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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Jesus Encinas, Jr.

10 Plaintiff,

11 v.

12 Carolyn W. Colvin, Commissioner of the  
13 Social Security Administration,

14 Defendant.

No. CV11-1063 PHX DGC

**ORDER**

15 Plaintiff's counsel, Mr. Slepian, has filed a motion for an award of attorney fees  
16 under 42 U.S.C. § 406(b). Doc. 21. The Commissioner does not oppose the motion.  
17 Doc. 23. The Court will grant the motion and award \$5,000.00 in fees.

18 **I. Background.**

19 On April 30, 2012, the Court granted judgment in Plaintiff's favor and remanded  
20 the case for an award of benefits. Doc. 19. On remand, Plaintiff received \$56,969.40 in  
21 past-due benefits. Doc. 21 at 2. Mr. Slepian has now filed a motion for attorneys' fees  
22 under 42 U.S.C. § 406(b), requesting \$5,000 for 34.7 hours of work performed. Doc. 21-  
23 1 at 7.

24 The fee agreement between Plaintiff and Mr. Slepian provides that Mr. Slepian  
25 shall receive 25 percent of the past-due benefits award. Doc. 21-1 at 3. Under § 406(b),  
26 Mr. Slepian typically would be entitled to this contingent fee if found reasonable by the  
27 Court, and it would come from Plaintiff's recovery. A 25% fee in this case would equal  
28 \$14,242.50. Mr. Slepian would also normally have been entitled to seek fees under the

1 Equal Access to Justice Act (“EAJA”), and estimates that his recovery under the statute  
2 would have been approximately \$6,650 for the 34.7 hours he devoted to this case. This  
3 amount would have been paid by Defendant, not taken from Plaintiff’s recovery.  
4 28 U.S.C. § 2412(d)(1)(A). To prevent Mr. Slepian from receiving a double recovery  
5 from these two sources – § 406(b) and the EAJA – Congress requires that Mr. Slepian  
6 refund to Plaintiff the lower amount of these two fees. *Gisbrecht v. Barnhart*, 535 U.S.  
7 789, 796 (2002). Thus, assuming Mr. Slepian had received the 25% contingency fee of  
8 \$14,242.50 and an EAJA fee of \$6,650, he would have refunded to Plaintiff the \$6,650  
9 EAJA fee and kept the \$14,242.50 contingency fee.

10         Unfortunately, Mr. Slepian failed to seek fees under the EAJA. Doc. 21 at 2. His  
11 only remaining source of recovery, therefore, is § 406(b). Rather than seeking the full  
12 25% contingency fee when he cannot offset it with the EAJA fees he could have obtained  
13 from the government, Mr. Slepian asks the Court to award him \$5,000 in § 406(b) fees.  
14 This money would come from Plaintiff’s past-due benefits of \$56,969.40, but would be  
15 considerably less than the \$14,242.50 Mr. Slepian would have received under the  
16 contingency fee agreement and § 406(b) in normal circumstances, and less than the net  
17 amount Plaintiff would pay if Mr. Slepian had received the \$14,242.50 contingency fee  
18 from Plaintiff and remitted to Plaintiff the \$6,650 in EAJA fees as required by law. In  
19 such a scenario, Plaintiff would be out \$7,592.35 (the difference between \$14,242.50 and  
20 \$6,650), whereas, under Mr. Slepian’s proposal, Plaintiff will be out only \$5,000. In  
21 effect, Mr. Slepian is proposing that he receive considerably less than the \$14,242.50 his  
22 fee agreement calls for, and that Plaintiff incur an expense of \$5,000 which is less than he  
23 would have incurred had Mr. Slepian filed a timely EAJA application. In short, Mr.  
24 Slepian is proposing that he, not Plaintiff, bear the consequences of his error.

25 **II. Legal Standard**

26         Section 406 establishes “the exclusive regime for obtaining fees for successful  
27 representation of Social Security benefits claimants.” *Gisbrecht*, 535 U.S. at 795-96.  
28 Section 406(b) provides that

1 [w]henever a court renders a judgment favorable to a claimant . . . who was  
2 represented before the court by an attorney, the court may determine and  
3 allow as part of its judgment a reasonable fee for such representation, not in  
4 excess of 25 percent of the total of the past-due benefits to which the  
claimant is entitled by reason of such judgment[.]

5 42 U.S.C. § 406(b)(1)(A).

6 In *Gisbrecht*, the Supreme Court discussed the meaning of the term “reasonable  
7 fee” in § 406(b). The Court concluded that “§ 406(b) does not displace contingent-fee  
8 agreements as the primary means by which fees are set for successfully representing  
9 Social Security benefits claimants in court.” 535 U.S. at 807. “Rather, § 406(b) calls for  
10 court review of such arrangements as an independent check, to assure that they yield  
11 reasonable results in particular cases.” *Id.* The Court noted that “Congress has provided  
12 one boundary line: Agreements are unenforceable to the extent that they provide for fees  
13 exceeding 25 percent of the past-due benefits.” *Id.* *Gisbrecht* also recognized, as noted  
14 above, that a claimant’s attorney who has received fees under the EAJA and § 406(b)  
15 must refund to the claimant the smaller fee award. *Id.* at 796; *see Yarnevic v. Apfel*, 359  
16 F. Supp. 2d 1363, 1366 (N.D. Ga. 2005).

17 **III. Analysis.**

18 Mr. Slepian’s fee calculation makes a few assumptions. The first is that the Court  
19 would find that 25% is a reasonable § 406(b) fee. If Mr. Slepian were to receive the full  
20 25% of past-due benefits as provided in his fee agreement with Plaintiff, he would  
21 receive a fee equivalent to \$410 per hour (\$14,242 divided by 34.7 hours). The Court  
22 concludes that this is a reasonable rate given the inherent risk of contingent fee  
23 agreements. *See Grunseich v. Barnhart*, 439 F. Supp. 2d 1032, 1035 (C.D. Cal. 2006)  
24 (awarding hourly rate of \$600); *Yarnevic*, 359 F. Supp. 2d at 1365-67 (awarding hourly  
25 rate of \$643); *Claypool v. Barnhart*, 294 F. Supp. 2d 829, 833-34 (S.D. W. Va. 2003)  
26 (awarding fee equivalent to \$1,433 hourly rate); *Brown v. Barnhart*, 270 F. Supp. 2d 769,  
27 772-73 (W.D. Va. 2003) (awarding fee equivalent to \$977 hourly rate). Under normal  
28 circumstances, the Court would award Mr. Slepian \$14,242.35 for his representation of

1 Plaintiff before the Court. Therefore, the Court accepts Mr. Slepian's assumption that he  
2 would have been awarded 25% under the fee agreement.

3 Mr. Slepian's second assumption is an above-normal EAJA fee award of  
4 \$9,242.35 that would offset the \$14,242.35 contingent fee. This high assumed recovery  
5 works to the benefit of Plaintiff, who would receive a refund of the EAJA fees and would  
6 incur a net outlay of \$5,000. It also means that Mr. Slepian will receive only \$5,000,  
7 which equates to an hourly rate of \$144/hour. Without much analysis, the Court can  
8 conclude that this is a reasonable fee. See § 406(b) (setting 25% of the award as a  
9 maximum contingent fee). Mr. Slepian achieved a good result for his client, and should  
10 receive some compensation for his work.

11 EAJA awards are not automatic, and operate to the benefit of the claimant by  
12 offsetting some of the fees due the attorney under the contingent fee agreement. *Id.* Mr.  
13 Slepian failed to request EAJA fees, but his proposed § 406(b) fee and assumptions  
14 operate to make up for that failure to the benefit of his client. Mr. Slepian has failed to  
15 cite any case where the attorney failed to request EAJA fees and was allowed to assume  
16 an EAJA award in order to request the remaining § 406(b) fees. The Court has also failed  
17 to find any such case. Because Mr. Slepian's proposal does not penalize Plaintiff,  
18 however, and in fact results in a more favorable result for Plaintiff than if Mr. Slepian had  
19 sought an EAJA award, the Court grants his request to award \$5,000 in attorney's fees  
20 under § 406(b).

21 **IT IS ORDERED** that the motion for award of attorney fees (Doc. 21) is **granted**  
22 pursuant to 42 U.S.C. § 406(b). Mr. Slepian is awarded **\$5,000** in attorney fees, to be  
23 paid out of the sums withheld by Defendant from Plaintiff's past-due benefits.

24 Dated this 20th day of October, 2015.

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28 David G. Campbell  
United States District Judge