UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NHU NGOC NGUYEN,

Plaintiff,

v.

NANCY BERRYHILL, Acting Commissioner of the Social Security Administration,[1]

Defendant.

Case No.: 10-CV-2349-LAB-MDD

ORDER GRANTING MOTION TO EXPEDITE; AND

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND COSTS

Introduction

This order was prepared in draft some time ago. But because of an administrative error, it was inadvertently not signed and docketed. The Court appreciates the parties' patience in this matter. Plaintiff's motion to expedite (Docket no. 14) is **GRANTED** with the issuance of this order.

On a joint motion from the parties, the Court entered final judgment against the Commissioner of Social Security, reversing the denial of Nhu Ngoc Nguyen's

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[1] Pursuant to Fed. R. Civ. P. 25(d), Nancy Berryhill, Acting Commissioner of the Social Security Administration, is substituted as Defendant.

disability claim. Nguyen now moves for $3,713.31[2] in attorney's fees and $550 in expenses under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). The Commissioner concedes the reasonableness of awarding Nguyen the $125 per hour statutory maximum, adjusted for inflation to $175.06,[3] for each hour reasonably billed on the case. (Dkt. No. 9-1 at 7:15.) However, she opposes Nguyen's request for a $50 per hour fees enhancement, and argues that only five of Nguyen's requested 16.5 hours were reasonably necessary to litigate the case. Additionally, the Commissioner argues that $200 of the costs requested were incurred for non-compensable activities. Upon review of the record and pleadings, the Court finds that a $50 per hour fees enhancement is appropriate here and that the hours requested were reasonable, and awards Nguyen $3,713.31 in attorney's fees and $350 in costs.

Discussion

Fees Enhancement

EAJA grants reasonable attorney's fees in cases against an official of the United States acting in her official capacity. It caps the hourly rate at $125, adjusted for inflation to $175.06, "unless the court determines that . . . a special factor, such as limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." A "special factor" enhancement requires "some distinctive knowledge or specialized skill needful for the litigation in question." *Pierce v. Underwood*, 487 U.S. 552, 572 (1988). The Ninth Circuit identified "three requirements [that] must be satisfied before the court can exceed the statutory limit. First, the attorney must possess distinctive knowledge and skills developed

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[2] In this order, the calculated figures are rounded to the nearest cent, resulting in the difference of a few cents between Nguyen's fee request of $3713.31 and the slightly higher figure that could be obtained by multiplying the rounded numbers. The Court will use Nguyen's figures.

[3] The Commissioner does not dispute that the $125 hourly rate is properly adjusted for inflation to $175.06.

through a practice specialty. Secondly, those distinctive skills must be needed in the litigation. Lastly, those skills must not be available elsewhere at the statutory rate." *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) (internal citations omitted). The burden is on Nguyen to show that she is entitled to the fees she seeks. *See Blum v. Stenson*, 465 U.S. 886, 896 n.11 (1984); *Harris v. Maricopa Cty. Sup. Ct.*, 631 F.3d 963, 971 (9th Cir. 2011).

Nguyen argues she is entitled to a $50 per hour fees enhancement because her attorney, Alexandra Tran Manbeck, specializes in social security law and refugee issues, and speaks fluent Vietnamese. (Dkt. No. 8-2 at 4:24–25.) There is no dispute that Manbeck's fluency in Vietnamese is the type of specialty contemplated by the Supreme Court. *See Pierce*, 487 U.S. at 572; *Le v. Apfel,* 99cv1929 (IEG) (Dkt. No. 26 at 6). Instead, the Commissioner argues that Manbeck's ability to speak Vietnamese was not necessary to this case other than in actual communications between the attorney and client, (Dkt. No. 9-1 at 6:26), and that Nguyen has not shown that suitable counsel was unavailable at the statutory maximum rate. (Dkt. No. 9-1 at 6:10–11 and 26.)

Vietnamese Fluency as a Necessary Specialized Skill

Knowledge of a foreign language is a specialized skill warranting fees enhancement under § 2412(d)(1)(A), "where such qualifications are necessary." *Pierce*, 487 U.S. at 572. "Effective communication between attorney and client is a fundamental requirement of the adversarial system." *Phan v. Astrue*, 07cv862 (AJB) (Dkt. No. 29 at 3:25–26). "It is axiomatic that communicating directly with one's client is a critical component of effective representation." *Le Vo v. Apfel*, 98cv2090 (TJW) (Dkt. No. 25 at 9:11–13). But the court looks to the facts of each case to determine what communication actually occurred. *Phu v. Barnhart*, 02cv2326 (Dkt. No. 39 at 6:14–15).

While some cases require frequent and ongoing communication between the lawyer and client, here Manbeck conferred with Nguyen for two hours: first to

review and discuss evidence, then to discuss the defendant's offer to remand. The assistance of someone fluent in Vietnamese was certainly needed during those two hours. But the bulk of the work in this case required Manbeck to review English language records, interview witnesses in English, and conduct English language legal research on U.S. federal law. (Dkt. No. 8-1 at 3.) None of those activities, nor the nine hours billed preparing and defending her request for attorney's fees, knowledge of Vietnamese.

One way to look at this situation is that the need was not so much for an attorney who was fluent in Vietnamese as it was for the services of an attorney, and of a Vietnamese interpreter. An attorney not fluent in Vietnamese could have litigated this case as competently using an interpreter, and included the interpreter's compensation as part of the costs. *See* 28 U.S.C. §1920(6) (providing that compensation of interpreters is taxable as costs). Manbeck saved costs by not hiring an interpreter. The enhancement she is requesting is the same amount that would be reasonable for an interpreter. For this reason, the Court finds that the assistance of someone fluent in Vietnamese was necessary to litigation for the two hours Manbeck was communicating with Nguyen.[4] That person could have been an interpreter, but in this case it was Manbeck herself.

If fluency in Vietnamese were the only basis on which Manbeck was seeking an enhancement, the Court would award that enhancement for two hours only. But as discussed below, there are other reasons a fee enhancement is appropriate. The Court therefore treats Manbeck's Vietnamese fluency as providing modest support for the requested enhancement.

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[4] General Order No. 527-A, signed August 03, 2011, increased the allowable interpreter fees from $45 to $50 per hour. Thus, Nguyen's requested $50 fees enhancement is reasonable.

Manbeck's Expertise in Social Security and Refugee Issues

Nguyen relies on *Pirus v. Bowen*, 869 F.2d 536 (9th Cir. 1989) to argue she is entitled to a fee enhancement based on Manbeck's expertise in social security law. (Dkt. No. 8-2 at 4:24-5:3.) However, *Pirus* was "no routine disability case[.]" *Pirus*, 869 F.2d at 542. Although the court in *Pirus* approved an enhancement in the hourly rate for an attorney who specialized in social security cases, that case involved a class action lawsuit within "a highly complex area of the Social Security Act." *Id*. Nothing in *Pirus* suggests that social security cases are always a matter of specialization for purposes of the EAJA.[5] *See also Pierce,* 487 U.S. at 572 (holding that an "extraordinary level of the general lawyerly knowledge and ability useful in all litigation" did not merit a fee enhancement).

By contrast, Nguyen's appeal of the denial of Social Security benefits was relatively straightforward. *See Costa v. Comm'r of Soc. Sec. Admin*., 690 F.3d 1132 (9th Cir. 2012). Nguyen's appeal challenged the Commissioner's decision based on her failure to consider and appropriately weigh the medical evidence and opinions provided by two medical doctors, and failure to consider the cumulative impact of physical and psychological impairments evidenced in their reports. (Compl. ¶¶ 13–29.) Likewise, the factual basis of the case was not uniquely complex. Nguyen sought benefits due to arthritis, leg pain, and post-traumatic stress syndrome. (Compl. ¶¶ 7–8.) Furthermore, the few hours spent litigating this case support the conclusion that this was not an especially complex social security case. (Dkt. No. 8-1 at 3.)

It is important to bear in mind that social security cases always require some expertise in Social Security law. The base rate takes into account the degree of

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[5] The Seventh, Eighth, and Tenth Circuits have explicitly rejected the notion that Social Security cases are always a matter of specialization for purposes of the EAJA, finding no conflict with *Pirus*. *Raines v. Shalala*, 44 F.3d 1355, 1361 (7th Cir. 1995); *Stockton v. Shalala*, 36 F.3d 49, 50 (8th Cir.1994); *Chynoweth v. Sullivan*, 920 F.2d 648, 650 (10th Cir.1990).

expertise required to litigate a Social Security appeal. If enhancements were routinely awarded, the base rate would almost never be used, and would be virtually meaningless.

But Manbeck's experience with refugees—specifically her knowledge of legal issues relating to traumatized persons—*was* needed to litigate this case. Nguyen's appeal relied, at least in part, on the Commissioner's "failure to consider the cumulative impact of [Nguyen's] multiple physical and mental impairments[,]" in violation of the Commissioner's implementing regulations. (Compl. ¶ 20.) Manbeck based this cause of action on Dr. James Grisolia's diagnosis and treatment of Nguyen for post-traumatic stress syndrome and associated refractory headaches, major depression, and mental impairments. (Compl. ¶¶ 7–8.) Litigating issues related to psychological impairment suffered after a traumatic experience requires specialization in issues arising in such situations. The Court therefore finds that all hours reasonably billed in this case required Manbeck's special knowledge of legal issues relating to refugees.

Qualified Counsel Unavailable at the Statutory Rate

Nguyen sufficiently established that qualified counsel was not available to litigate this case at the statutory maximum hourly rate. *See Nadarajah v. Holder*, 569 F.3d 906, 915 (9th Cir. 2009). An attorney's own declaration may satisfactorily demonstrate "that no suitable counsel would have taken on claimant's case at the statutory rate[.]" *Id.* No declaration from the client is required. In this case, the declaration needed to say, "with at least modest support," that Nguyen would be unable to find a legal expert in refugee issues for $125 per hour.[6] *Id*.

Manbeck declares under penalty of perjury, "I am entitled to an enhancement of $50 per hour for specialization in Social Security and refugee issues, and for the

[6] This rate would be adjusted upward to $175.06 to account for inflation. *See supra* n.2 and accompanying text.

fact that there is no attorney available to take on these types of cases involving Vietnamese refugees applying for SSI benefits in Southern California." (Dkt. No. 8-1 at 4.) The Court finds that this statement, while broad, suffices to meet the standard of "modest support." *Nadarajah*, 569 F.3d at 915. Nguyen's pleadings provide additional support for the Court's interpretation of Manbeck's sworn statement. The motion for attorney's fees reads,"[n]ot only does plaintiff's attorney have Vietnamese language skills which allow her to communicate directly with her clients, and other considerable experience in litigating Social Security cases for Vietnamese refugees, there is no other lawyer in the San Diego area who has the necessary skills or experience who would take the case for $125 an hour." (Dkt. No. 8-2 at 7:2–6.)

The Court finds Manbeck sufficiently established the unavailability of qualified counsel at the statutory maximum rate. Therefore, the Court also finds that all hours she reasonably billed qualify for the requested $50 per hour fees enhancement, a total rate of $225.06 per hour (2010 inflation adjusted rate of $175.06 + fees enhancement of $50).

Hours Reasonably Expended

Manbeck claims she spent 16.5 hours over the course of six months litigating this routine disability case. It appears that the work she completed was consistent with the number of hours billed.[7] Manbeck had to review files and prepare a complaint, negotiate the remand of the case, and prepare her request for attorney's fees under EAJA. The Commissioner challenges the reasonableness of hours billed for each of these actions and argues that only five hours were reasonably expended in this case.

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[7] This total includes 13.5 hours requested in her initial petition, along with an additional three hours spent composing Nguyen's fees request reply. (See Dkt. No. 11 at 1.) The Court presumes that the Commissioner would challenge these three additional hours as unreasonable for the purposes of deciding this motion.

First, the Commissioner argues that 5.5 hours spent reviewing records and preparing the complaint was unreasonable. She alleges that Nguyen's complaint was unnecessarily lengthy, (Dkt. No. 9-1 at 3:23), and that Manbeck should have been familiar with the record because she represented Nguyen during the administrative process. Manbeck's itemized activity descriptions indicate reasonably necessary work accomplished in a reasonable number of hours. (Dkt. No. 8-1 at 3.) The fact that the Commissioner ultimately moved to remand the case "does not make it unreasonable for Ms. Manbeck to have spent time on [multiple] issues[.]" *Phan v. Astrue*, 07cv862 (JLS) (Dkt. No. 8-3, 6:22–23). On the contrary, it was the strength of the complaint that convinced the Commissioner, "prior to any briefing . . . that the administrative law judge's decision could not be defended[,]" and that it "required remand." (Dkt. No. 9-1, 3:2–4.) Additionally, regardless of whether Manbeck represented Nguyen during administrative proceedings, an appeal in a federal court reasonably required Manbeck to research distinct legal issues, review evidence, and confirm witness testimony. The Court finds reasonable the 5.5 hours expended prior to the complaint's filing.

Second, the Commissioner argues that two hours billed negotiating remand was unreasonable because Manbeck merely "received and read the motion and added one sentence." (Dkt. No. 9-1 at 4:3.) The Court disagrees. Both parties agree that the Commissioner's counsel unilaterally prepared a motion for remand and sent it to Manbeck. (Dkt. No. 9-1 at 4:1-5.) Manbeck reviewed the motion and "added one sentence," which the Commissioner's attorney altered, and which Manbeck again altered "to the satisfaction of both parties." *Id*. The fact that Manbeck added and then changed only one sentence does not mean that the remainder of the pleading did not require her careful attention. Additionally, Manbeck says her client was ill and "needed lengthy explanations to convince her of the need to accept the government's offer to settle." (Dkt. No. 10 at 6.) Under these circumstances, two hours was reasonable.

Third, the Commissioner challenges the nine hours spent on a motion and reply brief for attorney's fees. She does not deny that time spent on a fees application is compensable, s*ee Clark v. City of Los Angeles*, 803 F.2d 987, 992 (9th Cir. 1986), but she points out that Manbeck's motion is substantially similar to several Manbeck has used in the past and questions the six hours "allegedly spent drafting and preparing Plaintiff's EAJA application." (Dkt. No. 9-1 at 4:15.) She made the same argument in *Phan v. Astrue,* another benefits denial appeal decided against the Commissioner in this District. In that case the court explained,

> even if some of the EAJA motion did not need to be drafted anew, it was not unreasonable for counsel to invest five hours to ensure that the motion completely set forth Plaintiff's case for EAJA fees. When using "boilerplate", counsel must still customize the work to the specifics of the case at hand and conduct research to ensure the continuing validity of case law.

Phan v. Astrue, 07cv862 (JLS) (Dkt. No. 29 at 7:10-14). In this case, Nguyen argues convincingly that preparing the motion for attorney's fees without using prior pleadings would reasonably have taken longer than six hours. (Dkt. No. 10 at 9.) The Court finds it was reasonable for Manbeck to expend six hours to prepare the motion, using an exemplar.

Manbeck spent an additional three hours drafting the EAJA reply brief. Given her need to carefully review the Commissioner's ten-page opposition, research the cases cited therein, and draft her nine-page reply, the Court finds the additional three hours was reasonable. Therefore, the Court finds all of the hours requested by Nguyen to be reasonably necessary to the litigation of this case and awards Nguyen $3,713.31 (16.5 hours times the enhanced rate) in attorney's fees.

C. Costs

In addition to attorney's fees, EAJA provides for "a judgment for costs, as enumerated in section 1920 of this title[.]" Section 1920 sets forth the following taxable court costs:

> 1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920. An applicant for reimbursement of expenses bears the burden to produce evidence that permits the court to determine what expenses were incurred in the litigation, and why they were incurred. *See Loranger v. Stierheim*, 10 F.3d 776, 784 (11th Cir.1994). An attorney's own sworn affidavit provides the necessary proof that costs were in fact incurred. *United States v. Adkinson*, 256 F. Supp. 2d 1297, 1320 (N.D. Fla. 2003) *aff'd*, 360 F.3d 1257 (11th Cir. 2004).

Manbeck states under penalty of perjury that she incurred $550 in costs while litigating this case. She spent "$350 in filing fees with the district court, and filing services of $100, and service of process of $100." (Dkt. No. 8-1 at 4.) As set forth in § 1920, a plaintiff's cost of service is not expressly taxed by EAJA. Likewise, cost of service is not an element of attorney's fees. *Chen v. Slattery*, 842 F. Supp. 597, 600 (D. D.C. 1994). Because this Court lacks power to shift expenses that fall into neither category, *see W. Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 86 (1991), plaintiff cannot recover the cost of service. Therefore, the Court awards Nguyen $350 for the cost of filing fees with the district court, but not the $200 she requests for service of process.

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Conclusion

For these reasons, the Court **GRANTS** in part Nguyen's motion for attorney's fees. The Court **AWARDS** a total of $4,063.31 for combined attorney's fees and costs.

IT IS SO ORDERED.

Dated: July 14, 2017

Hon. Larry Alan Burns
United States District Judge