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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DIANE N. DINH,)	Case No. CV 06-1050-OP
Plaintiff,)	
v.)	ORDER GRANTING PLAINTIFF'S
)	PETITION FOR APPROVAL OF FEES
MICHAEL J. ASTRUE,)	PURSUANT TO § 406(b)
Commissioner of Social Security,)	
Defendant.)	

I.
PROCEEDINGS

On September 22, 2009, Plaintiff’s counsel, Manuel D Serpa (“Counsel”), filed a petition for attorney fees pursuant to 42 U.S.C. § 406(b) (“Petition”). Counsel seeks an award of § 406(b) fees in the gross amount of \$10,766.10, subject to an offset for the \$5,000.00 in EAJA fees previously paid, resulting in a net award of \$5,766.10. (Pet. at 1.)

The Petition is supported by Counsel’s Declaration and supporting exhibits which establish that, after this Court’s remand, the Social Security Administration (“SSA”) awarded Plaintiff back benefits in the total amount of \$49,064.40. A summary of Counsel’s time spent is attached to Counsel’s declaration. (Serpa Decl. Ex. F.) The summary reports that Counsel spent 34.4 hours of time

1 representing Plaintiff in this case. (Id.) On October 19, 2009, the Commissioner
2 filed a Response to the Petition with his analysis. On October 22, 2009, Counsel
3 filed a Rely to the Commissioner’s Response.

4 **II.**

5 **DISCUSSION**

6 **A. Fees Awarded to Attorneys Who Successfully Represent Social Security** 7 **Benefit Claimants in Court.**

8 An attorney who successfully represents a Social Security benefits claimant
9 in court may be awarded as part of the judgment “a reasonable fee . . . not in excess
10 of 25 percent of the total of the past-due benefits” awarded to the claimant. 42
11 U.S.C. § 406(b)(1)(A). The fee is payable “out of, and not in addition to, the
12 amount of [the] past-due benefits.” Id. Because benefits amounts figuring in the
13 fee calculation are limited to those past due, attorneys may not obtain additional
14 fees based on a claimant’s continuing entitlement to benefits.

15 Fee awards may be made under the Equal Access to Justice Act (“EAJA”),
16 as well as 42 U.S.C. § 406(b), and such was the case here. Plaintiff was previously
17 awarded EAJA fees, by stipulation, in the amount of \$3,650.00 for services
18 rendered by counsel in securing the remand of his case. An EAJA award, however,
19 offsets an award under § 406(b) so that the total of the past due benefits actually
20 received by the claimant is increased by the amount of the EAJA award up to the
21 point where the claimant could potentially obtain one hundred percent of past-due
22 benefits. Gisbrecht v. Barnhart, 535 U.S. 789, 796, 122 S. Ct. 1817, 152 L. Ed. 2d
23 996 (2002) (citation omitted).

24 **B. The Applicable Case Law**

25 In Gisbrecht, the Supreme Court resolved a circuit split in the appropriate
26 method of calculating fees under § 406(b). Several circuits, including the Ninth
27 Circuit, had followed the “lodestar” method, under which the number of hours
28 reasonably devoted to each case was multiplied by a reasonable hourly rate. Id. at

1 799 (citations omitted). Other circuits had given effect to an attorney-client
2 contingent-fee agreement if the resulting fee was reasonable. Id. (citations
3 omitted).

4 The Supreme Court evaluated the two approaches and concluded that §
5 406(b) (limiting attorney’s fees to twenty-five percent of past-due benefits) was
6 designed to control, and not displace, contingent fee agreements that are within the
7 statutory ceiling. Id. at 807-09. The Court held that § 406(b) “calls for court
8 review of such arrangements as an independent check, to assure that they yield
9 reasonable results in particular cases.” Id. at 807. In rejecting the lodestar
10 approach, the Court noted that, while the lodestar method was used in federal-court
11 adjudication of disputes over the amount of fees properly shifted to the loser in
12 litigation, fee-shifting to a losing party was not relevant in § 406(b) cases. Id. at
13 802. As the Court observed, § 406(b) does not authorize the prevailing party to
14 recover fees from the losing party; rather, it authorizes fees payable from the
15 successful party’s recovery. Id.

16 In testing the reasonableness of fees yielded by contingency fee agreements
17 within § 406(b)’s twenty-five percent ceiling, Gisbrecht provided some guidance
18 by identifying the following examples as factors that, standing alone or in
19 combination, warrant a reduction: (1) the result achieved; (2) counsel’s
20 “substandard” character of representation; (3) delay by counsel (justifying a
21 reduction to prevent counsel from profiting from the accumulation of benefits
22 while the case is pending due to any foot-dragging); (4) “if the benefits are large in
23 comparison to the amount of time counsel spent on the case [thereby resulting in a
24 windfall], a downward adjustment is similarly in order.”; and (5) counsel’s record
25 of the hours spent representing the claimant and counsel’s normal hourly billing
26 rate for non-contingency work. Id. at 808. Another factor to consider is the
27 attorney’s risk of loss in taking the case on a contingency basis. Id. at 805; see also
28 Ellick v. Barnhart, 445 F. Supp. 2d 1166 (C.D. Cal. 2006) (providing a thorough

1 analysis of post-Gisbrecht case law and factors considered by various courts).
2 Complexity of the matter also seems to play a role in many of the decisions. Id. at
3 1169, 1171 nn.12, 14, 15, & 16, 1172.

4 **C. The Reasonableness of the Fees Yielded by the Current Contingency**
5 **Fee Agreement.**

6 In this case, the Petition is supported by a copy of the mutually executed
7 contingency fee agreement between Plaintiff and Counsel's law firm. (Serpa Decl.
8 Ex. A.) Plaintiff agreed to pay Counsel attorney fees not exceeding twenty-five
9 percent of the back benefits awarded for work before the Court – the statutory
10 maximum. As discussed above, the SSA ultimately awarded Plaintiff back benefits
11 of \$49,064.40. Consequently, under the terms of the fee agreement, Plaintiff is
12 contractually obligated to pay Counsel total attorney fees of \$12,266.10
13 (\$49,064.40 x .25). From that amount, \$1,500.00 is deducted for payments
14 received by Counsel pursuant to § 406(a), yielding a net amount of \$10,766.10.
15 The Commissioner withheld this amount of back benefits to cover Counsel's
16 attorney fees in the event this Court finds no further reduction is warranted under
17 Gisbrecht. Counsel is requesting a portion of this amount in § 406(b) fees.
18 Plaintiff has not objected to the Petition, and the record does not indicate that the
19 fee agreement was the product of any fraud, coercion, or overreaching.

20 The Court is satisfied that the fee sought under the contingency agreement is
21 reasonable. As with any contingency fee agreement, the risk of loss in this case
22 was substantial. Furthermore, the Court notes that before Plaintiff succeeded in
23 obtaining benefits, she exhausted the multi-tiered administrative appeals process,
24 filed a Complaint in this Court, secured a remand for further administrative
25 proceedings, and obtained an award of retroactive benefits for her client.

26 The character of the representation in this case was not substandard and
27 attests to the reasonableness of the fee. The results of the representation support
28 the reasonableness of the fee. As one court recently observed in a Section 406(b)

1 case:

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

9 Coppett v. Barnhart, 242 F. Supp. 2d 1380, 1384 n.7 (S.D. Ga. 2002) (citing
10 Hensley v. Eckerhart, 461 U.S. 424, 448-49, 103 S. Ct. 1933, 76 L. Ed. 2d 40
11 (1983) (Burger, J., concurring)). Significantly, since Gisbrecht, district courts have
12 been deferential to the terms of contingency contracts in § 406(b) cases, accepting
13 that the resulting de facto hourly rates may exceed those for non-contingency fee
14 arrangements. Hearn v. Barnhart, 262 F. Supp. 2d 1033, 1037 (N.D. Cal. 2003)
15 (awarding \$25,132.50 in Section 406(b) fees, equivalent to \$450.00 per hour)
16 (citing, inter alia, Martin v. Barnhart, 225 F. Supp. 2d 704 (W.D. Va. 2002)
17 (awarding \$10,189.50, equivalent to \$605.00 per hour); Coppett, 242 F. Supp. 2d
18 1380 (awarding \$6,554.12, equivalent to \$350.49 per hour)).

19 In conclusion, the Court finds that the fee requested by Counsel, which does
20 not exceed the twenty-five percent statutory ceiling of Section 406(b), is
21 reasonable under the inquiry called for by Gisbrecht.

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1 **III.**

2 **CONCLUSION**

3 Based upon the foregoing considerations, the Petition is granted. Net fees
4 under § 406(b) in the amount of \$5,766.10, which takes into account the EAJA fee,
5 shall be paid to Plaintiff's Counsel out of the sums withheld by the Commissioner
6 from Plaintiff's benefits.

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8 **IT IS SO ORDERED.**

9
10 DATED: November 9, 2009

11 
12 **HONORABLE OSWALD PARADA**
13 **United States Magistrate Judge**