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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ELLIE CARNO,

12 Plaintiff,

13 vs.

14 MICHAEL J. ASTRUE, Commissioner of
Social Security,

15 Defendant.

CASE NO. 07cv671 - IEG - NLS

Order Denying Motion for Award of
Attorneys' Fees [Doc. No. 20]

16 Plaintiff moves for attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. §
17 2412. For the following reasons, the Court denies the motion as untimely.

18 **BACKGROUND**

19 In May 2002, plaintiff, a Social Security recipient, applied for widow's benefits as a survivor
20 her late husband, Mr. Duran. In that application, she reported her marriage to the agency for the first
21 time. On June 20, 2005, the Social Security Administration advised plaintiff she had received an
22 overpayment of wife's benefits of \$25,897 between 1992 and May 2005.

23 Plaintiff requested a waiver of the overpayment on June 29, 2005. The Social Security
24 Administration denied plaintiff's request, finding plaintiff was not free of fault. On October 17, 2006,
25 an administrative law judge conducted a hearing, concluded plaintiff was overpaid benefits,
26 determined plaintiff was not without fault, and declined to waive recovery of the overpayment. The
27 ALJ's decision became the Commissioner's final decision when the Appeals Council found no basis
28 for review. Plaintiff commenced this action for judicial review pursuant to 405(g) and filed a motion
for summary judgment on November 26, 2007. (Doc. No. 14.)

1 On January 24, 2008, the parties jointly moved for an order of voluntary remand. (Doc. No.
2 18.) On January 29, 2008, the Court issued an Order of Remand pursuant to sentence four of 42
3 U.S.C. Section 405(g). (Doc. No. 19.) On December 1, 2008, Plaintiff filed the present motion.

4 DISCUSSION

5 i. Parties' Argument

6 Plaintiff argues the Equal Access to Justice Act ("EAJA") requires the United States pay
7 prevailing party's costs "unless the court finds that the position of the United States was substantially
8 justified or that special circumstances make an award unjust." 28 U.S.C. §2412(d)(1)(A). Plaintiff
9 argues she was the prevailing party because, under Shalala v. Schaefer, 509 U.S. 292, 300-302 (1993),
10 a claimant who obtained a judgment pursuant to "sentence four" of 42 U.S.C. § 405(g) is a prevailing
11 party. Plaintiff obtained a sentence four judgment in this action. Plaintiff further argues the United
12 States position is not substantially justified, proven by the government's concession that the ALJ's
13 determination contained errors requiring remand.

14 The government argues the motion is untimely. The government argues plaintiff had only 30
15 days to submit an application for attorneys' fees to the court after final judgment. Final judgment
16 occurred, according to the government, on August 27, 2008. Therefore, the government argues
17 plaintiff's December 1, 2008 application was untimely.

18 ii. Analysis

19 The EAJA instructs courts to award costs to a "prevailing party . . . unless the court finds that
20 the position of the United States was substantially justified or that special circumstances make an
21 award unjust." 28 U.S.C. § 2412(d)(1)(A). A party has thirty days after the final judgment to apply
22 for attorneys' fees and costs. 28 U.S.C. § 2412(d)(1)(B). A "final judgment" is a judgment that is
23 final and not appealable. 28 U.S.C. § 2412(d)(2)(G). The parties do not dispute plaintiff became a
24 "prevailing party" on January 29, 2008, when the Court remanded the action pursuant to sentence four
25 of 42 U.S.C. §405(g). See Shalala v. Schaefer, 509 U.S. 292, 302 ("A sentence-four remand, of
26 course, is a judgment for the plaintiff.")(citations omitted). To determine timeliness, the Court must
27 calculate when judgment was entered, when judgment became final, and when the EAJA attorneys'
28 fees application period expired.

1 The first issue is when the Court entered judgment. Federal Rule of Civil Procedure 58
2 controls the entry of judgment. Rule 58(c) sets the “time of entry” at the earlier of (1) the time when
3 the judgment is set forth in a separate document or (2) 150 days after the entry in the civil docket,
4 whichever occurs earlier. Fed. R. Civ. P. 58(c). In the present case, the judgment was not set forth
5 in a separate document; therefore, entry occurred 150 days after the entry in the civil docket. Entry
6 in the civil docket occurred on January 29, 2008; therefore, entry of judgment occurred 150 days later,
7 on June 27, 2008.

8 The second issue is when judgment became final. A judgment is final when it is no longer
9 appealable. 28 U.S.C. § 2412(d)(2)(G). In cases in which the federal government is a party, Rule 4(a)
10 of the Federal Rules of Appellate Procedure allows a party to appeal up to 60 days after the entry of
11 judgment. In the present case, plaintiff’s 60 days began to run on June 27, 2008 and expired on
12 August 27, 2008. Because plaintiff failed to appeal, judgment became final on August 27, 2008.


13 The final issue is whether plaintiff brought a timely application for attorneys’ fees. Under the
14 EAJA, after final judgment plaintiff had 30 days to apply for attorneys’ fees. 28 U.S.C. §
15 2412(d)(1)(B). In the present case, plaintiff had until 30 days after August 27, 2008; therefore, any
16 application filed after September 27, 2008 was untimely. Accordingly, plaintiff’s December 1, 2008
17 application for attorneys’ fees was untimely and is DENIED.

18 CONCLUSION

19 For the foregoing reasons, the Court DENIES plaintiff’s motion for attorneys’ fees and costs.

20 **IT IS SO ORDERED.**

21 DATED: February 13, 2009

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23 IRMA E. GONZALEZ, Chief Judge
24 United States District Court
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