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

NICHOLAUS KOZUB,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of the Social Security
Administration,
Defendant.

Case No.: 15-CV-2564 W (DHB)

**ORDER GRANTING APPLICATION
FOR AWARD OF ATTORNEYS'
FEES UNDER THE EQUAL ACCESS
TO JUSTICE ACT [DOC. 27]**

Pending before the Court is Plaintiff's application for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1). [Doc. 27.] The Court decides the matter without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons that follow, the Court **GRANTS** Plaintiff's application.

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1 **I. BACKGROUND**

2 On March 26, 2011, Plaintiff Nicholas Lee Kozub filed an application for
3 Supplemental Security Income alleging disability beginning May 15, 2007. (*See Report*
4 *& Recommendation (“R&R”)* [Doc. 22] 2:14–17.) Kozub’s claims were initially denied
5 on October 24, 2011, and upon reconsideration on April 2, 2012. (*See id.* [Doc. 22]
6 2:16–17.) On June 1, 2012, Kozub requested a hearing before an Administrative Law
7 Judge (“ALJ”), which took place on January 23, 2014. (*See id.* [Doc. 22] 2:17–20.) ALJ
8 Elizabeth R. Lishner decided that Kozub was not disabled within the meaning of the
9 Social Security Act and denied Kozub’s application on April 29, 2014. (*See id.* [Doc. 22]
10 2:18–20.) The Appeals Council denied Kozub’s request for review on October 5, 2015.
11 (*Id.* [Doc. 22] 3:10–12.)

12 On November 13, 2015, Mr. Kozub filed a Complaint seeking judicial review of
13 the adverse administrative decision. (*See Compl.* [Doc. 1].) He filed a motion for
14 summary judgment on May 6, 2016. (*See Pl.’s MSJ* [Doc. 13].) Defendant filed a cross-
15 motion for summary judgment on July 21, 2016. (*See Def.’s MSJ* [Doc. 18].) On
16 December 13, 2016, United States Magistrate Judge Louisa S. Porter issued a Report and
17 Recommendation (“R&R”), which recommended that Plaintiff’s motion for summary
18 judgment be granted, that Defendant’s motion for summary judgment be denied, and that
19 the case be remanded for further proceedings. (*See R&R* [Doc. 22].) Defendant did not
20 object to the R&R. On January 9, 2016, the Court adopted Judge Porter’s R&R in its
21 entirety and ordered the case remanded for further proceedings. (*Jan. 9, 2017 Order*
22 [Doc. 23].)

23 On March 16, 2017, Plaintiff filed the pending application for attorneys’ fees.
24 (*Pl.’s App.* [Doc. 27].) Plaintiff seeks 45.7 hours of attorneys’ fees under the Equal
25 Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d)(1), at a rate of \$190.28/hour for
26 work completed in 2015 and \$192.68/hour for work completed in 2016—an amount
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1 totaling \$8,782.91.¹ (*See Angelo Decl.* [Doc. 27-2] ¶ 7; *Reply* [Doc. 30] 6:3–6.) Despite
2 the fact that it did not object to the R&R, Defendant opposes, contending that Plaintiff is
3 not entitled to fees at all. (*Def.’s Opp’n* [Doc. 29-1] 3:7–6:18.) Alternatively, it contends
4 that Plaintiff should only be compensated for 18.1 hours of attorney work at the same
5 rate, for \$3,479 in total. (*Id.* [Doc. 29-1] 6:19–10:4.)

7 **II. LEGAL STANDARD**

8 **Except as otherwise specifically provided by statute, a court shall award to a**
9 **prevailing party other than the United States fees and other expenses, in addition to**
10 **any costs awarded pursuant to subsection (a), incurred by that party in any civil**
11 **action (other than cases sounding in tort), including proceedings for judicial review**
12 **of agency action, brought by or against the United States in any court having**
13 **jurisdiction of that action, unless the court finds that the position of the United**
14 **States was substantially justified or that special circumstances make an award**
15 **unjust.**

16 28 U.S.C. § 2412(d)(1)(A).

17 To the extent that Plaintiff is entitled to fees under the EAJA, such fees much be
18 “reasonable.” *See* 28 U.S.C. § 2412(d)(2)(A). A reasonable attorneys’ fee is determined
19 by multiplying a reasonable hourly rate by the number of hours reasonably expended on
20 the litigation. *See McGrath v. County of Nevada*, 67 F.3d 248, 252 (9th Cir. 1995). The
21 product of those two figures, known as a lodestar, must then be adjusted downward by
22 any claimed hours that were not reasonably expended. *See id.* “Ultimately, a

23 ¹ Plaintiff initially requested compensation for 45.7 hours of attorney time in connection with this
24 matter. This comprises 9.4 hours in 2015, 32.7 hours in 2016, and 0.9 hours in 2017. (*See Angelo Decl.*
25 [Doc. 27-2] ¶ 7.) As discussed in Section III.B., *infra*, hours in 2015 are compensated at the rate of
26 \$190.28, and hours in 2016–17 at the rate of \$192.68. (*See Statutory Maximum EAJA Rates* [Doc. 27-2,
27 Exh. A].) In sum, Plaintiff’s initial request was \$8,782.90. (*Angelo Decl.* [Doc. 27-2] ¶ 7; *Pl.’s App.*
28 [Doc. 27-1] 6:15–18.)

29 In the reply, Plaintiff’s attorney recognizes a mathematical error in his initial calculations. (*See Reply*
30 [Doc. 30] 1:27–2:3.) His request for 9.4 hours in 2015 remains the same, but he alters his request for
31 2016 hours downward by 4.4 hours to 28.3 total, and he eliminates his original request for 2017. (*Id.*)
32 He then seeks an additional 5.3 hours for the preparation of the reply brief in 2017—in short, the total
33 request increases with the reply brief by one cent to \$8,782.91. (*Id.*)

1 ‘reasonable’ number of hours equals ‘[t]he number of hours . . . [which] could reasonably
2 have been billed to a private client.’ ” Gonzalez v. City of Maywood, 729 F.3d 1196,
3 1202 (9th Cir. 2013) (quoting Moreno v. City of Sacramento, 534 F.3d 1106, 1111 (9th
4 Cir. 2008)).

6 **III. DISCUSSION**

7 **A. The Government’s Position was Not Substantially Justified.**

8 The government contends that the Plaintiff is not entitled to attorneys’ fees at all
9 because it was substantially justified in defending this case. (*See Def.’s Opp’n*
10 [Doc. 29-1] 1:8–6:18.)

11 A position is “substantially justified” if it is reasonable in law and fact. See Pierce
12 v. Underwood, 487 U.S. 552, 565 (1988). “The government has the burden of
13 demonstrating that its position was substantially justified.” Kali v. Bowen, 854 F.2d 329,
14 332 (9th Cir. 1988). “[Its] failure to prevail does not raise a presumption that its position
15 was not substantially justified.” Id. However, “it ‘will be only a decidedly unusual case
16 in which there is substantial justification under the EAJA even though the agency’s
17 decision was reversed as lacking in reasonable, substantial and probative evidence in the
18 record.’ ” Campbell v. Astrue, 736 F.3d 867, 868 (9th Cir. 2013) (quoting Thangaraja v.
19 Gonzales, 428 F.3d 870, 874 (9th Cir. 2005)). The Court looks to the totality of the
20 circumstances, analyzing both the government’s asserted position in the trial court action
21 and the nature of the underlying administrative action. See Kali, 854 F.2d at 332.

22 Judge Porter’s R&R noted three legal errors in the ALJ’s decision: (1) the ALJ
23 failed to determine whether Plaintiff’s impairment manifested prior to age 22; (2) the
24 ALJ left it unclear as to whether she rejected Plaintiff’s IQ score; and (3) the ALJ did not
25 consider whether Plaintiff’s anxiety imposes a significant work-related limitation. (*R&R*
26 [Doc. 22] 7:3–9:26.) The government did not object to the R&R. (*See Jan. 9, 2017*
27 *Order* [Doc. 23].)

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1 The government offers Campbell,² 736 F.3d at 867, for the proposition that not
2 every Social Security remand should result in a fees award. (*Def.’s Mot.* [Doc. 29-1]
3 2:15–24.) That is a correct statement of the law, but it is beside the point here.

4 In Campbell, the ALJ had to make a determination as to whether that claimant had
5 been disabled in the past, during a period in which there was an absence of records to
6 examine. See id. at 868–69. “The ALJ . . . had to consider circumstantial evidence that
7 [the claimant] cared for her children and worked during that time, which justified doubts
8 that [she] was fully disabled.” Id. “While the ALJ erred in her determination, . . . the
9 fact that she was trying to extrapolate what Campbell’s injury may have been in 1996
10 from other evidence regarding a disease which may worsen at varying rates [led the
11 court] to conclude that the ALJ’s decision was ‘substantially justified.’ ” Id. (quoting 28
12 U.S.C. § 2412(d)(1)(A)). “The difference between examining current medical records to
13 make a decision about a present condition and extrapolating from medical records to
14 make a decision about a past condition distinguishes this case from [precedent].” The
15 Ninth Circuit held that case one of the “unusual” cases in which attorneys’ fees should
16 not be awarded under the EAJA, despite circumstances warranting remand. See id. at
17 869.

18 Here, as Magistrate Judge Porter pointed out in the R&R—to which the
19 Government did not object—the ALJ committed three legal errors in analyzing the
20 present existence of an intellectual disability. (*See R&R* [Doc. 22].) First, the ALJ did
21 not make a specific finding as to whether Plaintiff’s IQ deficits began prior to age 22.
22 (*See R&R* [Doc. 22] 7:3–26.) Second, the ALJ left it unclear as to whether she rejected
23 Plaintiff’s IQ score of 65. (*See id.* [Doc. 22] 8.) Third and finally, the ALJ did not
24 consider whether Plaintiff’s anxiety was an additional and significant work-related
25 limitation. (*See id.* [Doc. 22] 9.) These errors required no guesswork or extrapolation.
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28 ² It erroneously cites the case as Campbell v. Colvin. (*Def.’s Opp’n* [Doc. 29-1] 2:17.)

1 They related directly to a present condition. They are not analogous to what was required
2 of the ALJ in Campbell. See 736 F.3d at 868–69.

3 At this point, nearly four months have passed since the government declined to
4 object to the adverse R&R, which then became the order of the Court. (See *Jan. 9, 2017*
5 *Order* [Doc. 23].) Despite the failure to object, the government now opposes Plaintiff’s
6 fees motion without offering any persuasive reasoning as to how or why its position was
7 substantially justified in light of Judge Porter’s analysis. (*Def.’s Opp’n* [Doc. 29-1] 4:26–
8 5:17 (asserting that Plaintiff “never alleged that he had an intellectual disability at any
9 stage of the administrative proceedings”—an issue mentioned in the R&R and discussed
10 in depth in the parties’ preceding briefs³); 5:18–20 (“[T]he ALJ properly found that
11 Plaintiff did not have a valid IQ score of 60–70 and a physical or mental impairment
12 imposing and additional and significant work-related limitation of function.”⁴); 5:28–6:1
13 (“[T]he ALJ properly found that Plaintiff was not disabled under the Listings based on
14 the overall record”).) These issues have already been litigated.

15 This is not the “decidedly unusual case in which there is substantial justification
16 under the EAJA, even though the agency’s decision was reversed as lacking in
17 reasonable, substantial, and probative evidence in the record.” See Campbell, 736 F.3d at
18 868 (quoting Thangaraja, 428 F.3d at 874). Defendant does not show that its position
19 was substantially justified so as to preclude an award of fees pursuant to the EAJA. See
20 Pierce, 487 U.S. at 565; Kali, 854 F.3d at 332.

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25 ³ Ninth Circuit law is clear that the Court is constrained to review the reasons for an ALJ’s decision.
26 Connett v. Barnhart, 340 F.3d 871, 874 (9th Cir. 2003). As the ALJ addressed intellectual disability per
27 Listing 12.05 in her decision despite Plaintiff’s apparent failure to raise the issue, that failure to raise the
28 issue is, by definition, not a reason for the ALJ’s decision and is not reviewable on appeal.

⁴ Judge Porter addressed each of these respective issues in her R&R. (See *R&R* [Doc. 22] 8:1–28; 9:1–
26.)

1 **B. Billing Rate**

2 Pursuant to the EAJA rate and Ninth Circuit Rule 39-1.6, Plaintiff seeks to be
3 compensated at an hourly rate of \$190.28 for hours in 2015 and \$192.68 for hours in
4 2016. (*See Pl. 's Reply* [Doc. 30] 1:27–28; *Statutory Maximum EAJA Rates* [Doc. 27-2,
5 Exh. A].) Defendant also uses \$190.28 and \$192.68 in its calculation of Plaintiff's billing
6 rate. (*See Def. 's Opp'n* [Doc. 29-1] 10:3–4.) The parties do not appear to dispute that
7 this is a reasonable rate for Mr. Angelo's work. \$190.28/hour for work completed in
8 2015 and \$192.68 for work completed in 2016 are reasonable hourly rates. See 28 U.S.C.
9 § 2412(d)(2)(A).

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11 **C. Hours of Work Performed**

12 Plaintiff seeks compensation for 9.4 hours of attorney work in 2015, 28.3 hours in
13 2016, and 5.3 hours in 2017. (*See Pl. 's Reply* [Doc. 30] 1:27–28, 2:1–2.)

14 Factors in determining how much time an attorney could reasonably spend on a
15 particular case include the complexity of the legal issue, the procedural history, and the
16 size of the record. See *Costa v. Comm'r of SSA*, 690 F.3d 1132, 1136 (9th Cir. 2012).

17 “[S]ocial security disability cases are often highly fact-intensive and require
18 careful review of the administrative record, including complex medical evidence.” Costa,
19 690 F.3d at 1134 n.1. This case was no exception. The administrative record was
20 complex, containing over 350 pages. (*See A.R.* [Docs. 10–11].) Plaintiff's case
21 necessitated an in-depth review of these documents. In addition, his attorney prepared,
22 briefed, and filed a motion for summary judgment, a reply to the government's cross-
23 motion for summary judgment, the pending motion for EAJA attorneys' fees, and a reply
24 to the government's objection to the motion for attorneys' fees. [Docs. 13, 20, 27, 30.]

25 The government seeks to cut Plaintiffs' fees so dramatically that he would be
26 compensated for less than 40% of his requested amount—only “18.1 hours of attorney
27 time.” (*See Def. 's Opp'n* [Doc. 29-1] 6:19–10:4.) This portion of the opposition lacks a
28 cogent line of reasoning in support of this drastic request. In essence, the government

1 appears to contend that “Plaintiff’s counsel is an experienced practitioner, well[-]versed
2 in Social Security matters,” and as a result of being an accomplished attorney he should
3 not have spent 28.1 hours reviewing a 351-page administrative record and briefing both
4 the successful motion for summary judgment and the now-pending EAJA fees motion.
5 (*Id.*) Instead, according to the government, he should have worked over twice as fast.
6 This is without merit.

7 45.7 hours in total reflects “the time [that] could reasonably have been billed to a
8 private client” for this work. See Moreno, 534 F.3d at 1111. Multiplied by an hourly
9 rate of \$190.28 for the 9.4 hours completed in 2015 and \$192.68 for the 36.3 hours
10 completed in 2016, the total amount is \$8,782.91. See McGrath, 67 F.3d at 252. There is
11 no good reason to depart from this figure.

12 Mr. Kozub is entitled to \$8,782.91 in attorneys’ fees. See 28 U.S.C. §
13 412(d)(1)(A).

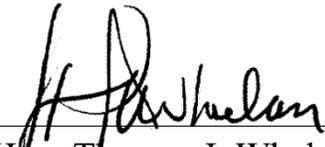
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15 **IV. CONCLUSION & ORDER**

16 For the foregoing reasons, the Court **GRANTS** Plaintiff’s application for
17 attorneys’ fees. [Doc. 27.]

18 Mr. Kozub is awarded attorneys’ fees in the amount of \$8,782.91.

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20 **IT IS SO ORDERED.**

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22 Dated: June 21, 2017

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25 Hon. Thomas J. Whelan
26 United States District Judge
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