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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

JANET THOMAS-ANWAR,  
Plaintiff,  
v.  
MICHAEL ASTRUE,  
Commission of the Social  
Security Administration,  
Defendant.

NO. CV 06-2724-OP  
ORDER GRANTING PLAINTIFF'S  
PETITION FOR ATTORNEY'S FEES  
PURSUANT TO 42 U.S.C. § 406(b)

**I.**

**INTRODUCTION**

After a denial of an application for disability benefits under Title II of the Social Security Act, Plaintiff sought review in this Court of Defendant's decision denying her benefits. After Plaintiff served her portion of the Joint Stipulation on Defendant, the parties entered into a stipulation to remand the case for further proceedings. The Court then ordered the case remanded to the Commissioner. Following the remand and further administrative review, Plaintiff was awarded benefits. Plaintiff's counsel has now filed a Motion for Attorney's Fees pursuant to 42 U.S.C. § 406(b) ("Motion"). Defendant

1 submitted a Response to the Motion (“Response”).<sup>1</sup> Plaintiff’s counsel also submitted a  
2 Reply in Support of the Motion (“Reply”). For the reasons discussed below, the Motion  
3 is GRANTED.

4 **II.**  
5 **PROCEDURAL HISTORY**

6 The Law Offices of Lawrence D. Rohlfing represented Janey Thomas-Anwar  
7 before the United States District Court on the basis of a retainer agreement to cover  
8 those services calling for fees of 25% of the back benefits. Following the stipulated  
9 remand, the Commissioner awarded benefits to Plaintiff. The Social Security  
10 Administration has effectuated the decision, paid benefits and withheld \$14, 731.25 for  
11 attorney’s fees. The Motion seeks \$9,400 in fees. (Mot. at 3).

12 **III.**  
13 **DISCUSSION**

14 **A. Fees Awarded To Attorneys Who Successfully Represent Social Security**  
15 **Benefit Claimants In Court.**

16 An attorney who successfully represents a Social Security benefits claimant in  
17 court may be awarded as part of the judgment “a reasonable fee . . . not in excess of 25  
18 percent of the total of the past-due benefits” awarded to the clamant.<sup>2</sup> 42 U.S.C. §  
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20 <sup>1</sup> Because the Commissioner is not a party to the contingency fee agreement  
21 between Plaintiff and his attorney, he simply “offers below an analysis of the fees sought  
22 in the event that it may assist the court in the Court’s determination.” (Response at 2.)

23 <sup>2</sup> For representation of a benefits claimant at the administrative level, an attorney  
24 may file a fee petition or fee agreement. 42 U.S.C. § 406(a). In the event of a determination  
25 favorable to the claimant, the Commissioner “shall . . . fix . . . a reasonable fee” for the  
26 attorney’s services. *Id.* § 406(a)(1). As an alternative to fee petitions, an attorney may file  
27 a contingency fee agreement with the Agency in advance of a ruling on the claim for  
28 benefits. *Id.* §§ 406(a)(2)-(4). If the ruling is favorable to the claimant, the Agency will  
generally approve the agreement subject to certain limitations. *Id.* §§ 406(a)(2)(A)(ii) and  
(iii).

1 406(b)(1)(A). The fee is payable “out of, and not in addition to, the amount of [the]  
2 past-due benefits.” Id. Because benefits amounts figuring in the fee calculation are  
3 limited to those past due, attorneys may not obtain additional fees based on a claimant’s  
4 continuing entitlement to benefits.

5 Fee awards may be made under the Equal Access to Justice Act (“EAJA”), as  
6 well as 42 U.S.C. § 406(b) (“Section 406(b”). As was the case here, Plaintiff was  
7 previously awarded EAJA fees in the amount of \$3,671.24 for services rendered by  
8 counsel in securing the remand of his case. An EAJA award, however, offsets an award  
9 under Section 406(b) so that the total past-due benefits actually received by the claimant  
10 is increased by the amount of the EAJA award up to the point where the claimant could  
11 potentially obtain one hundred percent of past-due benefits. Gisbrecht v. Barnhart, 535  
12 U.S. 789, 796, 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002) (citation omitted).

13 **B. The Applicable Case Law.**

14 In Gisbrecht, the Supreme Court resolved a circuit split in the appropriate method  
15 of calculating fees under Section 406(b). Several circuits, including the Ninth Circuit,  
16 had followed the “lodestar” method, under which the number of hours reasonably  
17 devoted to each case was multiplied by a reasonable hourly rate. Gisbrecht, 535 U.S. at  
18 799 (citations omitted). Other circuits had given effect to an attorney-client contingent-  
19 fee agreement if the resulting fee were reasonable. Id. (citations omitted).

20 The Court evaluated the two approaches and concluded that Section 406(b)  
21 (limiting attorney’s fees to twenty-five percent of past-due benefits) was designed to  
22 control, and not displace, contingent fee agreements that are within the statutory ceiling.  
23 Id. at 807-09. The Court held that Section 406(b) “calls for court review of such  
24 arrangements as an independent check, to assure that they yield reasonable results in  
25 particular cases.” Id. at 807; see also Hearn v. Barnhart, 262 F. Supp. 2d 1033, 1036  
26 (N.D. Cal. 2003) (citing Gisbrecht). In rejecting the lodestar approach, the Court noted  
27 that, while the lodestar method was used in federal-court adjudication of disputes over  
28 the amount of fees properly shifted to the loser in litigation, fee-shifting to a losing party

1 was not relevant in Section 406(b) cases. Gisbrecht, 535 U.S. at 802. As the Court  
2 observed, Section 406(b) does not authorize the prevailing party to recover fees from the  
3 losing party. Rather, it authorizes fees payable from the successful party's recovery. Id.  
4

5 In testing the reasonableness of fees yielded by contingency fee agreements within  
6 Section 406(b)'s twenty-five percent ceiling, courts have examined the character of the  
7 representation and the results achieved. Id. at 808. For example, if an attorney is  
8 responsible for any delay, his contractual recovery may be reduced to prevent the  
9 attorney from profiting from the accumulation of benefits during the pendency of the  
10 case in court. Id. (citation omitted). Additionally, if the benefits are large in comparison  
11 to the amount of time counsel spent on the case, a downward adjustment might be  
12 appropriate. Id. (citations omitted).

13 **C. The Reasonableness Of The Fees Yielded By The Instant Contingency Fee**  
14 **Agreement.**

15 In this case, the sole issue is the reasonableness of the fees yielded by the  
16 contingency fee agreement between Plaintiff and his counsel. While Plaintiff's counsel  
17 acknowledges the EAJA offset, the amount of fees subject to the court's analysis  
18 remains the aggregate derived from the agreement: twenty-five percent of the past-due  
19 benefits. The Motion includes documentation supporting counsel's fee request.

20 The Court is satisfied that the fee sought under the contingency agreement is  
21 reasonable. As Plaintiff indicates, the risk of loss in his case was substantial. Plaintiff  
22 has provided statistical documentation that an attorney can expect to win roughly 35% of  
23 the time. (Mot. at 13, Exs. 5-8.) Furthermore, the Court notes that before Plaintiff  
24 succeeded in obtaining benefits, he exhausted the multi-tiered administrative appeals  
25 process.

26 The character of the representation in this case was not substandard and attests to  
27 the reasonableness of the fee. After Plaintiff served her portion of the Joint Stipulation  
28 on Defendant, the parties entered into a stipulation to remand the case for further

1 proceedings. The Court then ordered the case remanded to the Commissioner.  
2 Following the remand and further administrative review, Plaintiff was awarded benefits.  
3 The results of the representation support the reasonableness of the fee. As one court  
4 recently observed in a Section 406(b) case:

5 Attorneys who take cases on contingency, thus deferring payment of their  
6 fees until the case has ended and taking upon themselves the risk that they  
7 will receive no payment at all, generally receive far more in winning cases  
8 than they would if they charged an hourly rate. The difference, however,  
9 reflects the time value of money and the risk of non-recovery usually borne  
10 by clients in cases where lawyers are paid an hourly rate.

11 Coppett v. Barnhart, 242 F. Supp. 2d 1380, 1384 n.7 (S.D. Ga. 2002) (citing Hensley v.  
12 Eckerhart, 461 U.S. 424, 448-49, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (Burger, J.,  
13 concurring)). Significantly, since Gisbrecht, district courts have been deferential to the  
14 terms of contingency contracts in Section 406(b) cases, accepting that the resulting de  
15 facto hourly rates may exceed those for non-contingency fee arrangements. Hearn, 262  
16 F. Supp. 2d at 1037 (awarding \$25,132.50 in Section 406(b) fees, equivalent to \$450.00  
17 per hour) (citing, inter alia, Martin v. Barnhart, 225 F. Supp. 2d 704 (W.D. Va. 2002)  
18 (awarding \$10,189.50, equivalent to \$605.00 per hour); Coppett, 242 F. Supp. 2d 1380  
19 (awarding \$6,554.12, equivalent to \$350.49 per hour)).

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1 In conclusion, the Court finds that the fee requested by Plaintiff, which does not  
2 exceed the twenty-five percent statutory ceiling of Section 406(b), is reasonable under  
3 the inquiry called for by Gisbrecht. Plaintiff's counsel shall be paid the sum of \$9,400  
4 from the amount withheld by the Commissioner from Plaintiff's past-due benefits, and  
5 counsel shall refund \$3,671.24 to Janet Thomas-Anwar for EAJA fees previously paid  
6 by the Commissioner.

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8 **IT IS SO ORDERED.**

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10 DATED: September 5, 2008



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HONORABLE OSWALD PARADA  
United States Magistrate Judge