government’s position was substantially justified. Rather,  
15 Defendant argues that the Court should deny Plaintiff’s petition as untimely. In the  
16 alternative, Defendant argues that Plaintiff counsel’s claimed hours are excessive and  
17 unreasonable.

### 18 19 **A. Timeliness of Plaintiff’s Petition**

20 A prevailing party seeking attorney’s fees under the EAJA must submit an application  
21 to the court within thirty days of final judgment in the action. 28 U.S.C. § 2412(d)(1)(B). A  
22 final judgment is one that is no longer appealable. Akopyan v. Barnhart, 296 F.3d 852, 854  
23 (9th Cir. 2002). Defendant contends that the judgment in this case became final 120 days  
24 after the Ninth Circuit filed its decision and entered judgment remanding the case for further  
25 proceedings to the District Court on April 18, 2008. This time period includes the 90 days  
26 during which Defendant could petition for a writ of certiorari with the Supreme Court and the  
27 30 days allowed under the EAJA. Defendant cites Al-Harbi v. I.N.S., 284 F.3d 1080 (9th Cir.  
28 2004) to support its position.

1           The Court disagrees that Al-Harbi is on point here. In Al-Harbi, Plaintiff prevailed on  
2 a petition for review to the Ninth Circuit from the Board of Immigration Appeals (“BIA”). When  
3 the Ninth Circuit reversed the decision of the BIA and granted the petition for review, it  
4 remanded the case directly to the BIA for further proceedings. See Al-Harbi v. I.N.S., 242  
5 F.3d 882, 894 (9th 2001). In contrast, here the Ninth Circuit remanded not to an  
6 administrative agency, but to the District Court. Thus, the Ninth Circuit’s decision was not  
7 the final judgment because it did not terminate the judicial phase of the proceeding. See  
8 Kolman v. Shalala, 39 F.3d 173, 176 (7th Cir. 1994) (finding that Seventh Circuit’s decision  
9 was not a final judgment since rather than terminating the case it remanded it to the district  
10 court with further directions to remand the case to the Social Security Administration).  
11 Rather, judgment was final here after the District Court entered judgment and the time to  
12 appeal expired, making the judgment final and no longer appealable. See Melkonyan v.  
13 Sullivan, 501 U.S. 89, 102 (1991); Akopyan, 296 F.3d at 854 (holding that a sentence four  
14 remand becomes a final judgment upon expiration of the time for appeal).

15           In a civil case where the Government is a party, a notice of appeal must be filed within  
16 60 days from entry of judgment. Fed. R. App. P. 4(a)(1)(B). Judgment is considered entered  
17 for purposes of Rule 4(a) if it has been entered in compliance with Federal Rule of Civil  
18 Procedure 58. Fed. R. App. P. 4(a)(1); see also Shalala v. Schaefer, 509 U.S. 292, 302–303  
19 (1993). For the purpose of Rule 58, judgment is entered when it is entered in the civil docket  
20 and is set out in a separate document. Fed. R. Civ. P. 58(c).

21           Here, the District Court entered judgment on the civil docket and set out the judgment  
22 in a separate document on November 3, 2008 [Docket Nos. 26, 27]. Thus, Plaintiff had 120  
23 days following November 3, 2008 to file an EAJA application. Plaintiff filed his Motion for  
24 Attorney’s Fees on October 11, 2008, well before his time expired. The Court therefore finds  
25 that Plaintiff timely filed his application and is entitled to attorney’s fees pursuant to the EAJA.

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28 B. Reasonableness of Plaintiff Counsel’s Claimed Hours

1 The award of attorney's fees under the EAJA must be reasonable. 28 U.S.C. §  
2 2412(d)(2)(A). "The most useful starting point for determining the amount of a reasonable  
3 fee is the number of hours reasonably expended on the litigation multiplied by a reasonable  
4 hourly rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). Hours that are excessive,  
5 redundant, or otherwise unnecessary should be excluded from an award of fees. Id. at 434.  
6 "Hours that are not properly billed to one's *client* also are not properly billed to one's  
7 *adversary* pursuant to statutory authority." Id. (quoting Copeland v. Marshall, 641 F.2d 880,  
8 891 (D.C. Cir. 1980) (en banc)).

9 Plaintiff seeks fees based on an hourly rate of \$166.46 for work performed in 2007  
10 and \$169.46 for work performed in 2008. Defendant does not challenge the  
11 reasonableness of this hourly rate. The Court finds that the hourly rate is reasonable and  
12 fairly takes into account the relevant cost of living adjustment.<sup>1</sup>

13 Plaintiff's counsel billed 75.90 hours in connection with the litigation of this action and  
14 the preparation of the EAJA fee motion. Upon review of the itemization of the billed hours,  
15 the papers filed in connection with the EAJA fee motion, and the appellate briefs, the Court  
16 finds that certain of the hours billed by Plaintiff were excessive. Specifically, the Court finds  
17 that the time Plaintiff spent reviewing her records and preparing her itemization of hours on  
18 7/18/08 and 7/25/08 was excessive. The Court therefore disallows 3.75 hours, but will allow  
19 3 hours related to this task. Plaintiff Counsel's requested fee is thereby reduced by \$635.48.

20 The Court also disallows EAJA fees for Plaintiff Counsel's time spent reviewing  
21 Defendant's Opposition to the EAJA petition and preparing a Reply brief. Plaintiff's Counsel  
22 untimely filed her Reply thirty-three days after the hearing date. Plaintiff's reply was due five  
23 court days *prior* to the hearing date. CivLR 7.1(e)(3). Because the Court performed  
24 substantial research on its own prior to Plaintiff's Reply, it was of little assistance.

25 Other than the hours specifically disallowed by the Court, the Court finds the hours  
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27 <sup>1</sup> The EAJA provides that attorneys fees shall not be awarded in excess of \$125 per  
28 hour unless the court determines that an increase in the cost of living or a special factor  
justifies a higher fee. The hourly rate claimed by Plaintiff fairly reflects the cost of living  
adjustment for the time period in question.

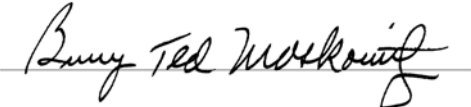
1 billed by Plaintiff's counsel to be reasonable. Taking into account the reductions detailed  
2 above, the Court allows the recovery of 72.15 hours, calculated at the rate of \$166.46 for the  
3 hours billed in 2007 and \$169.46 for the hours billed in 2008, for a total award of \$12,048.30.

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**III. CONCLUSION**

For the reasons discussed above, Plaintiff's motion for attorney's fees is **GRANTED**  
**IN PART** and **DENIED IN PART**. The Court awards Plaintiff \$12,048.30 in attorney's fees.  
**IT IS SO ORDERED.**

DATED: March 2, 2009

  
Honorable Barry Ted Moskowitz  
United States District Judge