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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Alberto Lozoya,

10 Plaintiff,

11 v.

12 Kilolo Kijakazi,<sup>1</sup>

13 Acting Commissioner of Social Security,

14 Defendant.

No. CV-12-0294-TUC-BGM

**ORDER**

15 Currently pending before the Court is Plaintiff's Attorney's Motion [for] Attorney  
16 Fees Under 42 U.S.C. § 406(b) ("Motion for Fees") (Doc. 25). Defendant responded  
17 indicating no objection to Plaintiff's motion. Def.'s Response to Pl.'s Atty's Mot. for  
18 Att'y Fees Under 42 U.S.C. § 406(b) (Doc. 27).

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20 **I. BACKGROUND**

21 Plaintiff filed this cause of action for review of the Commissioner of Social  
22 Security's decision, pursuant to Sections 405(g) and 1383(c)(3) of the Social Security  
23 Act, Title 42, United States Code. Compl. (Doc. 1). Upon consideration of Defendant's  
24 unopposed motion for remand, the Court entered its Order (Doc. 20), remanding the  
25 matter to the Administrative Law Judge ("ALJ") for a *de novo* hearing and new decision.

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27 <sup>1</sup> The Court takes judicial notice that Andrew Saul is no longer Commissioner of the  
28 Social Security Administration ("SSA"). The Court will substitute the new Acting  
Commissioner of the SSA, Kilolo Kijakazi, as Respondent pursuant to Rule 25(d) of the Federal  
Rules of Civil Procedure. *See also* Fed. R. App. P. 43(c)(2).

1 Subsequently, pursuant to stipulation by the parties, the Court awarded Plaintiff  
2 attorney's fees in the amount of \$3,400.00 pursuant to the Equal Access to Justice Act  
3 ("EAJA"), 28 U.S.C. § 2412. Order 1/14/2013 (Doc. 24). The Department of Treasury  
4 seized the entire amount of the EAJA award to satisfy a debt Plaintiff owed. *See* Pl.'s Br.  
5 in Support of Pl.'s Atty's Mot. for Atty's Fees Under 42 U.S.C. § 406(b) ("Fee Brief")  
6 (Doc. 26) at 2.

7 After remand, Plaintiff was found disabled, and the Social Security Administration  
8 awarded him past-due benefits in the amount of \$135,042.00. *See id.* The Social  
9 Security Administration ("SSA") withheld \$33,760.50 as 25% of past-due benefits owed  
10 to Plaintiff and authorized a payment in that amount to Plaintiff's counsel, Ms. Miller.  
11 *Id.* at 2. Subsequently SSA determined that "Plaintiff's auxiliaries were owed \$58,567."  
12 *Id.* SSA notified Plaintiff's counsel that it withheld \$14,641.75 from Plaintiff's past due  
13 benefits "which represent[ed] the balance of 25 percent of the past-due benefits for  
14 ALBERTO LOZOYA and family, in anticipation of direct payment of an authorized  
15 attorney's fee." Fee Brief (Doc. 26), SSA Memo to Miller 7/24/2021 (Exh. "D") (Doc.  
16 26-4) at 1. Plaintiff's counsel now seeks an order awarding her \$14,641.71. *See* Fee  
17 Brief (Doc. 26). There are no EAJA fees to refund because of the seizure of that award  
18 pursuant to the Treasury Offset Program. *Id.* at 11.

## 19 20 **II. ANALYSIS**

### 21 **A. Fees—Generally**

22 Regarding Social Security cases the Supreme Court of the United States has  
23 recognized that:

24 As part of its judgment, a court may allow "a reasonable fee . . . not in  
25 excess of 25 percent of the . . . past-due benefits" awarded to the claimant.  
26 § 406(b)(1)(A). The fee is payable "out of, and not in addition to, the  
27 amount of [the] past-due benefits." *Ibid.* Because benefits amounts figuring  
28 in the fee calculation are limited to those past due, attorneys may not gain  
additional fees based on a claimant's continuing entitlement to benefits.

1 *Gisbrecht v. Barnhart*, 535 U.S. 789, 795, 122 S. Ct. 1817, 1822, 152 L. Ed. 2d 996  
2 (2002) (alterations in original). Additionally, pursuant to the EAJA, a prevailing Social  
3 Security benefits claimant “may be awarded fees payable by the United States if the  
4 Government’s position in the litigation was not ‘substantially justified.’” *Id.* at 796, 122  
5 S.Ct. at 1822. “Fee awards may be made under both prescriptions, but the claimant’s  
6 attorney must ‘refun[d] to the claimant the amount of the smaller fee.’” *Id.* at 796, 122 S.  
7 Ct. at 1822 (alterations in original).

8 ***B. Fee Agreement***

9 “Courts that approach fee determinations by looking first to the contingent-fee  
10 agreement, then testing it for reasonableness, have appropriately reduced the attorney’s  
11 recovery based on the character of the representation and the results the representative  
12 achieved.” *Gisbrecht*, 535 U.S. at 808, 122 S. Ct. at 1828. “A fee resulting from a  
13 contingent-fee agreement is unreasonable, and thus subject to reduction by the court, if  
14 the attorney provided substandard representation or engaged in dilatory conduct in order  
15 to increase the accrued amount of past-due benefits, or if the ‘benefits are large in  
16 comparison to the amount of time counsel spent on the case.’” *Crawford v. Astrue*, 586  
17 F.3d 1142, 1148 (9th Cir. 2009) (quoting *Gisbrecht*, 525 U.S. at 808–09, 122 S. Ct. at  
18 1828–29). “[T]he district court has an affirmative duty to assure that the reasonableness  
19 of the fee is established.” *Crawford*, 586 F.3d at 1149.

20 Plaintiff executed a Fee Agreement outlining counsel’s entitlement to fees for her  
21 representation of Plaintiff. Fee Brief (Doc. 26), Contract for Att’y Representation in Fed.  
22 Ct. SSI/Soc. Sec. Disability (Exh. “A”) (Doc. 26-1). The Agreement provides for a  
23 contingent fee of twenty-five (25) percent of the past due benefits if Social Security  
24 benefits were awarded. *Id.* This agreement is consistent with the twenty-five (25)  
25 percent limit on contingent fee agreements mandated by Section 406(b)(1)(A), Title 42,  
26 United States Code, and there is no evidence of fraud or overreaching in its making. In  
27 this case, counsel was successful in obtaining a reversal and remand from this Court back  
28 to the ALJ, and subsequently obtaining a favorable result upon remand. Having reviewed

1 the case file, the Court finds the fee award should not be reduced based upon the quality  
2 of the representation, and Plaintiff's counsel did not engage in dilatory tactics. The Court  
3 further finds that counsel provided adequate representation in this matter. Accordingly,  
4 the Court finds that the fees are reasonable, and should be awarded.

5 **C. EAJA Offset**

6 "The 1985 amendments [to § 206(b) of the EAJA] address the fact that Social  
7 Security claimants may be eligible to receive fee[] awards under both the SSA and EAJA,  
8 and clarify the procedure that attorneys and their clients must follow to prevent the  
9 windfall of an unauthorized double recovery of fees for the same work." *Astrue v. Ratliff*,  
10 560 U.S. 586, 596, 130 S.Ct. 2521, 2528, 177 L.Ed.2d 91 (2010). "Fee awards may be  
11 made under both prescriptions, but the claimant's attorney must 'refun[d] to the claimant  
12 the amount of the smaller fee.'" *Gisbrecht*, 535 U.S. at 796, 122 S.Ct. at 1822 (quoting  
13 Act of Aug. 5, 1985, Pub.L. 99-80, § 3, 99 Stat. 186) (alterations in original). "Thus, an  
14 EAJA award offsets an award under Section 406(b), so that the amount of the total past-  
15 due benefits the claimant actually receives will be increased by the EAJA award up to the  
16 point the claimant receives 100 percent of the past-due benefits." *Id.* at 796, 122 S.Ct. at  
17 1822 (citations omitted). Moreover, "[w]here the court allows a fee, § 406(b) permits the  
18 Commissioner to collect the approved fee out of the client's benefit award and to certify  
19 the fee for 'payment to such attorney out of' that award." *Ratliff*, 560 U.S. at 596 n. 4,  
20 130 S.Ct. at 2528 n. 4 (citing 42 U.S.C. § 406(b)(1)(A)).

21 Here, Plaintiff was awarded fees pursuant to the EAJA in the amount of  
22 \$3,400.00. Order 1/14/2013 (Doc. 24). The Department of Treasury seized the entire  
23 amount of the EAJA award to satisfy a debt Plaintiff owed. *See* Pl.'s Br. in Support of  
24 Pl.'s Atty's Mot. for Atty's Fees Under 42 U.S.C. § 406(b) ("Fee Brief") (Doc. 26) at 2.  
25 As such, there is nothing for Plaintiff's counsel to return.

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27 **III. CONCLUSION**

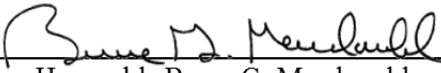
28 Accordingly, IT IS HEREBY ORDERED that:

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(1) Plaintiff's Attorney's Motion for Award of Attorney Fees Under 42 U.S.C. § 406(b) (Doc. 25) is GRANTED; and

(2) Plaintiff's counsel is awarded fees of \$14,641.71 pursuant to 42 U.S.C. § 406(b).

Dated this 7th day of January, 2022.

  
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Honorable Bruce G. Macdonald  
United States Magistrate Judge