

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
SOUTHERN DIVISION

FREDDIE ICE,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 1:07cv385-CSC
)	(WO)
MICHAEL J. ASTRUE,)	
Commissioner of Social Security,)	
)	
Defendant.)	

MEMORANDUM OPINION AND ORDER

On September 2, 2008, the plaintiff filed a petition for authorization of attorney’s fees pursuant to 42 U.S.C. § 406(b). The plaintiff seeks \$6,634.75 representing 25 percent of past due benefits withheld for payment of attorney’s fees minus \$5,300.00 requested from the Social Security Administration for services rendered at the administrative level. The United States does not object to an award of fees but asserts that the amount requested “may be unreasonable because it may represent a windfall to counsel.” (Doc. # 17 at 2).

On March 9, 2005, the plaintiff applied for disability insurance benefits pursuant to Title II of the Social Security Act, 42 U.S.C. §§ 401 et seq., alleging that he was unable to work because of a disability. His application was denied at the initial administrative level. The plaintiff then requested and received a hearing before an Administrative Law Judge (“ALJ”). Following the hearing, the ALJ also denied the claim on September 14, 2006. The Appeals Council rejected a request for review. The ALJ’s decision consequently became the

final decision of the Commissioner of Social Security (Commissioner).¹ See *Chester v. Bowen*, 792 F.2d 129, 131 (11th Cir. 1986).

On October 9, 2006, the plaintiff entered into a contingency fee agreement with counsel in which plaintiff agreed to payment of attorney's fees in the amount of 25 percent of any past due benefits awarded to plaintiff. On May 4, 2007, the plaintiff sought review of the Commissioner's decision pursuant to 42 U.S.C. §§ 405(g) and 1631(c)(3). Pursuant to 28 U.S.C. § 636(c), the parties consented to entry of final judgment by the United States Magistrate Judge. On October 12, 2007, the Commissioner filed a motion to remand this case pursuant to sentence four of 42 U.S.C. § 405(g). The plaintiff did not object to the remand. Consequently, the court remanded this case to the Commissioner for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g).

The plaintiff was subsequently awarded past due disability benefits. The Social Security Administration withheld \$11,934.75 from the plaintiff's past due benefits for payment of attorney's fees. Plaintiff's counsel has petitioned the Social Security Administration for an award of attorney's fees in the amount of \$5,300.00 for work performed at the administrative level. Pursuant to 42 U.S.C. § 406(b), the plaintiff now seeks payment of fees in the amount of \$6,634.75 which is 25 percent of the past due benefits awarded the plaintiff minus the \$5,300.00 requested for services rendered at the

¹ Pursuant to the Social Security Independence and Program Improvements Act of 1994, Pub.L. No. 103-296, 108 Stat. 1464, the functions of the Secretary of Health and Human Services with respect to Social Security matters were transferred to the Commissioner of Social Security.

administrative level.² Plaintiff's counsel asserts that he expended 18.25 hours over a seven month period representing the plaintiff.

In *Grisbrecht v. Barnhart*, 535 U.S. 789 (2002), the Supreme Court examined the question of attorney's fees in conjunction with contingency fee agreements in Social Security disability cases. Specifically, the Court held that "§ 406(b) does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claims in court. Rather § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases." *Id.* at 807. The contingency fee agreement in this case does not exceed the 25 percent ceiling established by § 406(b). However, it is not sufficient for the court to simply accept 25 percent of past due benefits as a reasonable attorney fee.

Courts that approach fee determinations by looking first to the contingent-fee agreement, then testing for reasonableness, have appropriately reduced the attorney's recovery based on the character of the representation and the results the representation achieved. . . . If the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is similarly in order.

Id. at 808. Thus, the court must determine whether the amount of fees sought pursuant to the

² 42 U.S.C. 406(b) provides as follows:

Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may, notwithstanding the provisions of section 405(i) of this title, but subject to subsection (d) of this section, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

contingency fee agreement is reasonable.

“Within the 25 percent boundary . . . *the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered.*” *Id.*, at 807 (emphasis added). The burden is on plaintiff’s counsel to demonstrate that reasonableness of the requested fee. *Id.* Counsel is seeking \$6,634.75 in attorney’s fees for 18.25 hours of work over a seven month period. In *Gisbrecht*, the court noted that if the “benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is . . . in order.” 536 U.S. at 808. The plaintiff’s counsel did not submit to the court his hourly rate for non-contingent fee work, nor did counsel refer this court to any previous awards of fees *to him* for similar work. Moreover, counsel has not argued, and the court does not find, that this case presented any greater risk of loss than the typical social security disability case. *See McGuire v. Sullivan*, 873 F.2d 974, 985 (7th Cir. 1989).³

An award of the full 25% of the past due benefits will result in an hourly rate of \$363.55. While this hourly rate is surely not determinative of reasonableness, a comparison of this rate to what counsel would bill for non-contingent fee work or has previously been awarded would be a legitimate indicator of reasonableness. However, the court has nothing before it except counsel’s assertion that the amount sought is *reasonable*. (Doc. # 19 at 1) (emphasis in original).

Of course, the court’s judgment about reasonableness must itself be tempered by

³Cited with approval in *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002).

Gisbrecht's conclusion that Congress meant to “contain” and not “outlaw” lawful contingent fee agreements. Justice Scalia’s observation that the *Gisbrecht* opinion does not provide a framework for analysis underscores the difficulty in “making reasonableness determinations” under *Gisbrecht*. While the *Gisbrecht* court notes that district courts perform this function in a wide variety of contexts, the court does not give any context for making these decisions. In the instant case, counsel expended 18.25 hours for which he claims fees in the amount of \$6,634.75. Although counsel is experienced in representing Social Security claimants, he provides the court no evidence about how long he has been practicing law in general and representing Social Security claimants in particular. Thus, the court cannot make a determination about whether the amount of time counsel spends on a case will be less than other lawyers who are not as experienced or skilled. Additionally, there is the lack of evidence that this case was exceptional or that there was an increased possibility of loss. In short, counsel has not met his burden of giving the court a framework within which to make a reasonable determination. Consequently, the court concludes that counsel has failed to meet his burden of establishing that payment of 25% of the past due benefits would be reasonable under the circumstances of this case.

The court concludes that the contingent fee amount should be reduced by \$1326.95 which equals a reduction of 20%. Counsel will be awarded \$5,307.80 which represents an hourly rate in the amount of \$290.88 which the court concludes is a reasonable attorney fee in this case in light of the hours of work performed over the time period of counsel’s involvement. The court reiterates that this reduction is due to counsel’s failure to meet his

