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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 KHENE KEOVONGSA,
12 Plaintiff,
13 v.
14 CAROLYN W. COLVIN, Acting
15 Commissioner of Social Security,
16 Defendant.
17

Case No.: 3:16-CV-00842-BTM-NLS

**ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
ATTORNEY'S FEES AND
GRANTING REQUEST FOR
JUDICIAL NOTICE**

[ECF Nos. 24, 30]

18 Pending before for the Court is Plaintiff Khene Keovongsa's ("Plaintiff")
19 motion for attorney's fees pursuant to the Equal Access to Justice Act ("EAJA"),
20 (ECF No. 24), and request for judicial notice, (ECF No. 30). For the reasons
21 discussed below, the Court grants in part Plaintiff's motion and grants the request
22 for judicial notice.

23 **I. BACKGROUND**

24 On April 7, 2016, pursuant to 42 U.S.C. § 405(g), Plaintiff filed this action
25 seeking review of the Commissioner's final decision to deny her social security
26 benefits. (ECF No. 1.) On September 29, 2017, the Court concluded that the
27 Administrative Law Judge ("ALJ") lacked substantial evidence in finding that
28 Plaintiff did not suffer from a medically severe impairment and remanded the

1 case for further administrative proceedings. (ECF No. 20.)

2 **II. STANDARD**

3 The EAJA provides in part that “a court shall award to a prevailing party
4 other than the United States fees and other expenses . . . unless the court finds
5 that the position of the United States was substantially justified or that special
6 circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). The parties
7 do not dispute that Plaintiff is the prevailing party in this action or that the
8 government’s position was not substantially justified.

9 Plaintiff’s attorney, Alexandra Manbeck, requests compensation for a total
10 of 81.5 hours and argues that a \$50 enhancement is warranted in this case
11 because of her specialized expertise. Ms. Manbeck also requests \$50 for costs.
12 Defendant objects to the proposed enhancement and disputes some of the
13 proposed hours.

14 **A. Reasonable Hours Expended**

15 Plaintiff has submitted a declaration from her attorney, Ms. Manbeck,
16 itemizing the hours spent on this case. Ms. Manbeck’s declaration states that
17 she spent a total of 81.5 hours on this case, 74 hours on work performed before
18 filing the reply brief and an additional 7.5 for preparing the reply brief and
19 communicating with Plaintiff’s family. Defendant disputes numerous entries as
20 either excessive, duplicative, or otherwise not properly compensable under the
21 EAJA.

22 An award of attorney’s fees under the EAJA must be reasonable. 28
23 U.S.C. § 2412(d)(2)(A). “The most useful starting point for determining the
24 amount of a reasonable fee is the number of hours reasonably expended on the
25 litigation multiplied by a reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S.
26 424, 433 (1983). Hours that are excessive, redundant, or otherwise unnecessary
27 should be excluded from an award of fees. *Id.* at 434.

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1 **1. Claims IV and V**

2 Defendant takes issue with the hours Plaintiff’s counsel spent litigating
3 claims four and five, which were dismissed by the Court after granting
4 Defendant’s motion to dismiss. Defendant urges the Court to reduce the hours
5 spent on the Complaint or in the alternative, exclude any award for hours spent
6 defending the claims against the motion to dismiss. Plaintiff, on the other hand,
7 argues that good litigation strategy required Ms. Manbeck to raise every possible
8 cause of action.

9 When “a plaintiff has achieved only partial or limited success, the product of
10 hours reasonably expended on the litigation as a whole times a reasonable rate
11 may be an excessive amount.” *Hensley*, 461 U.S. at 436. Indeed, “[t]he extent
12 of a plaintiff’s success is a crucial factor in determining the proper amount of an
13 award of attorney’s fees” *Id.* at 440. In cases of partial success, the Ninth
14 Circuit requires district courts to follow a two-step process which is referred to as
15 the “*Hensley* analysis.” *Ibrahim v. Dep’t of Homeland Sec.*, Nos. 14-16161, 14-
16 17272, 2019 WL 73988, at *19 (9th Cir. Jan. 2, 2019) (en banc). “[F]irst, the
17 court must determine whether “the plaintiff fail[ed] to prevail on claims that were
18 unrelated to the claims on which he succeeded.” *Id.* (citing *Hensley*, 461 U.S. at
19 434). “This inquiry rests on whether the ‘related claims involve a common core of
20 facts or are based on related legal theories.’” *Id.* (quoting *Webb v. Sloan*, 330
21 F.3d 1158, 1168 (9th Cir. 2003)). Time spent on unsuccessful but related claims
22 is to be included in the lodestar, but “[h]ours expended on unrelated,
23 unsuccessful claims should not be included in an award of fees.” *Webb*, 330
24 F.3d at 1168.

25 The second step requires the district court to consider “whether the plaintiff
26 achieved a level of success that makes the hours reasonably expended a
27 satisfactory basis for making a fee award.” *Ibrahim*, 2019 WL 73988, at *19
28 (internal quotations and citation omitted). At this step, a district court may apply

1 a downward adjustment by “award[ing] only that amount of fees that is
2 reasonable in relation to the results obtained.” *Hensley*, 461 U.S. at 440,
3 including hours spent on unsuccessful claims that could not be isolated or
4 severed cleanly from the whole in the context of the first *Hensley* step, *Webb*,
5 330 F.3d at 1169.

6 The Court agrees with Defendant that Plaintiff was not successful on her
7 fourth and fifth claims. Plaintiff filed a Complaint alleging the following claims: (1)
8 the ALJ erred by failing to consider Plaintiff’s disabling pain; (2) the ALJ erred by
9 failing to consider Plaintiff’s multiple physical and mental impairments; (3) the
10 ALJ erred by failing to give Plaintiff’s treating physicians’ opinions the appropriate
11 weight; (4) the ALJ violated Plaintiff’s right to due process by failing to notify her
12 of the denial; and (5) the ALJ violated the Administrative Procedure Act (“APA”)
13 by failing to afford Plaintiff a full and fair hearing. Defendants moved to dismiss
14 claims four and five for mootness and claim five for lack of subject matter
15 jurisdiction. The Court granted Defendant’s motion to dismiss, holding that claim
16 four was moot and that the Court lacked subject matter jurisdiction over claim
17 five. Thus, Plaintiff did not prevail on these claims.

18 Under the first *Hensley* step, the Court must determine whether these
19 claims are related to the claims on which she succeeded. *Ibrahim*, 2019 WL
20 73988, at *19. This requires the Court to decide whether the successful claims
21 and unsuccessful claims “involve a common core of facts or are based on related
22 legal theories.” *Id.* “[C]laims are unrelated if the successful and unsuccessful
23 claims are distinctly different both legally and factually.” *Webb*, 330 F.3d at 1169
24 (internal citations omitted). Here, Plaintiff’s successful claims are unrelated to
25 claims four and five as they did not require the Court to determine whether
26 Plaintiff received a fair hearing or whether her due process rights were violated.
27 Accordingly, claims four and five are not related to her successful claims.

28 Having determined that the unsuccessful claims are unrelated, the Court

1 must next look to whether the claims “were entirely distinct and separate from the
2 successful claims.” *Webb*, 330 F.3d at 1169. Based on the declaration
3 submitted by Ms. Manbeck, it is not possible to isolate the time she devoted on
4 claims four and five in preparing the Complaint. However, it is possible to isolate
5 the hours Ms. Manbeck spent on defending Defendant’s motion to dismiss given
6 that only claims four and five were at issue. Therefore, the Court will exclude
7 8.75 hours from the award.

8 **2. Clerical Tasks**

9 Defendant also challenges the hours spent on “clerical tasks,” arguing that
10 they are not compensable under the EAJA. Tasks that are clerical in nature are
11 not compensable as attorney’s fees under the EAJA. *Missouri v. Jenkins*, 491
12 U.S. 274, 288 n.10 (1989). Courts have routinely found that time spent on
13 electronically filing documents is not compensable under the EAJA. *Jones v.*
14 *Metro. Life Ins. Co.*, 845 F. Supp. 2d 1016, 1027 (N.D. Cal. 2012); *Clemons v.*
15 *Berryhil*, No. 16-cv-00981-JLT, 2017 WL 3581738, at *4 (E.D. Cal. Aug. 18,
16 2017). Similarly, time spent on preparing summonses and cover sheets is
17 considered clerical in nature. *Uhl v. Colvin*, 13-cv-1303-SMS, 2016 WL 3361800,
18 at *2 (E.D. Cal. June 16, 2016). The Court agrees that the entries for
19 April 7 and 25, 2016 are clerical in nature. Therefore, the Court will reduce the
20 total time by .75 hours.

21 **3. Briefing**

22 Lastly, Defendant argues that Plaintiff’s counsel spent an excessive
23 amount of time on the motion for summary judgment brief and EAJA petition
24 given Ms. Manbeck’s experience with litigating social security cases. The
25 Administrative Record was 375 pages long and contained the opinions of at least
26 ten doctors. Plaintiff was tasked with arguing that the ALJ’s decision regarding
27 both her mental and physical impairments was not supported by substantial
28 evidence. The Court does not find the time spent on preparing the briefs to be

1 unreasonable. Thus, the Court will not reduce the hours any further.

2 **B. Enhanced Hourly Rate**

3 Plaintiff proposes that an hourly enhancement rate of \$50 is appropriate,
4 while Defendant argues that the statutory maximum, with the cost of living
5 adjustment, should control. The EAJA provides in part that:

6 The amount of fees awarded under this subsection shall be based
7 upon prevailing market rates for the kind and quality of the services
8 furnished, except that . . . attorney fees shall not be awarded in
9 excess of \$125 per hour unless the court determines that an increase
10 in the cost of living or a special factor, such as the limited availability
of qualified attorneys for the proceedings involved, justifies a higher
fee.

11 28 U.S.C. § 2412(d)(2)(A). The adjusted hourly rate in the Ninth Circuit, taking
12 into account increases in cost of living, was \$192.68 in 2016, \$196.79 in 2017,
13 and \$201.60 in 2018.¹

14 Hourly rate enhancements based upon limited availability of qualified
15 attorneys are typically appropriate “where the attorneys possess ‘distinctive
16 knowledge’ and ‘specialized skill’ that was ‘needful to the litigation in question’
17 and ‘not available elsewhere at the statutory rate.’” *Nadarajah v. Holder*, 569
18 F.3d 906, 912 (9th Cir. 2009) (quoting *Thangaraja v. Gonzales*, 428 F.3d 870,
19 876 (9th Cir. 2005)).

20 Plaintiff argues that an increase in hourly rate is appropriate because of
21 Ms. Manbeck’s specialized expertise in the Vietnamese language, social security
22 law, and experience in assisting immigrants and refugees from South East Asia.
23 Without Ms. Manbeck, Plaintiff contends she would have been unable to present
24 her case because there was no attorney in San Diego who was willing to
25 represent her without requesting advanced payment of legal fees.

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28 ¹ The adjusted EAJA rates for the Ninth Circuit from 2009 to the present are available at
www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last visited January 28, 2019).

1 Defendant concedes that Ms. Manbeck is fluent in Vietnamese but argues
2 that these language skills were not necessary for her work except when speaking
3 with her client. Defendant, therefore, urges that if the Court is inclined to award
4 an enhancement, it should only do so for time spent communicating with Plaintiff.
5 There is no question that foreign language fluency alone may constitute a
6 specialty that warrants an enhancement. *Pierce v. Underwood*, 487 U.S. 552,
7 572 (1988) (“Examples of [some distinctive knowledge or specialized skill] would
8 be an identifiable practice specialty such as patent law, or knowledge of foreign
9 law or language.”). However, here, it is unclear how Ms. Manbeck’s fluency in
10 Vietnamese was critical to this case. Plaintiff is a Laotian refugee whose
11 preferred language is Laotian. (ECF No. 9, Administrative Record, 179.) Neither
12 Plaintiff nor Ms. Manbeck asserts that her fluency in Vietnamese was used to
13 communicate with Plaintiff. In fact, Plaintiff asserts that Ms. Manbeck
14 communicated with Plaintiff’s relatives to properly represent her. (Pl.’s Reply,
15 ECF No. 27, 4.) Therefore, Ms. Manbeck’s language skills offered her no special
16 advantage in the instant case. See *Nayab v. Astrue*, No. 07cv0733 JM, 2008
17 U.S. Dist. LEXIS 86927, at *17 (Oct. 28, 2008) (finding that the attorney’s fluency
18 in Vietnamese was not necessary to the case where the plaintiff was from
19 Afghanistan and spoke Farsi).

20 Plaintiff also argues that Ms. Manbeck’s expertise in social security law and
21 in working with refugees warrants an enhancement. While the Ninth Circuit in
22 *Pirus v. Bowen*, 868 F.2d 536, 546 (9th Cir. 1989) approved a fee enhancement
23 for an attorney that specialized in social security cases, that case “involved a
24 highly complex area of the Social Security Act” that “required substantial
25 knowledge of the legislative history of the ‘widow’s insurance’ provisions of the
26 Act.” By Contrast, Plaintiff’s case was not a highly complex case and thus her
27 knowledge in social security law alone does not warrant an enhancement.

28 Nevertheless, the Court finds that her expertise in social security law

1 coupled with her experience with South East Asian refugees was indispensable
2 to representing Plaintiff. Plaintiff in part appealed the Commissioner's failure to
3 consider her psychological impairment. Dr. Henderson and Dr. Lessner
4 diagnosed her with severe depression, post-traumatic stress disorder, and bi-
5 polar disorder. Dr. Engelhorn, on the other hand, attributed her impairments to
6 "acculturation problems," a diagnosis the ALJ credited. Ms. Manbeck's
7 experience with refugee culture was, therefore, crucial to understanding Plaintiff's
8 psychological impairment and successfully advocating on her behalf.

9 Moreover, Plaintiff demonstrates that she could not have received
10 specialized representation elsewhere at the statutory rate. *See Nadarajah v.*
11 *Holder*, 569 F.3d 906, 915 (9th Cir. 2009) (citing *Atlantic Fish Spotters Ass'n v.*
12 *Daley*, 205 F.3d 488, 493 (1st Cir. 2000) (noting that a declaration stating with "at
13 least modest support" that legal assistance at the statutory rate was unavailable
14 to plaintiff was sufficient showing that no other counsel would represent plaintiff
15 at the statutory rate). In her declaration submitted as part of her motion for
16 attorney's fees, Plaintiff states that after presenting her case to "numerous law
17 firms specializing in social security law," no law firm agreed to represent her
18 without advanced payment, which Plaintiff could not afford. (ECF. No. 24-3, ¶1,
19 ¶4.) Plaintiff claims that Ms. Manbeck was the only attorney who agreed to
20 represent her without requesting advanced payment. (Id. at ¶4.) Moreover,
21 Plaintiff states that she "lost five years of benefits during the period of 2008 to
22 2012 when [she] was unable to find legal representation." (Id.) Thus, Plaintiff
23 sufficiently establishes that qualified counsel was not available to litigate this
24 case at the statutory maximum hourly rate.

25 Read together, Plaintiff's and Ms. Manbeck's declarations support the
26 request for a rate enhancement. *See Nadarajah*, 569 F.3d at 915. The Court is
27 convinced that few attorneys possess the distinctive knowledge and specialized
28 skill required to advocate on behalf of refugee clients. The Court also agrees

1 that another attorney would not take this matter for the statutory rate. Therefore,
2 a higher fee is justified because of the special factors in this case. Finally, the
3 Court finds that an enhancement of \$50 above the statutory rate is reasonable
4 based on a number of cases from the Southern District of California where a \$50
5 enhancement was granted. *See, e.g., Keovongsa v. Berryhill*, 16-cv-841-BAS-
6 AGS (S.D. Cal. June 7, 2018); *Nguyen v. Berryhill*, 10-cv-2349-LAB-MDD, 2017
7 WL 3020958 (S.D. Cal. July 17, 2017); *Phan v. Astrue*, 07-cv-862-JLS-AJB, 2008
8 U.S. Dist. LEXIS 48112 (S.D. Cal. Nov. 13, 2008).

9 **C. Payment to Plaintiff's Counsel**

10 Plaintiff requests that the fee award be made payable to Ms. Manbeck,
11 subject to any federal debt offset. Defendant argues that pursuant to *Astrue v.*
12 *Ratliff*, 560 U.S. 586 (2010), the fee must be payable to Plaintiff, not her attorney.
13 The EAJA expressly authorizes an award of fees “to a prevailing party.” 28
14 U.S.C. § 2412(d)(1)(A). However, district courts have ordered payment of EAJA
15 fees directly to the litigant’s attorney when the fees have been assigned to
16 plaintiff’s counsel in a fee agreement and the government has exercised its
17 discretion to waive the requirement of the Anti-Assignment Act, 31 U.S.C.
18 § 3727. *See Yesipovich v. Colvin*, 166 F. Supp. 3d 1000, 1011 (N.D. Cal. 2015);
19 *Reed v. Berryhill*, No. 16-cv-05675, 2017 WL 2903218, at *3 (W.D. July 7, 2017).
20 Here, it appears Defendant may be willing to waive the requirements of the Anti-
21 Assignment Act if the United States Department of the Treasury determines that
22 Plaintiff does not owe a government debt. Accordingly, the Court finds that EAJA
23 fees may be paid directly to Ms. Manbeck, subject to a fee assignment and
24 Defendant’s waiver of the Anti-Assignment Act’s requirements.

25 **D. Plaintiffs’ Request for Judicial Notice**

26 Plaintiff has submitted a request for judicial notice of another case in this
27 district along with her motion for attorney’s fees. (ECF No. 30.) Plaintiff’s
28 request for judicial notice is **granted**.

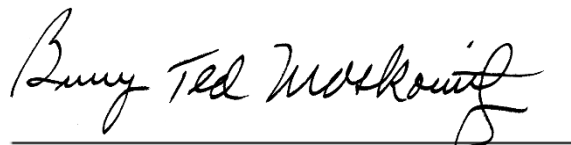
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III. CONCLUSION

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4 For the reasons discussed above, Plaintiff's motion for attorney's fees (ECF
5 No. 24) is **granted in part**. The Court grants Plaintiff a recovery of 47.25 hours
6 (56.75 reduced by 9.5), which multiplied by the rate of \$242.68 per hour, comes
7 to an award of \$11,466.63 for Ms. Manbeck's work in 2016. Additionally, the
8 Court grants Plaintiff a recovery of 17.25 hours, which multiplied by the rate of
9 \$246.79 per hour, comes to an award of \$4257.13 for Ms. Manbeck's work in
10 2017. Finally, the Court grants Plaintiff a recovery of 7.5 hours spent on the reply
11 briefing, which multiplied by the rate of \$251.60 per hour, comes to an award of
12 \$1887.00 for Ms. Manbeck's work in 2018. Therefore, the Court awards Plaintiff
13 a total of \$17,610.76 in attorney's fees and \$50 in costs, for a total judgment of
14 \$17,660.76, to be paid to Ms. Manbeck in accordance with the discussion above.
15 Plaintiff's request for judicial notice (ECF No. 30) is **granted**. The Clerk shall
16 enter judgment accordingly.

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18 **IT IS SO ORDERED.**

19 Dated: January 28, 2019

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23 Honorable Barry Ted Moskowitz
24 United States District Court
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