UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHARLES P. POSEY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting Commissioner of Social Security,

Defendant.

Case No. 3:13-cv-05649-KLS

ORDER GRANTING PLAINTIFF'S MOTION FOR ATTORNEY FEES, AND OTHER EXPENSES PURSUANT TO EQUAL ACCESS TO JUSTICE ACT

This matter is before the Court on plaintiff's filing of a motion for attorney fees and other expenses pursuant to 28 U.S.C. § 2412, the Equal Access to Justice Act ("EAJA"). See ECF #17. Plaintiff seeks a total of $4,694.20 in attorney's fees and expenses in the amount of $61.72. See id. After reviewing plaintiff's motion, defendant's response to that motion, plaintiff's reply thereto, and the remaining record, the Court hereby finds that for the reasons set forth below plaintiff's motion should be granted.

FACTUAL AND PROCEDURAL HISTORY

On May 16, 2014, the Court reversed defendant's decision to deny plaintiff's applications for disability insurance and Supplemental Security Income ("SSI") benefits, and remanded the matter for further administrative proceedings. See ECF #15. On August 5, 2014, plaintiff filed

his motion for attorney fees and other expenses pursuant to the EAJA. See ECF #17. As defendant has filed her response to plaintiff's motion, and plaintiff has filed his reply thereto, this matter is now ripe for the Court's review.

## DISCUSSION

The EAJA reads in relevant part:

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

28 U.S.C. § 2412(d)(1)(A). Thus, to be eligible for attorney fees under the EAJA: (1) the claimant must be a "prevailing party"; (2) the government's position must not have been "substantially justified"; and (3) no "special circumstances" exist that make an award of attorney fees unjust. Commissioner, Immigration and Naturalization Service v. Jean, 496 U.S. 154, 158 (1990).

In Social Security disability cases, "[a] plaintiff who obtains a sentence four remand is considered a prevailing party for purposes of attorneys' fees." Akopyan v. Barnhart, 296 F.3d 852, 854 (9th Cir. 2002) (citing Shalala v. Schaefer, 509 U.S. 292, 301-02 (1993). [1] Such a

[1] Section 405(g) of Title 42 of the United States Code "authorizes district courts to review administrative decisions in Social Security benefit cases." Id., 296 F.3d at 854. Sentence four and sentence six of Section 405(g) "set forth the exclusive methods by which district courts may remand [a case] to the Commissioner." Id. "The fourth sentence of § 405(g) authorizes a court to enter 'a judgment affirming, modifying, or reversing the decision of the [Commissioner], with or without remanding the cause for a rehearing." Melkonyan v. Sullivan, 501 U.S. 89, 98 (1991); see also Akopyan, 296 F.3d at 854 (sentence four remand is "essentially a determination that the agency erred in some respect in reaching a decision to deny benefits."). A remand under sentence four thus "becomes a final judgment, for purposes of attorneys' fees claims brought pursuant to the EAJA, 28 U.S.C. § 2412(d), upon expiration of the time for appeal." Akopyan, 296 F.3d at 854. A sentence six remand, on the other hand, "may be ordered in only two situations: where the Commissioner requests a remand before answering the complaint, or where new, material evidence is adduced that was for good cause not presented before the agency." Id. Accordingly, "[u]nlike sentence four remands, sentence six remands do not constitute final judgments." Id. at 855. Instead, "'[i]n

plaintiff is considered a prevailing party even when the case is remanded for further administrative proceedings. Id. There is no issue here as to whether plaintiff is a prevailing party given that as discussed above, the Court reversed defendant's decision to deny benefits and remanded this case for further administrative proceedings. In addition, defendant does not argue there are – nor do there appear to be – any special circumstances making an award of attorney's fees unjust.

As noted above, to be entitled to attorney fees under the EAJA, defendant's position must not be "substantially justified." Jean, 496 U.S. at 158. Normally, for defendant's position to be "substantially justified," this requires an inquiry into whether defendant's conduct was "'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person" – and "had a 'reasonable basis both in law and fact.'" Gutierrez v. Barnhart, 274 F.3d 1255, 1258 (9th Cir. 2001) (quoting Pierce v. Underwood, 487 U.S. 552, 565 (1988)); Penrod v. Apfel, 54 F.Supp.2d 961, 964 (D. Ariz. 1999) (citing Pierce, 487 U.S. at 565); see also Jean, 496 U.S. at 158 n.6; Flores v. Shalala, 49 F.3d 562, 569-70 (9th Cir. 1995). As such, this "does not mean 'justified to a high degree.'" Corbin v. Apfel, 149 F.3d 1051, 1052 (9th Cir. 1998) (quoting Pierce, 487 U.S. at 565). On the other hand, "the test" for substantial justification "must be more than mere reasonableness." Kali v. Bowen, 854 F.2d 329, 331 (9th Cir. 1988).

Defendant has the burden of establishing substantial justification. See Gutierrez, 274 F.3d at 1258. Defendant's position must be "*as a whole*, substantially justified." Gutierrez, 274 F.3d at 1258-59 (emphasis in original). That position also "must be 'substantially justified' at 'each stage of the proceedings.'" Corbin, 149 F.3d at 1052 ("Whether the claimant is ultimately found

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sentence six cases, the filing period [for motions for EAJA attorney's fees] does not begin until after the postremand proceedings are completed, the Commissioner returns to court, the court enters a final judgment, and the appeal period runs.'" Id. (citing Melkonyan, 501 U.S. at 102).

to be disabled or not, the government's position at each [discrete] stage [in question] must be 'substantially justified.'") (citations omitted); see also Hardisty v. Astrue, 592 F.3d 1072, 1078 (9th Cir. 2010) ("[D]istrict courts should focus on whether the government's position on the particular issue on which the claimant earned remand was substantially justified, not on whether the government's ultimate disability determination was substantially justified."). Accordingly, the government must establish that it was substantially justified both in terms of "the underlying conduct of the ALJ" and "its litigation position defending the ALJ's error." Gutierrez, 274 F.3d at 1259. As the Ninth Circuit further explained:

> The plain language of the EAJA states that the "'position of the United States' means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D); *Jean*, 496 U.S. at 159, 110 S.Ct. 2316 (explaining that the "position" relevant to the inquiry "may encompass both the agency's prelitigation conduct and the [agency's] subsequent litigation positions"). Thus we "must focus on two questions: first, whether the government was substantially justified in taking its original action; and, second, whether the government was substantially justified in defending the validity of the action in court." *Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988).

Id.; see also Kali, 854 F.2d at 332 (noting government's position is analyzed under "totality of the circumstances" test)[2]; Thomas v. Peterson, 841 F.2d 332, 334-35 (9th Cir. 1988). Indeed, the Ninth Circuit has explicitly stated that "[i]t is difficult to imagine any circumstance in which the government's decision to defend its actions in court would be substantially justified, but the underlying decision would not." Sampson, 103 F.3d at 922 (quoting Flores, 49 F.3d at 570 n.11).

The EAJA does create "a presumption that fees will be awarded unless the government's position was substantially justified." Thomas, 841 F.2d at 335; see also Flores, 49 F.3d at 569

[2] As the Ninth Circuit put it in a later case: "[i]n evaluating the government's position to determine whether it was substantially justified, we look to the record of both the underlying government conduct at issue and the totality of circumstances present before and during litigation." Sampson v. Chater, 103 F.3d 918, 921 (9th Cir. 1996).

(noting that as prevailing party, plaintiff was entitled to attorney's fees unless government could show its position in regard to issue on which court based its remand was substantially justified). Nevertheless, "[t]he government's failure to prevail does not raise a presumption that its position was not substantially justified." Kali, 854 F.2d at 332, 334; Thomas, 841 F.2d at 335.

Substantial justification will not be found where the government defends "on appeal . . . 'basic and fundamental' procedural mistakes made by the ALJ." Lewis v. Barnhart, 281 F.3d 1081, 1085 (9th Cir. 2002) (quoting Corbin, 149 F.3d at 1053). In Corbin, the Ninth Circuit found "the failure to make [specific] findings" and "weigh evidence" to be "serious" procedural errors, making it "difficult to justify" the government's position on appeal in that case. Corbin, 149 F.3d at 1053. In Shafer v. Astrue, 518 F.3d 1067, 1072 (9th Cir. 2008), the Ninth Circuit found the ALJ "committed the same fundamental procedural errors" noted in Corbin in failing "to provide clear and convincing reasons for discrediting [the claimant's] subjective complaints," and "to make any findings regarding" the diagnosis of a non-examining medical expert. The Court of Appeals went on to find the ALJ committed additional procedural errors not present in Corbin, including rejecting "a treating physician's opinion in favor of a non-treating physician's opinion without providing clear and convincing reasons." Id.

The Court in this case found the ALJ erred in giving less weight to the opinion of examining psychologist, Raymond C. List, Ph.D., on the basis of plaintiff's activities of daily living, because the record failed to show those activities were performed at a frequency or to an extent necessarily inconsistent with Dr. List's opinion, and accordingly the ALJ failed to establish any actual contradiction that undermined that opinion. See ECF #15, pp. 5-6. Given this error, the Court accordingly also found the ALJ's residual functional capacity assessment and step five finding, and thus the ALJ's non-disability determination, could not be said to be

supported by substantial evidence and therefore free of error as well. See id. at pp. 2-3, 6-10. The ALJ's failure to offer specific and legitimate reasons for rejecting an examining physician is of a substantially similar nature as those "basic and fundamental" procedural errors pointed out in Corbin and Shafer.

Defendant argues the ALJ's evaluation of that opinion had a reasonable basis both in law and fact, and therefore so did the government's position in defending it in federal court, because the record reflected activities of daily living that were inconsistent with Dr. List's opinion. The Court agrees ALJ's decision to give less weight to Dr. List's opinion based on plaintiff's daily activities had a reasonable basis in law, given that an ALJ may reject a physician's opinion for that reason. See Morgan v. Commissioner of Social Sec. Admin., 169 F.3d 595, 601-02 (9th Cir. 1999) (upholding rejection of physician's conclusion that claimant suffered from marked limitations in part on basis that other evidence of claimant's ability to function, including reported activities of daily living, contradicted that conclusion).

The Court declines to find, however, that the ALJ's decision regarding that evidence had a reasonable basis in fact. As noted above, the failure to provide a specific and legitimate reason for rejecting the opinion of an examining physician is the type of "basic and fundamental" error noted by the Ninth Circuit that makes it difficult to justify the government's defense thereof. Lewis, 281 F.3d at 1085; Corbin, 149 F.3d at 1053. It is true that the Court stated in its order that the record failed to show plaintiff's reported daily activities were performed at a frequency or to an extent that *necessarily* was inconsistent with Dr. List's opinion. See ECF #15, p. 6. But the Court also stated the ALJ had not established any actual contradiction between that opinion and those activities. See id. As such, the ALJ erred in establishing plaintiff's reported daily activities as a legitimate basis for discounting the opinion of Dr. List. The ALJ's rejection thereof thus was

not reasonable in light of the record as a whole, and therefore the government's position was not substantially justified in defending it. See Gundy v. Astrue, 500 Fed.Appx. 609, 611, 2012 WL 6054771, at **2 (9th Cir. Dec. 6, 2012) (concluding record lacked sufficient evidence on which ALJ could have reasonably based his decision to reject medical evidence, and thus government's defense of ALJ's procedural errors was not substantially justified).

CONCLUSION

For all of the foregoing reasons, plaintiff's motion for attorney's fees, costs and expenses pursuant to the EAJA (see ECF #17) hereby is GRANTED. Accordingly, the Court also hereby orders as follows:

(1) Plaintiff is granted attorney fees in the amount of $4,694.20 and expenses in the amount of $61.72.

(2) Subject to any offset allowed under the Treasury Offset Program, as discussed in Astrue v. Ratliff, 560 U.S. 586, 130 S. Ct. 2521, (2010), payment of this award shall be sent to plaintiff's attorney Joseph B. Lavin at his address: Joseph B. Lavin, Attorney at Law, 101 E. 5th St., Port Angeles, Washington 98362.

(3) After the Court issues this Order, defendant will consider the matter of plaintiff's assignment of EAJA fees and expenses to plaintiff's attorney. Pursuant to Astrue v. Ratliff, the ability to honor the assignment will depend on whether the EAJA fees and expenses are subject to any offset allowed under the Treasury Offset Program. Defendant agrees to contact the Department of Treasury after this Order is entered to determine whether the EAJA attorney fees and expenses are subject to any offset. If the EAJA attorney fees and expenses are not subject to any offset, those fees and expenses will be paid directly to plaintiff's attorney Joseph B. Lavin, either by direct

deposit or by check payable to him and mailed to his address.

DATED this 10th day of September, 2014.

Karen L. Strombom
United States Magistrate Judge