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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

KIMBERLY ELLSWORTH-  
GLASMAN,  
  
Plaintiff,  
  
v.  
  
CAROLYN W. COLVIN, Acting  
Commissioner of the Social Security  
Administration,  
  
Defendant.

CASE NO. 15-cv-5085-JRC  
  
ORDER ON PLAINTIFF'S  
CONTESTED MOTION FOR  
ATTORNEY'S FEES PURSUANT  
TO THE EQUAL ACCESS TO  
JUSTICE ACT

This Court has jurisdiction pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule MJR 13 (*see also* Notice of Initial Assignment to a U.S. Magistrate Judge and Consent Form, ECF No. 3; Consent to Proceed Before a United States Magistrate Judge, ECF No. 4). This matter comes before the Court on plaintiff's contested motion for attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (hereinafter "EAJA") (*see* ECF Nos. 17-21).

1 Subsequent to plaintiff's success at obtaining a reversal of the decision of the  
2 Social Security Administration, defendant Acting Commissioner challenged plaintiff's  
3 request for statutory attorney's fees on the grounds that defendant's position in this  
4 matter was justified in substance and had a reasonable basis in fact and law.

5 Because this Court disagrees, and because the requested fees are reasonable,  
6 plaintiff's motion for statutory fees should be granted.

### 7 BACKGROUND and PROCEDURAL HISTORY

8 On July 31, 2015, this Court issued an Order reversing and remanding this matter  
9 for further consideration by the Administration (*see* ECF No. 15).

10 The Court found that the ALJ failed to properly evaluate the medical evidence  
11 submitted by treating psychiatrist Dr. Deborah Smith, M.D. (*see id.*, pp. 4-11). This  
12 matter was reversed pursuant to sentence four of 42 U.S.C. § 405(g) for further  
13 consideration due to the harmful error in the evaluation of Dr. Smith's opinion (*see id.*,  
14 pp. 12-13).

15 Subsequently, plaintiff filed a motion for EAJA attorney's fees, to which  
16 defendant objected (*see* ECF Nos. 17, 20). Defendant asserts that the Court should not  
17 award attorney's fees under the EAJA because defendant's position was substantially  
18 justified (ECF No. 20). Plaintiff filed a reply (*see* ECF No. 21).

### 19 STANDARD OF REVIEW

20 In any action brought by or against the United States, the EAJA requires that "a  
21 court shall award to a prevailing party other than the United States fees and other  
22 expenses . . . unless the court finds that the position of the United States was  
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1 substantially justified or that special circumstances make an award unjust.” 28 U.S.C. §  
2 2412(d)(1)(A).

3 According to the United States Supreme Court, “the fee applicant bears the burden  
4 of establishing entitlement to an award and documenting the appropriate hours  
5 expended.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The government has the  
6 burden of proving that its positions overall were substantially justified. *Hardisty v.*  
7 *Astrue*, 592 F.3d 1072, 1076 n.2 (9th Cir. 2010), *cert. denied*, 179 L.Ed.2d 1215, 2011  
8 U.S. LEXIS 3726 (U.S. 2011) (*citing Flores v. Shalala*, 49 F.3d 562, 569-70 (9th Cir.  
9 1995)). Further, if the government disputes the reasonableness of the fee, then it also “has  
10 a burden of rebuttal that requires submission of evidence to the district court challenging  
11 the accuracy and reasonableness of the hours charged or the facts asserted by the  
12 prevailing party in its submitted affidavits.” *Gates v. Deukmejian*, 987 F.2d 1392, 1397-  
13 98 (9th Cir. 1992) (citations omitted). The Court has an independent duty to review the  
14 submitted itemized log of hours to determine the reasonableness of hours requested in  
15 each case. *See Hensley, supra*, 461 U.S. at 433, 436-37.

### 17 DISCUSSION

18 In this matter, plaintiff clearly was the prevailing party because she received a  
19 remand of the matter to the Administration for further consideration (*see* Order on  
20 Complaint, ECF No. 15). In order to award a prevailing plaintiff attorney fees, the EAJA  
21 also requires a finding that the position of the United States was not substantially  
22 justified. 28 U.S.C. § 2412(d)(1)(B).

1 The Court notes that the fact that the Administration did not prevail on the merits  
2 does not compel the conclusion that its position was not substantially justified. *See Kali v.*  
3 *Bowen*, 854 F.2d 329, 334 (9th Cir. 1988)) (*citing Oregon Env'tl. Council v. Kunzman*,  
4 817 F.2d 484, 498 (9th Cir. 1987)). The Court also notes that when determining the issue  
5 of substantial justification, the Court reviews only the “issues that led to remand” in  
6 determining if an award of fees is appropriate. *See Toebler v. Colvin*, 749 F.3d 830, 834  
7 (9th Cir. 2014)).

8  
9 The Supreme Court has squarely addressed the meaning of the term “substantially  
10 justified.” *See Pierce v. Underwood*, 487 U.S. 552, 564-68 (1988). The Court concluded  
11 that “as between the two commonly used connotations of the word ‘substantially,’ the  
12 one most naturally conveyed by the phrase before us here is not ‘justified to a high  
13 degree,’ but rather ‘justified in substance or in the main’ -- that is, justified to a degree  
14 that could satisfy a reasonable person.” *Id.* at 565. The Court continued, noting that the  
15 stated definition “is no different from the ‘reasonable basis both in law and fact’  
16 formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals  
17 that have addressed this issue.” *Id.* (citations omitted).

18 In addition, as stated by the Ninth Circuit, a “substantially justified position must  
19 have a reasonable basis both in law and fact.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258  
20 (9th Cir. 2001) (*citing Pierce v. Underwood, supra*, 487 U.S. at 565; *Flores, supra*, 49  
21 F.3d at 569). The Court is to focus on whether or not the Administration was  
22 substantially justified in taking its original action; and, in defending the validity of the  
23 action in court. *Id.* at 1259 (*citing Kali, supra*, 854 F.2d at 332). However, “if ‘the  
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1 government’s underlying position was not substantially justified,” the Court must award  
2 fees and does not have to address whether or not the government’s litigation position was  
3 justified. *See Toebler, supra*, 749 F.3d at 832 (quoting *Meier v. Colvin*, 727 F.3d 867,  
4 872 (9th Cir. 2013)).

5           Although defendant discusses again arguments regarding the merits of the  
6 underlying matter, the Court concludes that defendant has not demonstrated that the  
7 reason for the reversal of this case concerned an issue with respect to which reasonable  
8 minds could differ (*see* Response, ECF No. 20). Therefore, the Court will address  
9 whether or not defendant was substantially justified in taking its original action; and, in  
10 defending the validity of the action in court, *see Gutierrez, supra*, 274 F.3d at 1259  
11 (*citing Kali, supra*, 854 F.2d at 332); and, if the “substantially justified position [] ha[s] a  
12 reasonable basis both in law and fact.” *See Gutierrez, supra*, 274 F.3d at 1258 (citations  
13 omitted).

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15           Here, the Court concluded that the ALJ erred by failing to provide specific and  
16 legitimate reasons supported by substantial evidence for discrediting the opinion of Dr.  
17 Smith (*see* ECF No. 15, p. 7). First, the Court found that the ALJ’s rejection of Dr.  
18 Smith’s opinion regarding physical limitations because she had not treated plaintiff for  
19 physical symptoms showed “a misunderstanding of the diagnosis of pain disorder” (*see*  
20 *id.*). Contrary to the ALJ’s assertion, Dr. Smith had reviewed plaintiff’s physical medical  
21 history and, seeing no indication of malingering behavior, had the relationship as  
22 plaintiff’s treating psychiatrist to assess and concur with the diagnosis of pain disorder, in  
23 which psychological factors have an important role in the pain experienced (*see id.*, p. 8).  
24

1 Second, the Court found that, even inferring from the ALJ's opinion which  
2 activities she found contradictory to Dr. Smith's opinion though they were not listed,  
3 substantial evidence did not support that reason for discrediting the opinion (*see id.*, p. 9).  
4 Specifically, the Court noted that Dr. Smith had knowledge of plaintiff's lifestyle and still  
5 found her not to be capable of any exertional level of activity on a consistent basis (*see*  
6 *id.*). The ALJ finding a contradiction where Dr. Smith did not was an improper  
7 substitution of her own lay opinion under those circumstances (*see id.*).  
8

9 Based on the above stated errors, the Court reversed and remanded the ALJ's  
10 decision (*see id.*, pp. 12-13). Discounting a physician's opinion without proper  
11 justification is a "basic and fundamental" error. *Shafer v. Astrue*, 518 F.3d 1067, 1071-72  
12 (9th Cir. 2008). Absent special circumstances, which defendant has failed to show exist  
13 in this case, "the defense of basic and fundamental errors . . . is difficult to justify."  
14 *Corbin v. Apfel*, 149 F.3d 1051, 1053 (9th Cir. 1998).

15 Defendant reiterates arguments regarding the merits of the underlying issue and  
16 argues that the ALJ's position had a reasonable basis because Dr. Smith's opinion was  
17 inadequately supported by clinical findings (*see* ECF No. 20, p. 3). Defendant also argues  
18 that the record supports the reasonableness of the ALJ's finding that plaintiff's activities  
19 were inconsistent with Dr. Smith's opinion (*see id.*, p. 4). However, as discussed above,  
20 the ALJ's first reason was not legitimate within the context of plaintiff's diagnosis, and  
21 the ALJ's second reason was an improper substitution of her own lay opinion because Dr.  
22 Smith had the same information about plaintiff's activities. Thus, defendant's arguments  
23 are not persuasive, and the Court concludes that defendant has not demonstrated that the  
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1 sole reason for the reversal of this case was regarding an issue with respect to which  
2 reasonable minds could differ.

3 The ALJ's decision was unsupported by substantial evidence and based on legal  
4 error given her failure to state legally sufficient reasons to support the decision to deny  
5 benefits. The Court concludes that with respect to the ALJ's decision and the  
6 Administration's defense of said decision before this Court regarding the conclusive issue  
7 herein, the Administration's position was not substantially justified. The Court also  
8 concludes that there are no special circumstances which render an EAJA award in this  
9 matter unjust. Accordingly, the Court will award plaintiff attorney's fees under the  
10 EAJA.  
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12 Therefore, all that remains is to determine the amount of a reasonable fee. *See* 28  
13 U.S.C. § 2412(b); *Hensley, supra*, 461 U.S. at 433, 436-37; *see also Roberts v. Astrue*,  
14 2011 U.S. Dist. LEXIS 80907 (W.D. Wash. 2011), *adopted by* 2011 U.S. Dist. LEXIS  
15 80913 (W.D. Wash. 2011).

16 Once the court determines that a plaintiff is entitled to a reasonable fee, "the  
17 amount of the fee, of course, must be determined on the facts of each case." *Hensley*,  
18 *supra*, 461 U.S. at 429, 433 n.7. According to the U.S. Supreme Court, "the most useful  
19 starting point for determining the amount of a reasonable fee is the number of hours  
20 reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*,  
21 *supra*, 461 U.S. at 433.  
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23 Here, plaintiff prevailed on the single claim of whether or not the denial of her  
24 social security application was based on substantial evidence in the record as a whole and

1 not based on harmful legal error. When the case involves a “common core of facts or will  
2 be based on related legal theories . . . . the district court should focus on the  
3 significance of the overall relief obtained by the plaintiff in relation to the hours  
4 reasonably expended on the litigation.” *See Hensley, supra*, 461 U.S. at 435. The  
5 Supreme Court concluded that where a plaintiff “has obtained excellent results, his  
6 attorney should recover a fully compensatory fee.” *Id.*

7  
8 The Court concludes based on a review of the relevant evidence that the plaintiff  
9 here obtained excellent results. Therefore, the Court will look to “the hours reasonably  
10 expended on the litigation,” which, when combined with the reasonable hourly rate,  
11 encompasses the lodestar. *See Hensley, supra*, 461 U.S. at 435. Other relevant factors  
12 identified in *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 717-19 (5th Cir.  
13 1974) “usually are subsumed within the initial calculation of hours reasonably expended  
14 at a reasonably hourly rate.”<sup>1</sup> *See Hensley, supra*, 461 U.S. at 434 n.9 (other citation  
15 omitted); *see also Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975)  
16 (adopting *Johnson* factors); *Stevens v. Safeway*, 2008 U.S. Dist. LEXIS 17119 at \*40-\*41  
17 (C.D. Cal. 2008) (“A court employing th[e] *Hensley* lodestar method of the hours  
18 reasonably expended multiplied by a reasonable hourly rate] to determine the amount of  
19 an attorney’s fees award does not directly consider the multi-factor test developed in

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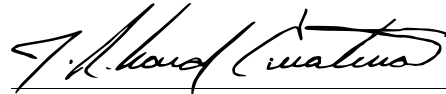
21 <sup>1</sup> The *Johnson* factors are: (1) The time and labor involved; (2) the novelty and difficulty of the questions involved; (3)  
22 the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance  
23 of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the  
24 circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10);  
the ‘undesirability’ of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in  
similar cases. *Johnson, supra*, 488 F.2d at 717-19) (citations omitted); *see also United States v. Guerette*, 2011 U.S. Dist. LEXIS  
21457 at \*4-\*5 (D. Hi 2011) (“factors one through five have been subsumed” in the determination of a number of hours  
reasonably expended multiplied by a reasonable rate); *but see City of Burlington v. Dague*, 505 U.S. 557 (1992) (rejecting factor  
6 of contingent nature of the fee).





1 for costs shall be mailed to plaintiff's counsel, Stephen A. Maddox, Esq., at Maddox &  
2 Laffoon, P.S., 410-A South Capitol Way, Olympia, WA 98501.

3 Dated this 16<sup>th</sup> day of November, 2015.

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5 J. Richard Creatura  
6 United States Magistrate Judge

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