

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 DAVID CURTIS,

10 Plaintiff,

11 v.

12 NANCY BERRYHILL, Commissioner of
13 Social Security,

14 Defendant.

CASE NO. C15-5234-JCC

ORDER

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16 This matter comes before the Court on Plaintiff's motion for Equal Access to Justice Act
17 (EAJA) attorney fees (Dkt. No. 23). Having thoroughly considered the parties' briefing and the
18 relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for
19 the reasons explained herein.

20 **I. BACKGROUND**

21 Plaintiff applied for Social Security Disability Insurance (SSDI) benefits and was denied
22 by an Administrative Law Judge (ALJ) on November 21, 2013. (Dkt. No. 3 at 2.) The Plaintiff
23 sought review by this Court. After briefing and consideration of the issues, this Court declined to
24 reconsider the ALJ's findings, stating there was a reasonable ground for the findings. (*See* Dkt.
25 No. 15.) On appeal, the Ninth Circuit overturned the findings of the ALJ, determining there was
26 a lack of "substantial evidence." (Dkt. No. 19 at 3.) The Ninth Circuit then remanded the case

1 back to this Court. (*Id.* at 4.)

2 **II. DISCUSSION**

3 Defendant argues that Plaintiff is not entitled to attorney fees because under the EAJA an
4 award of attorney fees is not appropriate if the “position of the United States was substantially
5 justified or that special circumstances make an award unjust.” 28 U.S.C. § 2412. However, the
6 Ninth Circuit noted it would be a “decidedly unusual case” in which substantial justification
7 exists for the Government’s position where the ALJ’s decision was overturned for “lacking
8 reasonable, substantial and probative evidence in the record.” *Thangaraja v. Gonzales*, 428 F.3d
9 870, 874 (9th Cir. 2005) (citing *Al-Harbi v. I.N.S.*, 242 F.3d 882, 886 (9th Cir. 2001)). The Ninth
10 Circuit held that if the “case was unsupported by substantial evidence [there is] a strong
11 indication that the ‘position of the United States’ . . . was not substantially justified.”
12 *Thangaraja*, 428 F.3d at 874 (quoting 28 U.S.C. § 2412(d)(1)(A)). “The government bears the
13 burden of demonstrating substantial justification.” *Id.* (citing *Gonzales v. Free Speech Coalition*,
14 408 F.3d 613, 618 (9th Cir.2005)).

15 Defendant maintains the award is inappropriate because its position was “justified to a
16 degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).
17 Specifically, Defendant argues that the ambiguous recommendation of Dr. Hoskins, the state
18 agency consultant, and the ALJ’s finding that Plaintiff’s testimony lacked credibility, are
19 sufficient to substantially justify the United States’ position. (Dkt. No. 19 at 1–2.) However, as
20 explained by the Ninth Circuit, the ALJ was under an affirmative duty to remedy that ambiguity,
21 not make a finding based on it. (Dkt. No. 19 at 1–2.)

22 The Ninth Circuit also found that the ALJ failed to make specific findings for
23 determining Plaintiff was not credible. The lack of treatment records for Plaintiff’s back pain
24 was not sufficient to reject testimony of the Plaintiff “absent affirmative evidence of
25 malingering.” (*Id.* at 3.) The Ninth Circuit determined that the ALJ’s findings lacked substantial
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1 evidence. (*Id.*) Thus, while there may be a disputed factual issue, this alone is not enough to
2 challenge the “strong indication” that Defendant lacked substantial justification.

3 **III. CONCLUSION**

4 For the foregoing reasons, Plaintiff’s motion for EAJA attorney fees (Dkt. No. 23) is
5 GRANTED. The Court ORDERS that attorney fees in the amount of \$7,332.30 be awarded to
6 Plaintiff pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412. Attorney fees will be
7 paid to Plaintiff’s attorney, dependent upon verification that Plaintiff has no debt which qualifies
8 for offset against the awarded fees, pursuant to the Treasury Offset Program as discussed in
9 *Astrue v. Ratliff*, 130 S.Ct. 2521 (2010). Attorney fees are paid pursuant to 28 U.S.C. § 1920.

10 If Plaintiff has no such debt, then the check shall be made out to Plaintiff’s attorney and
11 mailed to his office as follows:

12 Kevin Kerr
13 P.O. Box 14490
14 Portland, OR 97293.

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16 DATED this 11th day of July, 2017.

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20 John C. Coughenour
21 UNITED STATES DISTRICT JUDGE
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