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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 RAMIRO H. COSIO,

7 Plaintiff,

8 v.

9 NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

10 Defendants.

Case No. 3:17-cv-05128-TLF

ORDER GRANTING PLAINTIFF'S
MOTION FOR ATTORNEY FEES
AND EXPENSES PURSUANT TO 28
U.S.C. § 2412

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12 This matter is before the Court on Ramiro H. Cosio's filing of a motion for attorney fees,
13 expenses, and costs pursuant to 28 U.S.C. § 2412, the Equal Access to Justice Act (EAJA). Dkt.
14 23. After amending his motion, Mr. Cosio seeks a total of \$6,100.49 in attorney fees, \$414 in
15 costs, and \$5.97 in expenses. Dkt. 27.

16 A request for attorneys' fees should not become a second major litigation. *Decker v.*
17 *Berryhill*, 856 F.3d 659, 663 (9th Cir. 2017). The Court may grant a plaintiff's motion because
18 the ALJ's reasons are not supported by the record. *See Meier v. Colvin*, 727 F.3d 867, 873 (9th
19 Cir. 2013).

20 The EAJA provides:

21 Except as otherwise specifically provided by statute, a court shall award to a
22 prevailing party other than the United States fees and other expenses, in
23 addition to any costs awarded pursuant to subsection (a), incurred by that
24 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

1 finds that the position of the United States was substantially justified or that
2 special circumstances make an award unjust.

3 28 U.S.C. § 2412(d)(1)(A).

4 The government bears the burden of proving that its position was substantially justified.
5 *Gardner v. Berryhill*, 856 F.3d 652, 656 (9th Cir. 2017). The Court considers whether the
6 government’s conduct was “justified to a degree that could satisfy a reasonable person” and “had
7 a ‘reasonable basis both in law and fact.’” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir.
8 2001) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). Substantial justification is
9 “more than mere reasonableness,” though it “does not mean ‘justified to a high degree.’” *Kali v.*
10 *Bowen*, 854 F.2d 329, 331 (9th Cir. 1988); *Corbin*, 149 F.3d at 1052 (quoting *Pierce*, 487 U.S. at
11 565).

12 The Court must review the position of the United States in the civil action as well as the
13 underlying action or inaction of the agency. *Gardner*, 856 F.3d at 656. The Court must determine
14 whether the government’s position on the particular issue on which the Court based the remand
15 decision was substantially justified, not whether the ALJ would ultimately deny benefits after
16 considering the case again on remand. *Gardner*, 856 F.3d at 656-57.

17 In *Corbin v. Apfel*, the Ninth Circuit overturned the district court’s decision denying the
18 plaintiff’s request for attorneys’ fees. 149 F.3d 1051, 1052 (9th Cir. 1998). The Court observed
19 that, because the ALJ failed to provide clear and convincing reasons for discrediting the
20 plaintiff’s subjective complaints, this was such a fundamental error that it was difficult to justify
21 the government’s position on appeal in that case. *Id.* at 1053; *see also Shafer v. Astrue*, 518 F.3d
22 1067, 1071-72 (9th Cir. 2008) (holding that ALJ made the same type of fundamental error as
23 ALJ in *Corbin* by failing “to provide clear and convincing reasons for discrediting [claimant’s]
24 subjective complaints”). When the ALJ’s decision is not supported by substantial evidence, this

1 strongly indicates that the government’s position lacks substantial justification under 28 U.S.C. §
2 2412(d)(1)(A). *Meier*, 727 F.3d at 872.

3 Here, it is uncontested that Mr. Cosio is a prevailing party given that this case was
4 remanded for an award of benefits. *Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002)
5 (citing *Shalala v. Schaefer*, 509 U.S. 292, 301-02 (1993)). In addition, the Commissioner does
6 not argue there are any special circumstances making an award of attorney fees unjust.

7 The Commissioner does not appear to contend, either, that the ALJ’s underlying decision
8 was substantially justified. Because both the underlying agency decision and the Commissioner’s
9 litigation position must be substantially justified to avoid EAJA fees, the Commissioner’s failure
10 to contend that the ALJ decision was substantially justified would alone lead this Court to grant
11 Mr. Cosio’s EAJA motion. *See Meier*, 727 F.3d at 870. The Court nonetheless addresses the
12 Commissioner’s arguments below.

13 The Commissioner asks that this Court deny Mr. Cosio’s motion because the
14 government’s position in defending the ALJ decision was substantially justified. In particular,
15 the Commissioner asserts that a reasonable person could have found, as the ALJ did, that
16 objective evidence did not support the opinion of David Wigutoff, Ph.D., a psychiatrist who
17 examined Mr. Cosio. Dkt. 25, pp. 2-3.

18 Even if the Commissioner is correct on this narrow point, it would not make either the
19 ALJ decision or the Commissioner’s litigation position substantially justified. As this Court
20 observed in reversing the ALJ decision, the ALJ was required to give “‘persuasive, specific,
21 valid reasons’” to assign less weight to Mr. Cosio’s disability rating from the U.S. Department of
22 Veterans Affairs (VA), and the record needed to support those reasons. Dkt. 20, p. 5; *Berry v.*
23 *Astrue*, 622 F.3d 1228, 1236 (9th Cir. 2010) (quoting *Valentine v. Comm’r Soc. Sec. Admin.*, 574
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1 F.3d 685, 694-95 (9th Cir. 2009)). The ALJ stated only that the VA rating was “inconsistent with
2 the evidence of record through the date last insured, the period at issue,” pointing to evidence
3 that Mr. Cosio could attend group therapy. Dkt. 20, p. 6; AR 1982. She also rejected the
4 underlying opinion of Dr. Wigutoff. *Id.* The Court found that these were not persuasive, specific,
5 or valid reasons and that the record did not support them. Dkt. 20, pp. 6-9.

6 The record’s lack of support for the ALJ’s reasoning is a “strong indication” that the
7 ALJ’s position was not substantially justified. *Meier*, 727 F.3d at 873. The Commissioner offers
8 no reason that this would be a “decidedly unusual case” in which the ALJ’s decision lacked
9 substantial evidence to support it but was nonetheless substantially justified. *See Meier*, 727 F.3d
10 at 872. Because the ALJ decision lacked a reasonable basis in law and fact, it was not
11 substantially justified. *See Gutierrez*, 274 F.3d at 1258.

12 In addition, in defending that decision in litigation, the Commissioner offered no
13 substantive argument to support the ALJ’s rejection of Mr. Cosio’s VA rating. Dkt. 15, pp. 13-
14 14; *see* Dkt. 20, p. 6. The Commissioner instead relied on a waiver argument, which the Court
15 rejected. *Id.* Because the Commissioner did not address the central issue that led to remand, the
16 Commissioner’s litigation position was not substantially justified, either.

17 The Commissioner contends that the government’s position had a reasonable basis in fact
18 because “some evidence” supported it. Dkt. 25, pp. 2-3. That is not the correct standard. The
19 Commissioner cites an opinion, *Williams v. Bowen*, 966 F.2d 1259, 1261 (9th Cir. 1991), with a
20 different procedural posture. In *Williams*, the Ninth Circuit was reviewing for abuse of discretion
21 a district court’s finding that the government’s position was substantially justified. It is not clear
22 that the Ninth Circuit was announcing a “some evidence” standard of review in that case, and
23 few courts have cited the case for that proposition. More importantly, the Ninth Circuit has
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1 rejected a “some evidence” standard when determining, in the first place, whether the
2 government’s position was substantially justified. *Flores v. Shalala*, 49 F.3d 562, 570 (9th Cir.
3 1995) (holding that government was not substantially justified in defending ALJ’s unexplained
4 rejection of significant probative evidence).

5 In short, because the Commissioner’s arguments in response to the motion lack merit, the
6 Commissioner has not carried the burden of showing that the government’s position was
7 substantially justified. *See Gardner*, 856 F.3d at 656. The ALJ’s fundamental errors and the
8 Commissioner’s lack of an argument in defense them show that in this case, as in *Corbin, Shafer*,
9 and *Meier*, the government’s position was not substantially justified as to the issues upon which
10 the Court based its decision to remand.

11 Before granting attorney fees under the EAJA, the Court must determine whether those
12 fees are “reasonable.” *Comm’r, I.N.S. v. Jean*, 496 U.S. 154, 161 (1990); 28 U.S.C. §
13 2412(d)(1)(A). Here, the Commissioner does not challenge the reasonableness of the fees, costs,
14 and expenses that Mr. Cosio requests. The Court will therefore “defer[] to the winning lawyer’s
15 professional judgment” and award the requested amount. *See Costa v. Comm’r of Soc. Sec.*
16 *Admin.*, 690 F.3d 1132, 1136 (9th Cir. 2012).

17 Accordingly, the Court hereby orders as follows:

- 18 (1) Plaintiff is granted attorney fees in the amount of \$6,100.49 in attorney fees,¹ \$414 in
19 costs, and \$5.97 in expenses.

21 ¹ This includes 3.7 hours that plaintiff’s attorney spent on work related to plaintiff’s attorney fees motion and
22 attorney fees motion reply brief. *See* Dkt. 27-1, p. 1; *Jean*, 496 U.S. at 161-62 (stating, “absent unreasonably
23 dilatory conduct by the prevailing party in ‘any portion’ of the litigation, which would justify denying fees for that
24 portion, a fee award presumptively encompasses all aspects of the civil action,” and “the EAJA – like other fee-
shifting statutes – favors treating a case as an inclusive whole”) (citing *Sullivan v. Hudson*, 490 U.S. 877, 888 (1989)
(stating where administrative proceedings are “necessary to the attainment of the results Congress sought to promote
by providing for fees, they should be considered part and parcel of the action for which fees may be awarded”)).

1 (2) Subject to any offset allowed under the Treasury Offset Program, as discussed in *Astrue*
2 *v. Ratliff*, 560 U.S. 586 (2010), payment of this award shall be sent to plaintiff's
3 attorney Teal M. Parham at 910 12th Avenue - PO Box 757, Longview, WA 98632.

4 (3) After the Court issues this Order, defendant will consider the matter of plaintiff's
5 assignment of EAJA fees and expenses to Mr. Cosio's attorney. Pursuant to *Astrue v.*
6 *Ratliff*, the ability to honor the assignment will depend on whether the EAJA fees and
7 expenses are subject to any offset allowed under the Treasury Offset Program.

8 Defendant agrees to contact the Department of Treasury after this Order is entered to
9 determine whether the EAJA attorney fees and expenses are subject to any offset. If the
10 EAJA attorney fees and expenses are not subject to any offset, those fees and expenses
11 will be paid directly to plaintiff's attorney, either by direct deposit or by check payable
12 to him and mailed to his address.

13 Dated this 11th day of April, 2018.

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Theresa L. Fricke
17 United States Magistrate Judge
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