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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS KOERNER,

Plaintiff,

No. CIV S-09-2240 LKK GGH (TEMP)

vs.

MICHAEL J. ASTRUE,  
Commissioner of  
Social Security,

Defendant.

FINDINGS AND RECOMMENDATIONS

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Pending before the court is plaintiff’s application for an award of attorney’s fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)(1).<sup>1</sup> Plaintiff seeks attorney’s fees under EAJA for 8.7 hours of attorney time at \$175/hour and for 32.9 hours of attorney supervised law clerk time at \$110/hour for work done in 2009 and 2010 and costs in the amount of \$36.78, for a total amount of \$5,178.28. No opposition to the motion for fees under EAJA has been filed.

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<sup>1</sup> The EAJA motion was filed by plaintiff’s counsel Ian Sammis on April 18, 2011. Counsel Sammis died on May 28, 2011. Counsel Robert Weems substituted in as successor counsel on October 20, 2011. On January 17, 2012, counsel filed an additional motion for fees under 42 U.S.C. § 406(b).

1           The EAJA provides that the prevailing party in a civil action against the United  
2 States may apply for an order for attorneys' fees and expenses within thirty days of final  
3 judgment in the action. An applicant for Social Security benefits receiving a remand under  
4 sentence four of 42 U.S.C. § 405(g) is a prevailing party, regardless of whether the applicant later  
5 succeeds in obtaining the requested benefits. Shalala v. Schaefer, 509 U.S. 292 (1993). In this  
6 case, the matter was remanded under sentence four pursuant to the order of the court for  
7 immediate payment of benefits. See Order filed February 17, 2011, dkt. no. 29. Plaintiff thus is  
8 entitled to an award of fees under the EAJA. The court must allow the fee award unless it finds  
9 that the position of the United States was substantially justified. Flores v. Shalala, 49 F.3d 562,  
10 568-69 (9th Cir. 1995).

11           Having no opposition from the Commissioner on the issue of substantial  
12 justification, the court finds that the requested fees are reasonable and that plaintiff is entitled to  
13 the amount requested. Despite any fee agreement to the contrary, the EAJA award must be made  
14 by this court to plaintiff, and not to counsel. See Astrue v. Ratliff, \_\_\_ U.S. \_\_\_, 130 S.Ct. 2521  
15 (2010).<sup>2</sup>

16           Also pending before the court is plaintiff's motion for attorneys fees under 42  
17 U.S.C. § 406(b). Defendant has filed a statement of non-opposition to the motion. Plaintiff has  
18 submitted documentation indicating that the Commissioner has withheld \$11,338.00 from  
19 plaintiff's past due benefits, representing 25% of that amount, and a contingency fee agreement  
20 that plaintiff agreed to pay this amount. Plaintiff's counsel concedes that this amount should be  
21 offset in the amount of any fees awarded under EAJA.

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24           <sup>2</sup> In the event the government determines that some or all of the EAJA award can be used  
25 to offset any obligation owed by plaintiff to the federal government, then the offset addressed  
26 below on the 406(b) fee motion should be reduced accordingly. In addition, because plaintiff and  
his counsel entered into an agreement that the EAJA award is payable to counsel, any sums  
plaintiff receives from the government for payment of the EAJA fee must in turn be paid by  
plaintiff to his attorney.

1 42 U.S.C. § 406(b)(1)(A) provides, in relevant part:

2 Whenever a court renders a judgment favorable to a claimant under  
3 this subchapter who was represented before the court by an  
4 attorney, the court may determine and allow as part of its judgment  
5 a reasonable fee for such representation, not in excess of 25 percent  
6 of the total of the past-due benefits to which the claimant is entitled  
7 by reason of such judgment.

8 Rather than being paid by the government, fees under the Social Security Act are awarded out of  
9 the claimant's disability benefits. Russell v. Sullivan, 930 F.2d 1443, 1446 (9th Cir. 1991),  
10 receded from on other grounds, Sorenson v. Mink, 239 F.3d 1140, 1149 (9th Cir. 2001).

11 However, the 25 percent statutory maximum fee is not an automatic entitlement; the court also  
12 must ensure that the requested fee is reasonable. Gisbrecht v. Barnhart, 535 U.S. 789, 808-09  
13 (2002) ("We hold that § 406(b) does not displace contingent-fee agreements within the statutory  
14 ceiling; instead, § 406(b) instructs courts to review for reasonableness fees yielded by those  
15 agreements."). "Within the 25 percent boundary ... the attorney for the successful claimant must  
16 show that the fee sought is reasonable for the services rendered." Id. at 807.

17 Counsel seeks fees for 41.6 hours. Based on the quality of counsel's  
18 representation and the results achieved in this case, the undersigned finds the amount of hours  
19 expended to be reasonable. The hourly rate is also reasonable.<sup>3</sup> Accordingly, the undersigned  
20 will recommend an award in the amount of attorney fees requested under section 406(b), to be  
21 offset by the amount of fees awarded under EAJA.

22 For the foregoing reasons, IT IS HEREBY RECOMMENDED that:

23 1. Plaintiff's request for EAJA fees be granted and that plaintiff be awarded  
24 \$5,178.28 in attorney's fees under EAJA, said fees made payable to plaintiff; however, plaintiff  
25 is to in turn pay these fees to his attorney.

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26 <sup>3</sup> Whether calculated without an offset for EAJA, i.e. \$11,338/41.6 hours = \$273/hour, or  
with an offset for EAJA, i.e. \$6,159.72/41.6 hours=\$148/hour, the court finds the hourly rate  
reasonable. See, e.g., Crawford v. Astrue, 586 F.3d 1142 (9th Cir. 2009) (en banc) (computed  
hourly rates of up to \$900 per hour found to be reasonable).

