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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Victor Chavarria,

Plaintiff,

v.

Carolyn Colvin, Acting Commissioner of
Social Security Administration,

Defendant.

No. CV 11-345-TUC-CRP

ORDER

Pending before the Court is Plaintiff's Motion for Attorney Fees Pursuant to 42 U.S.C. §406(b). (Doc. 25). For the following reasons, the Court will grant Plaintiff's Motion.

DISCUSSION

Plaintiff has been before this Court twice seeking to overturn Defendant's denial of Plaintiff's application for disability insurance benefits. The first instance resulted in a March 2008 Order from this District Court remanding the matter for further proceedings. (*See* Order, (Doc. 23), pp. 1-2). Plaintiff again sought judicial review when, after remand, his request for benefits was denied. (*Id.*). The Court found in favor of Plaintiff and remanded the matter for an immediate award of benefits. (Order (Doc. 23)). Plaintiff now seeks attorneys' fees in the amount of \$24,041.73 pursuant to 42 U.S.C. §406(b)(1)(A). (Doc. 25). Plaintiff's counsel, Mr. Gravina, acknowledges that he received \$8,043.21 in fees pursuant to the Equal Access to Justice Act ("EAJA"), 28

1 U.S.C. § 2412(d), and avows that he will refund that amount to Plaintiff if the instant
2 motion is granted in full. (Motion, pp. 1-2; Affidavit (Doc. 26), ¶15).

3 Defendant takes no position on the instant motion, but notes that in light of the fact
4 that counsel received fees under the EAJA, if fees are awarded under §406(b), then
5 counsel must refund to Plaintiff the lesser of the two fee awards. (Response (Doc. 28), p.
6 3).

7 The fee agreement between Plaintiff and Mr. Gravina provides that Mr. Gravina
8 will receive 25% of the past-due benefits awarded to Plaintiff as a result of Mr. Gravina's
9 representation. (Affidavit, Exh. A). Mr. Gravina states in his affidavit that the past-due
10 benefits awarded to Plaintiff amounted to \$72,125.17, and the government withheld
11 \$24,041.73, which is 25% of the past-due amount, for direct payment of attorneys' fees.
12 (Affidavit, ¶4).

13 Section 406 sets forth "the exclusive regime for obtaining fees for successful
14 representation of Social Security benefits claimants." *Gisbrecht v. Barnhart*, 535 U.S.
15 789, 795-96 (2002). Section 406(b), "controls fees for representation..." before the
16 court. *Id.* at 794. Pursuant to §406(b), "[w]henver a court renders a judgment favorable
17 to a claimant under this subchapter who was represented before the court by an attorney,
18 the court may determine and allow as part of its judgment a reasonable fee for such
19 representation, not in excess of 25 percent of the total of the past-due benefits to which
20 the claimant is entitled by reason of such judgment[.]" 42 U.S.C. § 406(b)(1)(A).

21 The Supreme Court, when discussing the term "reasonable fee" as used in
22 §406(b), concluded that "§406(b) does not displace contingent-fee agreements as the
23 primary means by which fees are set for successfully representing Social Security
24 benefits claimants in court. Rather, §406(b) calls for court review of such arrangements
25 as an independent check, to assure that they yield reasonable results in particular cases."
26 *Gisbrecht*, 535 U.S. at 807 (footnote omitted). The Court also pointed out that "Congress
27 has provided one boundary line: Agreements are unenforceable to the extent that they
28 provide for fees exceeding 25 percent of the past-due benefits." *Id.* (citing 42 U.S.C. §

1 406(b)(1)(A)) (footnote omitted). When assessing reasonableness of the fee sought,
2 district courts “may properly reduce the fee for substandard performance, delay, or
3 benefits that are not in proportion to the time spent on the case.” *Crawford v. Astrue*, 586
4 F.3d 1142, 1151 (9th Cir. 2009) (citing *Gisbrecht*, 535 U.S. at 808).

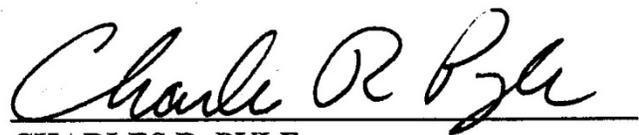
5 Mr. Gravina submitted an affidavit supported by an itemization of services
6 showing that he spent a total of 125.35 hours working on this matter while the case was
7 pending before the Court. (Affidavit, ¶9 & Exh. C). The fee requested results in an
8 hourly rate of \$191.80 per hour. (Motion, p. 2). Upon consideration of the *Gisbrecht*
9 reasonableness factors, the Court concludes that \$191.80 per hour is a reasonable rate on
10 the instant record. Mr. Gravina achieved a favorable result for Plaintiff and should be
11 compensated to recognize the risks attendant to contingent fee litigation. Consequently,
12 the Court will award Mr. Gravina \$24,041.73 under § 406(b)(1)(A). However, as both
13 parties have pointed out, Mr. Gravina must refund to Plaintiff the lesser of the fee
14 awarded under 42 U.S.C. § 406(b) and any fees awarded under the Equal Access to
15 Justice Act.

16 **CONCLUSION**

17 For the foregoing reasons, IT IS ORDERED that Plaintiff’s Motion for
18 Authorization of Attorney Fees pursuant to 42 U.S.C. § 406(b) (Doc. 25) is GRANTED.
19 The Court hereby awards Plaintiff’s Attorney, John A. Gravina, \$24,041.73 in attorney
20 fees pursuant to 42 U.S.C. § 406(b).

21 IT IS FURTHER ORDERED that Plaintiff’s counsel shall refund to Plaintiff the
22 lesser of the fee awarded under 42 U.S.C. § 406(b) and any fees awarded under the Equal
23 Access to Justice Act.

24 Dated this 5th day of May, 2015.

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26 
27 **CHARLES R. PYLE**
28 **UNITED STATES MAGISTRATE JUDGE**