

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

TRICIA A.K. BARTLETT,

Plaintiff,

1

NANCY A BERRYHILL, Acting  
Commissioner of Social Security.

Defendant.

CASE NO. 2:16-CV-01294-DWC

## ORDER ON MOTION FOR ATTORNEY'S FEES

Plaintiff Tricia A.K. Bartlett filed a Motion for Attorney's Fees and Expenses, seeking attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA"). Dkt. 23. Defendant objects to the Motion, contending the Defendant's position in the underlying case was substantially justified. Dkt. 24.

The Court concludes Defendant's position was not substantially justified. Accordingly, Plaintiff's Motion is granted. Plaintiff's request for an additional 2.7 hours expended in defending this Motion is also granted.

## BACKGROUND

2 On June 7, 2017, the Court found the ALJ erred in his assessment of the medical opinion  
3 evidence.<sup>1</sup> Dkt. 20. The Court reversed the ALJ’s decision and remanded the case to the Social  
4 Security Administration (“Administration”) for further consideration pursuant to sentence four of  
5 42 U.S.C. § 405(g). *Id.*

6 On September 5, 2017, Plaintiff filed this Motion. Dkt. 23. Defendant filed a Response,  
7 Dkt. 24, and on September 22, 2017, Plaintiff filed a Reply. Dkt. 25.

## DISCUSSION

9        In any action brought by or against the United States, the EAJA states “a court shall award  
10 fees and other expenses . . . unless the court finds  
11 that the position of the United States was substantially justified or that special circumstances make  
12 an award unjust.” 28 U.S.C. § 2412(d)(1)(A). According to the United States Supreme Court, “the  
13 fee applicant bears the burden of establishing entitlement to an award and documenting the  
14 appropriate hours expended.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The government  
15 has the burden of proving its positions overall were substantially justified. *Hardisty v. Astrue*, 592  
16 F.3d 1072, 1076 n.2 (9th Cir. 2010) (citing *Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir. 1995)).  
17 Further, if the government disputes the reasonableness of the fee, it also “has a burden of rebuttal  
18 that requires submission of evidence to the district court challenging the accuracy and  
19 reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted  
20 affidavits.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992) (citations omitted). The  
21 Court has an independent duty to review the submitted itemized log of hours to determine the  
22 reasonableness of hours requested in each case. See *Hensley*, 461 U.S. at 433, 436-37.

<sup>1</sup> As a result of these errors, the Court ordered the ALJ to reconsider Plaintiff's subjective symptom testimony and lay witness testimony on remand as well. Dkt. 20.

1      **I. Substantially Justified**

2      In this matter, Plaintiff was the prevailing party because she received a remand of the  
3 matter to the administration for further consideration. *See* Dkt. 20, 21. To award a prevailing  
4 plaintiff attorney's fees, the EAJA also requires finding the position of the United States was not  
5 substantially justified. 28 U.S.C. § 2412(d)(1)(B).

6      The Supreme Court has held “substantially justified” means “‘justified in substance or in  
7 the main’ – that is, justified to a degree that could satisfy a reasonable person.” *Pierce v.*  
8 *Underwood*, 487 U.S. 552, 565 (1988). A “substantially justified position must have a reasonable  
9 basis both in law and fact.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001) (citing  
10 *Flores v. Shalala*, 49 F.3d 562, 569 (9th Cir. 1995); *Pierce*, 487 U.S. at 565). The Court “must  
11 focus on two questions: first, whether the government was substantially justified in taking its  
12 original action; and second, whether the government was substantially justified in defending the  
13 validity of the action in court.” *Id.* at 1259 (quoting *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir.  
14 1988)). Thus, for the government to prevail, it must establish both the ALJ’s underlying conduct  
15 and its litigation position in defending the ALJ’s error were substantially justified. *Id.* “[I]f ‘the  
16 government’s underlying position was not substantially justified,’” the Court must award fees and  
17 does not have to address whether the government’s litigation position was justified. *Toebler v.*  
18 *Colvin*, 749 F.3d 830, 832 (9th Cir. 2014) (quoting *Meier v. Colvin*, 727 F.3d 867, 872 (9th Cir.  
19 2013)). The Court notes the fact the Administration did not prevail on the merits does not compel  
20 the Court to conclude its position was not substantially justified. *See Kali*, 854 F.2d at 334.

21      Here, the Court found the ALJ primarily erred in his treatment of the medical opinion  
22 evidence. *See* Dkt. 20. For example, the ALJ erred when he found Plaintiff’s treating physician not  
23 qualified to assess Plaintiff’s psychiatric condition, as an ALJ cannot discount a treating

1 physician's opinion on a psychiatric condition simply because the physician is not a mental health  
2 specialist. Dkt. 20, pp. 8-9 (citing *Lester v. Chater*, 81 F.3d 821, 833 (9th Cir. 1995)). The ALJ  
3 also erred by discounting a medical opinion rendered after Plaintiff's date last insured, since an  
4 ALJ must consider relevant evidence rendered after the date last insured. *Id.* at 9 (citing *Turner v.*  
5 *Comm'r of Soc. Sec. Admin*, 613 F.3d 1217, 1228-29 (9th Cir. 2010)). In addition, the ALJ erred  
6 by giving little weight to medical opinions for being based on Plaintiff's self-reports, as the  
7 treatment notes indicated the physicians also relied on objective measures. *Id.* at 9, 12-13 (citing  
8 *Ghanim v. Colvin*, 763 F.3d 1154, 1162 (9th Cir. 2014)). The ALJ further erred by providing  
9 conclusory reasons to discount medical opinion evidence. *See id.* at 11-12 (citing *Reddick v.*  
10 *Chater*, 157 F.3d 715, 725 (9th Cir. 1998)). In sum, the ALJ failed to provide specific and  
11 legitimate reasons for discounting the medical opinion evidence. *Id.* at 10, 13.

12 Defendant argues its position was substantially justified because the Court found, in some  
13 respects, one physician's opinion was inconsistent with the record. Dkt. 14, p. 2. In the underlying  
14 case, the Court did find the ALJ properly discounted one part of a physician's opinion. *See* Dkt. 20,  
15 p. 6-7. Nonetheless, as the Court explained in its Order, an ALJ errs when he divides a medical  
16 opinion into two parts and offers proper reasons to discount one part of the medical opinion but  
17 fails to provide a proper reason to discount the other part. *Id.* at 10 (citing *Dale v. Colvin*, 823 F.3d  
18 941, 945 (9th Cir. 2016)). Here, the Court found the ALJ erred when he failed to provide specific  
19 and legitimate reasons to discount one part of a medical opinion. *See id.* at 5-10. The ALJ also  
20 failed to properly consider the entire medical opinion of a different physician. *Id.* at 10-13. Hence,  
21 the ALJ erred, as he failed to provide specific and legitimate reasons, supported by substantial  
22 evidence, to discount the medical opinion evidence. *See id.* at 5-13; *see also Hensley*, 461 U.S. at  
23 435 ("the court's rejection of or failure to reach certain grounds is not a sufficient reason for  
24

1 reducing a fee. The result is what matters"); *Gardner v. Berryhill*, 856 F.3d 652, 658 (9th Cir.  
2 2017) (awarding EAJA fees where “[r]emand was a foregone conclusion” due to errors at the  
3 administrative level).

4 In sum, because the Court determined the ALJ’s evaluation of the medical opinion  
5 evidence as a whole was not supported by substantial evidence, the ALJ’s position was not  
6 substantially justified. *See Meier*, 727 F.3d at 872 (there is a strong indication the government’s  
7 position was not substantially justified when the agency’s decision is unsupported by substantial  
8 evidence); *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998) (“the defense of basic and  
9 fundamental errors . . . is difficult to justify”).

10 The Administration has not shown substantial justification for the ALJ’s underlying  
11 decision. Further, there are no special circumstances which render an EAJA award in this matter  
12 unjust. Accordingly, the Court finds Plaintiff is entitled to attorney’s fees under the EAJA. *See*  
13 *Meier*, 727 F.3d at 872; *Li v. Keisler*, 505 F.3d 913, 919 (9th Cir. 2007) (“we have consistently  
14 held that regardless of the government’s conduct in the federal court proceedings, unreasonable  
15 agency action at any level entitles the litigant to EAJA fees.”); *Toebeler*, 749 F.3d at 834  
16 (“[b]ecause the government’s *underlying* position was not substantially justified, we award fees,  
17 even if the government’s *litigation* position may have been justified”) (emphasis in original).

18 **II. Reasonableness of Fee**

19 Once the Court determines a plaintiff is entitled to a reasonable fee, “the amount of the fee,  
20 of course, must be determined on the facts of each case.” *Hensley*, 461 U.S. at 429, 433 n.7. Here,  
21 Defendant does not challenge the reasonableness of the fee. *See* Dkt. 24. Moreover, based on the  
22 facts and circumstances of this matter and the briefing, declarations and attorney time sheet, the  
23 Court concludes the amount of time incurred by Plaintiff’s attorney in this matter is reasonable. *See*  
24

1 Dkt. 23, 23-2, 23-3, 23-3, 25, 25-1. Specifically, the Court finds Plaintiff's request for expenses in  
2 the amount of \$6.79, costs in the amount of \$400, and attorney's fees in the amount of \$9,594.94,  
3 representing 47.6 hours of work, for a total award of \$10,001.73 reasonable. *See* Dkt. 23-4, 25-1.

4 **CONCLUSION**

5 For the above stated reasons, the Court hereby grants Plaintiff's Motion as follows:

6 Plaintiff is awarded \$6.79 in expenses.

7 Plaintiff is awarded \$400.00 in costs.

8 Plaintiff is awarded \$9,594.94 in attorney's fees, representing 44.9 hours of attorney work  
9 and 2.7 hours of paralegal work, for a total award of \$10,001.73, pursuant to the EAJA and  
10 consistent with *Astrue v. Ratliff*, 560 U.S. 586 (2010).

11 The Acting Commissioner shall contact the Department of Treasury to determine if the  
12 EAJA Award is subject to any offset. If the U.S. Department of the Treasury verifies to the Office  
13 of General Counsel that Plaintiff does not owe a debt, the government shall honor Plaintiff's  
14 assignment of EAJA Award and pay the EAJA Award directly to Eitan Yanich, Plaintiff's counsel.  
15 If there is an offset, any remainder shall be made payable to Plaintiff, based on the Department of  
16 the Treasury's Offset Program and standard practices, and the check shall be mailed to Plaintiff's  
17 counsel, Eitan Yanich, Law Office of Eitan Yanich, PLLC, at 203 Fourth Avenue E., Suite 321,  
18 Olympia, WA 98501.

19 Dated this 19th day of October, 2017.

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22 David W. Christel  
23 United States Magistrate Judge  
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