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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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12 Jill T. Holder,)

13) Plaintiff,)

No. CIV 05-3521-PHX-RCB

14) vs.)

O R D E R

15) Michael J. Astrue,¹)

16) Commissioner of the Social)

17) Security Administration,)

18) Defendant.)

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Currently pending before the court is a motion by plaintiff's

attorney, Scott E. Davis, for his fees pursuant to 42 U.S.C.

§ 406(b) (doc. 45). The defendant SSA Commissioner, in his quasi-

"trustee" role,² "inform[s] the Court of his analysis of this fee

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¹ In accordance with Fed. R. Civ. P. 25(d), which allows for substitution when, among other reasons, "a public officer who is a party in an official capacity . . . ceases to hold office while the action is pending[,] the court hereby substitutes Michael J. Astrue, who was confirmed as the Commissioner of the Social Security Administration ("SSA") on February 1, 2007, for Jo Anne B. Barnhart, the former Commissioner.

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² See Gisbrecht v. Barnhart, 535 U.S. 789, 798 n. 6, 122 S.Ct. 1817, 152 L.Ed.2d 996 (2002) (noting that although "the [SSA] Commissioner . . . has no direct financial stake in the answer to the § 406(b) question[,] . . . [h]e plays a part in the fee determination resembling that of a trustee for the claimants[>").

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1 request[,]” but beyond that expressly “takes no further action.”
2 See “Defendant’s Statement to Plaintiff’s Counsel’s Motion[.]”
3 (“Def. Stmt.”) (doc. 47) at 9:12-15. As more fully explained
4 below, because it appears that plaintiff Holder has not been served
5 with this fee motion, and because the record does not include a
6 copy of the contingency fee agreement, the court denies this motion
7 without prejudice.

8 Background

9 There is no dispute that plaintiff’s attorney successfully
10 obtained \$33,150.00 in past due benefits for plaintiff Holder. See
11 Memo. (doc. 46), exh. A thereto (doc. 46-2) at 1. Likewise, there
12 is no dispute that in the SSA’s Notice of Award to plaintiff, it
13 advised that her “lawyer *may* ask the court to approve a fee no
14 larger than 25 percent of past due benefits.” Id., exh. A thereto
15 (doc. 46-2) at 2 (emphasis added). The SSA further informed
16 plaintiff that for that reason, it was “withholding \$13,602.85[.]”
17 from her past-due benefits. Id. Explaining that “the court sets
18 the fee,” the SSA also advised plaintiff that it would “let [her]
19 and the lawyer know how much of th[at] money will be used to pay
20 the fee.” Id. Plaintiff will then be receiving the remainder.

21 See id.

22 The motion itself indicates that plaintiff’s attorney is
23 seeking the \$13,602.85, which the SSA’s Notice mentions. See Mot.
24 (doc. 45) at 1:16. In his supporting memorandum, however, he
25 requests only \$9,302.85. Memo. (doc. 46) at 1:20. The lower
26 requested amount is the difference between the withheld amount of
27 \$13,602.85, and the \$4,300.00 in fees which this court previously
28 approved under the Equal Access to Justice Act (“EAJA”). Memo.

1 (doc. 46) at 2:1-4. Indeed, plaintiff's attorney stresses that he
2 is petitioning the court "only for the amount remaining after the
3 EAJA offset, and requests that any amounts remaining after payment
4 of the section 406(b) attorney's fee be refunded directly to
5 Plaintiff." Id. at 4:1-3 (emphasis in original).

6 Legal Framework

7 In contrast to section 406(a) of the Social Security Act,
8 which "governs [attorneys'] fees for representation in
9 administrative proceedings[,]" section 406(b) of that Act "controls
10 [such] fees for representation in court." Gisbrecht, 535 U.S. at
11 794 (citing 20 C.F.R. § 404.1728(a)(2001)). Under section 406(b),
12 "[a]s part of its judgment, a court may allow 'a reasonable fee
13 . . . not in excess of 25 percent of the . . . past-due benefits'
14 awarded to the claimant." Id. at 795 (quoting 42 U.S.C.
15 § 406(b)(1)(A)). That statute expressly provides that any fee
16 award thereunder be payable "out of, and not in addition to, the
17 amount of [the] past due benefits." 42 U.S.C. § 406(b)(1)(A). In
18 other words, a denial of benefits results in no fee award. See id.
19 at 795. Similarly, "attorneys may not gain additional fees based
20 on a claimant's continuing entitlement to benefits." Gisbrecht,
21 535 U.S. at 795. Not only that, "any endeavor by the claimant's
22 attorney to gain more than that [statutory] fee, or to charge the
23 claimant a noncontingent fee, is a criminal offense." Id. at
24 806-07 (citing 42 U.S. § 406(b)(2); 20 C.F.R. § 404.1740(c)(2)
25 (2001)).

26 Based upon this statutory framework, in resolving a "division
27 among the Circuits on the appropriate method of calculating fees
28 under § 406(b)[,]" the Supreme Court in Gisbrecht "conclude[d]"

1 that that statute "does not displace contingent-fee agreements as
2 the primary means by which fees are set for successfully
3 representing Social Security benefits claimants in court." Id. at
4 807. "Rather," according to the Gisbrecht Court, "§ 406(b) calls
5 for court review of such arrangements as an independent check, to
6 assure that they yield reasonable results in particular cases."
7 Id. (footnote omitted). Observing that "Congress has provided one
8 boundary line[]" for reviewing section 406(b) fee arrangements, the
9 Gisbrecht Court reiterated that such arrangements "are
10 unenforceable to the extent that they provide for fees exceeding 25
11 percent of the past-due benefits." Gisbrecht, 535 U.S. at 807
12 (citing § 406(b)(1)(A) (1994 ed., Supp. V)) (footnote omitted).
13 At the same time, however, "[w]ithin th[at] 25 percent boundary,
14 . . . , the attorney for the successful claimant must show that the
15 fee sought is reasonable for the services rendered." Id. (citation
16 and footnote omitted).

17 "Section 406(b) . . . requires the court to determine whether
18 a fee agreement has been executed between the plaintiff and [her]
19 attorney[.]" Brandenburg v. Astrue, 2009 WL 1138088, at *2 (D.Or.
20 April 15, 2009) (internal quotation marks omitted) (emphasis added)
21 (citing, *inter alia*, Gisbrecht, 535 U.S. at 807). If so, the next
22 step is to determine "whether such agreement is reasonable." Id.
23 (citing, *inter alia*, Gisbrecht, 535 U.S. at 807). In performing
24 that reasonableness assessment, the Gisbrecht Court identified a
25 number of relevant factors: the attorney's risk of loss; "the
26 character of the representation and the results . . . achieved[;]"
27 delay by counsel; and the amount of the benefits "in comparison to
28 the amount of time counsel spent on the case[.]" Gisbrecht, 535

1 U.S. at 808. No one factor is dispositive. Indeed, the Supreme
2 Court in Gisbrecht seemed to give district courts a great deal of
3 latitude, noting that those courts "are accustomed to making
4 reasonableness determinations in a wide variety of contexts, and
5 their assessments in such matters, in the event of an appeal,
6 ordinarily qualify for highly respectful review." Id. at 808.

7 **Discussion**

8 Plaintiff's attorney recognizes that "[t]he starting point"
9 under Gisbrecht "is the contingent-fee request in light of the
10 contingent-fee agreement." Memo. (doc. 46) at 5:14-15 (footnote
11 omitted). Consistent with that recognition, plaintiff's attorney
12 states in his memorandum that "[p]laintiff contracted to pay 25% of
13 past-due benefits on a contingent-fee basis." Id. at 5:15-16.
14 Plaintiff then refers the court to the "contingent-fee agreement
15 attached [t]hereto as Exhibit 'B'." Id. at 5:16-17. Inadvertently,
16 however, that fee agreement was not attached as exhibit B - or at
17 all, for that matter.

18 The Commissioner does not dispute the terms of that fee
19 agreement, but he does accurately note that a copy of that
20 agreement is not before the court. Viewing provision of that
21 agreement as "essential" to resolving the fee claim, the
22 Commissioner believes that the court should require plaintiff's
23 attorney to provide a copy of that agreement, before deciding this
24 motion. Def. Stmt. (doc. 47) at 2:6.

25 At the outset, the court stresses that it has no reason to
26 doubt the veracity of plaintiff's attorney. Indeed, because he
27 signed the supporting memorandum of law, in accordance with Fed. R.
28 Civ. P. 11(b)(3), the court assumes that there is evidentiary

1 support for his statement as to the existence of a contingency fee
2 agreement and its terms. Nonetheless, under the particular
3 circumstances of this case, the court will require plaintiff's
4 attorney to follow the court's preferred practice which, as he
5 clearly intended, is to include the fee agreement as part of the
6 record. Without a copy of that fee agreement, the court cannot get
7 beyond the threshold Gisbrecht inquiry, which is "to determine
8 whether a fee agreement has been executed between the plaintiff and
9 [her] attorney[.]" See Brandenburg, 2009 WL 1138088, at *2
10 (internal quotation marks and citations omitted).

11 What is of more concern to the court, however, is that it
12 appears that plaintiff Holder was not served with a copy of this
13 motion - a factor which the Commissioner also mentions. The
14 Certificate of Service only indicates electronic filing upon local
15 and regional counsel for the SSA. See Memo. (doc. 46) at 9.
16 Obviously, if plaintiff's attorney prevails on any aspect of this
17 fee motion, it will directly impact plaintiff as those fees are
18 payable directly from her past-due benefits. The court realizes
19 that in the Notice of Award which it issued to plaintiff, the SSA
20 has previously advised her of the *possibility* of a fee award from
21 her past-due benefits. To the court's knowledge, however,
22 plaintiff was not advised by the SSA or by plaintiff's attorney,
23 that he is, in fact, requesting the court to approve a fee payment
24 from her past-due benefits.

25 "There is no question but that, when making section 406(b)
26 applications," as here, "attorneys are *required* to give notice to
27 their clients as to the existence of such application." See Taylor
28 v. Heckler, 608 F.Supp. 1255, 1260 (D.N.J. 1985) (citing, *inter*

1 alia, 20 C.F.R. § 404.1725(a)(7)) (emphasis added); see also
2 Robinson v. Secretary of Health, Education and Welfare, 456 F.Supp.
3 876, 878 (E.D. Mich. 1978) ("Basic fairness requires that when an
4 attorney claims to be entitled to money that would otherwise go to
5 that attorney's client, the attorney should be required to notify
6 the client of his claim."). The court agrees with the observations
7 of the Robinson court that "[i]n the vast majority of cases there
8 will undoubtedly be no disagreement between the client and the
9 attorney." Robinson, 456 F.Supp. at 878. "But when there is, the
10 court needs to know about the disagreement in order to be able to
11 make an informed decision." Id.

12 In light of the foregoing, and because the court believes that
13 it comports with fundamental notions of due process, before
14 considering the merits, the court will require plaintiff's attorney
15 to serve plaintiff Jill T. Holder with a renewed motion for
16 attorney's fees, a supporting memorandum of law, and all necessary
17 supporting documentation, including a copy of the contingent fee
18 agreement. Upon renewal, proof of such service shall be provided
19 to the court and to opposing counsel. Plainly any renewed motion
20 also must be filed and served in accordance with the applicable
21 rules.


22 For the reasons set forth above, IT IS ORDERED that:
23 "Plaintiff's Attorney's Motion for Award of Attorney's Fees
24 Under 42 U.S.C. § 406(b)" (doc. 45) is DENIED without prejudice to
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1 renew upon compliance with the notice, service and filing
2 requirements set forth herein.

3 DATED this 6th day of May, 2009.

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Robert C. Broomfield
Senior United States District Judge

Copies to counsel of record