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

PARKER DUANE DONAHUE,
Plaintiff,
v.
ANDREW SAUL, Commissioner of
Social Security,
Defendant.

Case No.: 19-cv-1818 W (AHG)

**ORDER GRANTING PLAINTIFF'S
MOTION FOR ATTORNEY'S FEES
UNDER THE EQUAL ACCESS TO
JUSTICE ACT [DOC. 26]**

Pending before the Court is Plaintiff Parker Duane Donahue's Motion for Attorney's Fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. Section 2412(d)(1). (*Mot.* [Doc. 26].) Defendant Andrew Saul, Commissioner of Social Security opposes the Motion. (*Opp'n* [Doc. 28].) The Court decides the matter on the papers

1 submitted and without oral argument. See Civ. L.R. 7.1(d)(1). For the reasons that
2 follow, the Court **GRANTS** Plaintiff’s Motion.

3
4 **I. BACKGROUND**

5 On December 8, 2015, Plaintiff filed an application for Title II Disability Insurance
6 Benefits. (*Admin. Record* [Doc. 14] at 169–70.) His application was denied on initial
7 review and again upon reconsideration. (*Id.* at 65–77, 79–93.) An Administrative Law
8 Judge (“ALJ”) then conducted a hearing, determined that Plaintiff was not disabled
9 within the meaning of the Social Security Act, and denied him disability insurance
10 benefits. (*Id.* at 20-64.) In response, Plaintiff brought the current action in this Court
11 seeking judicial review of the denial of his Social Security application.

12 On January 13, 2021, United States Magistrate Judge Allison H. Goddard issued a
13 Report and Recommendation (“R&R”) reversing the Commissioner’s determination that
14 Plaintiff is not disabled under the Social Security Act. (*R&R* [Doc. 21].) This Court then
15 adopted Judge Goddard’s R&R in full and remanded the case for further administrative
16 proceedings. (*Order Adopting R&R* (“*Order*”) [Doc. 24].)

17 As a result, Plaintiff’s counsel brought this Motion for Attorney’s Fees under the
18 EAJA, 28 U.S.C. Section 2412(d)(1). Plaintiff’s counsel seeks 60.49 hours of attorney’s
19 fees at a rate of \$207.78 per hour—totaling \$12,568.61. (*Decl. of Eddy Pierre* (“*Pierre*
20 *Decl.*”) [Doc. 26-2] ¶¶ 9–11.) Plaintiff’s counsel also requests an additional 5 hours of
21 attorney time for briefing the Reply to this Motion, increasing the total request to
22 \$13,607.51 for 65.49 hours of attorney work. (*Reply* [Doc. 29] at 7.)

23 Defendant opposes the Motion, arguing that Plaintiff is not entitled to any fees
24 because the Commissioner’s position was “substantially justified,” or, in the alternative,
25 that Plaintiff’s fee request should be reduced because the amount requested is
26 unreasonable. (*Opp’n* at 2.)

1 **II. LEGAL STANDARD**

2 The Equal Access to Justice Act provides, in relevant part: “a court shall award to
3 a prevailing party other than the United States fees and other expenses ... *unless the court*
4 *finds that the position of the United States was substantially justified* or that special
5 circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A) (emphasis added).

6
7 **III. DISCUSSION**

8 **A. The Government’s Position Was Not Substantially Justified**

9 “The government has the burden of demonstrating that its position was
10 substantially justified.” Kali v. Bowen, 854 F.2d 329, 332 (9th Cir. 1988). A position is
11 “substantially justified” if it “has a reasonable basis in both law and fact.” Thangaraja v.
12 Gonzales, 428 F.3d 870, 874 (9th Cir. 2005) (citations and internal quotations omitted);
13 see also Pierce v. Underwood, 487 U.S. 552, 565 (1988) (the substantial justification
14 standard is satisfied if there is a “genuine dispute.”). While failing to prevail does not
15 raise a presumption that the government’s position was not substantially justified, a
16 holding that the agency’s decision was unsupported by substantial evidence is a “strong
17 indication” that the agency’s position was not substantially justified. Thangaraja, 428
18 F.3d at 874. “[I]t will be only a decidedly unusual case in which there is substantial
19 justification under the EAJA even though the agency’s decision was reversed as lacking
20 in reasonable, substantial and probative evidence in the record.” Id. (internal quotations
21 and citation omitted).

22 Here, the ALJ’s decision was not substantially justified because it unreasonably
23 failed at steps two, three, and four in the disability analysis. See 20 C.F.R. §§
24 404.1520(c)-(e). First, the ALJ erred by not considering Plaintiff’s fibromyalgia *at all* in
25 step two even though “Plaintiff consistently listed fibromyalgia as a reason he could not
26 work in his disability application and updated disability reports, as well as listing it as the
27

1 basis for seeking medical treatment and the condition underlying his Lyrica prescription.”
2 (*R&R* at 10) (citation omitted). In addition, three independent medical sources (Drs.
3 Alicja Steiner, Shayna Walker, and Anchi Wang) diagnosed Plaintiff with fibromyalgia,
4 but the ALJ failed to consider these sources or at least provide some analysis explaining
5 why he did not consider them. (*Order* at 5; *R&R* at 11-12.) *Defendant* offers various
6 reasons why the ALJ may have ignored these diagnoses (*see Opp’n* at 3-5), but the Court
7 is limited to the ALJ’s reasoning and may not “affirm the decision of an agency on a
8 ground that the agency did not invoke in making its decision.” Pinto v. Massanari, 249
9 F.3d 840, 847-48 (9th Cir. 2001) (citation omitted).

10 Defendant counters that this error was harmless because the ALJ addressed
11 Plaintiff’s allegations of fibromyalgia in later steps and concluded, based on Dr. Eric
12 Anderson’s opinion, that Plaintiff could engage in light work on a regular and continuing
13 basis. (*Opp’n* at 5; *Order* at 5.) On the other hand, Drs. Steiner and Wang opined that
14 Plaintiff would require “frequent breaks” and would not be able to work a full day due to
15 fatigue. (*Order* at 5.) The issue again is that the ALJ did not explain why he was
16 discounting the opinions of Drs. Steiner and Wang in favor of Dr. Anderson’s opinion.
17 (*Id.*; *R&R* at 16-17.) “While the ALJ need not discuss all evidence presented to him, he
18 must explain ‘why significant probative evidence has been rejected.’” Rosemary G. V. v.
19 Saul, 2020 WL 6703123, at *2 (S.D. Cal. Nov. 12, 2020) (quoting Vincent v. Heckler,
20 739 F.2d 1393, 1394–95 (9th Cir. 1984)). Given this absence of explanation, the Court
21 cannot say that the ALJ’s position was reasonable in both law and fact.

22 Second, and as discussed more fully in the Order Adopting the R&R, the ALJ
23 failed to cite to specific clinical or objective evidence in support of his rejection of Dr.
24 Walker’s opinion and, in so doing, mischaracterized the extent of Plaintiff’s daily
25 activities and ability to work full days without frequent breaks. (*Order* at 7.) And third,
26 the ALJ did not provide sufficient evidence for discounting Plaintiff’s testimony

1 regarding his symptoms of fatigue, lower back aches, and difficulty thinking. (*Order* at
2 9; *R&R* at 30-32.) “When an ALJ ignores important evidence in making a disability
3 determination, it is grounds to find the government’s decision is not substantially justified
4 with regard to a determination on a plaintiff’s motion for attorney’s fees.” Rosemary,
5 2020 WL 6703123, at *2; see also McLean v. Colvin, 648 F. Appx. 621, 622 (9th Cir.
6 2016) (unpublished) (finding that the ALJ’s decision was not substantially justified
7 because the ALJ failed to discuss significant, probative record evidence contrary to the
8 ALJ’s findings). Further, if the “ALJ’s decision was not substantially justified, [the]
9 court need not reach the issue of whether the Commissioner’s litigation position was
10 substantially justified.” McLean, 648 F. Appx. at 622 (citing Tobeler v. Colvin, 749 F.3d
11 830, 832 (9th Cir. 2014)). Therefore, the government’s position was not substantially
12 justified and Plaintiff is entitled to reasonable attorney’s fees.

13
14 **B. Plaintiff’s Fee Request is Reasonable**

15 A plaintiff’s fee request under the EAJA must be “reasonable.” 28 U.S.C. §
16 2412(d)(2)(A). Factors in determining how much time an attorney could reasonably
17 spend on a particular case include, but are not limited to, “the complexity of the legal
18 issues, the procedural history, the size of the record, and when counsel was retained.”
19 Costa v. Comm’r of Social Sec. Admin., 690 F.3d 1132, 1136 (9th Cir. 2012).
20 “Ultimately, a ‘reasonable’ number of hours equals the number of hours ... which could
21 reasonably have been billed to a private client.” Gonzalez v. City of Maywood, 729 F.3d
22 1196, 1202 (9th Cir. 2013) (citation omitted and cleaned up). The EAJA caps fees at
23 \$125 per hour “unless the court determines that an increase in the cost of living or a
24 special factor, such as the limited availability of qualified attorneys for the proceedings
25 involved, justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A).

1 Plaintiff seeks compensation for a total of 65.49 hours of attorney work at a rate of
2 \$207.78 per hour for a total of \$13,607.51. (*Reply* at 7:23.) Defendant does not dispute
3 that \$207.78 is a reasonable rate¹ but argues that 9.5 hours (or \$1,973.91) should be
4 subtracted from the total because of alleged duplicative work and overbilling by
5 Plaintiff’s counsel. For example, Plaintiff submitted a confidential settlement proposal²
6 [Doc. 28-1] pursuant to Magistrate Judge Godard’s Order Re: Mandatory Settlement
7 Procedures, which according to Defendant “was essentially an 11-page brief ... set[ting]
8 forth all of the arguments Plaintiff intended to raise.” (*Opp’n* at 10.) Plaintiff billed 9.5
9 hours for this letter, an amount Defendant finds reasonable. (*Id.* at 11.) Defendant,
10 however, takes issue with Plaintiff requesting 22.25 hours for drafting his portion of the
11 joint motion, which allegedly borrows heavily from the settlement letter: “First, counsel
12 was able to review the record and write a thorough and detailed settlement brief, which
13 ultimately became much of her opening brief, in only 9.5 hours. The idea that he required
14 more than *twice* that much time to summarize the administrative proceedings and outline
15 the medical evidence, hearing testimony, and ALJ’s finding defies credulity.” (*Id.*)

16 Defendant overstates the overlap between the settlement brief and Plaintiff’s
17 portion of the joint motion and understates the complexity of the issues and size of the
18 record in this case (which contained more than 950 pages). Contrary to Defendant’s
19 assertion, it does not “defy credulity” that Plaintiff spent twice as long on his portion of
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22 ¹ The Ninth Circuit’s 2020 statutory maximum hourly rates under the EAJA, adjusted for increases in
23 the cost of living, was \$207.78. See “Statutory Maximum Rates Under the Equal Access to Justice
24 Act,” https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039 (last visited May 26, 2022);
see also *Thangaraja*, 428 F.3d at 876-77.

25 ² Courts “may consider evidence of a settlement offer to the degree such evidence is relevant to the
26 calculation of reasonable attorneys’ fees” See *In re Kekaouha-Alisa*, 674 F.3d 1083, 1094 (9th Cir.
27 2012).

1 the joint motion than his settlement letter. His portion of the joint motion was more than
2 three and a half times longer than his settlement letter. (8,247 words versus 2,333
3 words). (*Reply* at 6.) Plaintiff raised additional arguments in the joint motion, bolstered
4 existing arguments with additional evidence, and anticipated and preempted potential
5 arguments Defendant might raise in the joint motion. (*Id.*)

6 Defendant cites to Franklin v. Berryhill,³ Spitzer v. Saul,⁴ and Pena v. Saul⁵ in
7 support of his “duplicative work” argument. But these cases are distinguishable. In
8 Franklin, the district court properly reduced Plaintiff’s fee request in part because his
9 appellate brief was “overwhelmingly” copied from his summary judgment briefing and
10 only contained a small portion of original writing. 705 Fed. Appx. at 662. In Spitzer,
11 “Plaintiff [did] not dispute the assertion that significant portions of the letter brief were
12 copied into the opening brief.” 2020 WL 1970064, at *4. And in Pena, the Court found
13 “substantial overlap” between the letter brief and opening brief. 2021 WL 268311, at *4.
14 Here, in contrast, there is no “substantial overlap” between Plaintiff’s settlement letter
15 and joint motion and there is no evidence of direct and excessive copying from one brief
16 to the next. Accordingly, there is no reason to subtract 9.5 hours from Plaintiff’s fee
17 request.

18 Lastly, Defendant contends that any fees awarded must be paid to Plaintiff, not his
19 counsel. (*Opp’n* at 12.) Under Astrue v. Ratliff, 560 U.S. 586, 590 (2010), fees awarded
20 under the EAJA must be paid directly to the litigant. But courts may order payment
21 directly to counsel as long as plaintiff does not have a debt that is subject to offset under
22 the United States Department of the Treasury Offset Program and as long as plaintiff
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25 ³ 705 Fed. Appx. 661, 662 (9th Cir. 2017) (unpublished).

26 ⁴ 2020 WL 1970064, at *4 (E.D. Cal. Apr. 24, 2020).

27 ⁵ 2021 WL 268311, at *4 (E.D. Cal. Jan. 27, 2021).

1 assigned his right to EAJA fees to counsel. See Young v. Berryhill, 2017 WL 4387315,
2 at *3 (E.D. Cal. Oct. 3, 2017) (collecting cases). Here, Plaintiff assigned his right to
3 EAJA fees to his attorney. (*Pierre Decl.* ¶ 12.) Therefore, the fee award may be paid
4 directly to Plaintiff's counsel so long as Plaintiff does not owe a government debt that is
5 subject to offset.

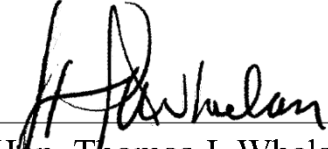
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7 **IV. CONCLUSION & ORDER**

8 For the reasons stated above, the Court **GRANTS** Plaintiff's Motion for Attorney's
9 Fees [Doc. 26] and **ORDERS** as follows:

- 10 1. Plaintiff is awarded attorney's fees in the amount of \$13,607.51;
- 11 2. Payment shall be made directly to Plaintiff's counsel unless the United
12 States Department of the Treasury determines that Plaintiff owes a federal
13 debt that is subject to offset.

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15 **IT IS SO ORDERED.**

16 Dated: May 26, 2022

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19 _____
20 Hon. Thomas J. Whelan
21 United States District Judge
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