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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Stacy Nichole Ohmer,
10 Plaintiff,

No. CV-14-02137-TUC-BPV

ORDER

11 v.

12 Nancy A. Berryhill, Acting Commissioner
13 of Social Security Administration,
14 Defendant.

15 Pending before the Court is “Plaintiff’s Motion and Notice of Motion for Approval
16 of Attorney’s Fees under 42 U.S.C. §406(b) of the Social Security Act”, with
17 accompanying memorandum and exhibits. (Doc. 22). Defendant has filed a Response
18 (Doc. 24). For the following reasons, the Court grants Plaintiff’s Motion.

19 **DISCUSSION**

20 Plaintiff filed this action in June 2014, seeking review of the denial of her
21 application for supplemental security income under the Social Security Act. (Doc. 1).
22 Thereafter, upon consideration of the parties’ briefs, the Court reversed the
23 Commissioner’s decision denying benefits and remanded the matter for additional
24 proceedings before the Administrative Law Judge. (Doc. 18); *see also* Doc. 19
25 (Judgment)). Upon remand, Plaintiff was granted disability benefits. (*See* Memorandum
26 (Doc. 22-2) at 3; Counsel’s Declaration (Doc. 22-3) at ¶8; Doc. 22-5).

27 Plaintiff now seeks attorney’s fees in the amount of \$10,700.00 pursuant to 42
28 U.S.C. §406(b). Plaintiff acknowledges that the Court has previously awarded her

1 \$4,200.00 in attorney’s fees pursuant to the Equal Access to Justice Act (“EAJA”), 28
2 U.S.C. § 2412(d). (Doc. 22-2 at 5). Plaintiff’s counsel, Tye Smith, states in his
3 declaration that “the \$10,700.00 herein sought would then be immediately reduced by
4 \$4,200.00, the amount that has already been awarded under the EAJA.” (Doc. 22-3 at
5 ¶12).

6 Defendant “has found no basis to object[.]” to Plaintiff’s Motion, and defers to the
7 Court’s judgment on this matter. (Doc. 24 at 1).

8 Section 406 sets forth “the exclusive regime for obtaining fees for successful
9 representation of Social Security benefits claimants.” *Gisbrecht v. Barnhart*, 535 U.S.
10 789, 795-96 (2002). Section 406(b), “controls fees for representation...” before the
11 court. *Id.* at 794. Pursuant to §406(b), “[w]henver a court renders a judgment favorable
12 to a claimant under this subchapter who was represented before the court by an attorney,
13 the court may determine and allow as part of its judgment a reasonable fee for such
14 representation, not in excess of 25 percent of the total of the past-due benefits to which
15 the claimant is entitled by reason of such judgment[.]” 42 U.S.C. § 406(b)(1)(A).

16 The record reflects that Plaintiff entered into a contingent-fee agreement wherein
17 she agreed to pay attorney’s fees not to exceed 25% of past-due benefits in the event that
18 the district court, on appeal, remanded her action for additional administrative review and
19 she was awarded past-due benefits on remand. (Doc. 22-7). The Supreme Court, when
20 discussing the term “reasonable fee” as used in §406(b), concluded that “§406(b) does
21 not displace contingent-fee agreements as the primary means by which fees are set for
22 successfully representing Social Security benefits claimants in court. Rather, §406(b)
23 calls for court review of such arrangements as an independent check, to assure that they
24 yield reasonable results in particular cases.” *Gisbrecht*, 535 U.S. at 807 (footnote
25 omitted). The Court also pointed out that “Congress has provided one boundary line:
26 Agreements are unenforceable to the extent that they provide for fees exceeding 25
27 percent of the past-due benefits.” *Id.* (citing 42 U.S.C. § 406(b)(1)(A)) (footnote
28 omitted). In assessing reasonableness of the fee sought, district courts should consider the

1 results achieved and may properly apply a reduction if the attorney provided substandard
2 representation or engaged in dilatory conduct in order to increase the accrued amount of
3 past-due benefits, or if the benefits are out of proportion to the time spent on the case,
4 thereby resulting in a windfall to counsel. *Crawford v. Astrue*, 586 F.3d 1142, 1148,
5 1151 (9th Cir. 2009) (citing *Gisbrecht*, 535 U.S. at 808). In making its assessment, the
6 district court may consider the lodestar calculation as an aid, if necessary. *Id.* The
7 attorney bears the burden of establishing that the fee sought is reasonable. *Id.* at 1148
8 (citing *Gisbrecht*, 535 U.S. at 807).

9 In applying *Gisbrecht*, the Ninth Circuit has emphasized that district courts “must
10 respect ‘the primacy of lawful attorney-client fee agreements,...looking first to the
11 contingent-fee agreement, then testing it for reasonableness.’” *Crawford*, 586 F.3d at
12 1148 (quoting *Gisbrecht*, 535 U.S. at 793, 808). Here, the fee agreement between
13 Plaintiff and counsel provided for a 25% contingency fee consistent with *Gisbrecht*.
14 Notification from the Social Security Administration indicated that 25% of the past-due
15 award, amounting to \$15,888.00, was withheld from Plaintiff’s past-due benefits for
16 payment of attorney’s fees. (Doc. 22-4 at 1). Thus, it appears that the approximate
17 award of past-due benefits amounts to \$63,552.00. However, counsel here does not seek
18 the full amount allowed pursuant to the agreement and statute but, instead, requests
19 \$10,700.00, which is approximately 17% of the award.

20 With regard to the reasonableness of the fees sought, Plaintiff’s counsel has
21 submitted time records indicating that he spent 24 hours working on Plaintiff’s case
22 before this Court, which results in an effective hourly rate of \$445.83. (Doc. 22-6). On
23 the instant record, there is no indication of any substandard performance by Plaintiff’s
24 counsel or that he engaged in any unreasonable delay given that Plaintiff’s opening brief
25 was filed on time, and counsel requested no extensions. Instead, counsel achieved a
26 favorable result for Plaintiff and should be compensated to recognize the risks attendant
27 to contingent fee litigation. Further, “[i]n cases of this type, the Ninth Circuit sitting *en*
28 *banc* has approved effective hourly rates of \$519, \$875, and \$902 without finding that

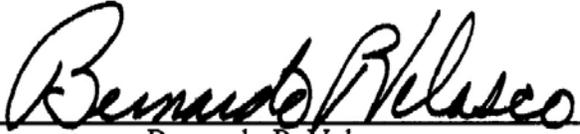
1 they are unreasonable.” *Young v. Colvin*, 2014 WL 590335, *1 (D. Ariz. Feb. 14, 2014)
2 (citing *Crawford*, 586 F.3d at 1153). Thus, upon consideration of the *Gisbrecht*
3 reasonableness factors, the Court concludes that the requested fee award is reasonable.
4 However, Mr. Smith must refund to Plaintiff the lesser of the fee awarded under 42
5 U.S.C. § 406(b) and the fee awarded under the EAJA. *See Gisbrecht*, 535 U.S. at 796.

6 **CONCLUSION**

7 For the foregoing reasons, IT IS ORDERED that “Plaintiff’s Motion and Notice of
8 Motion for Approval of Attorney’s Fees under 42 U.S.C. §406(b) of the Social Security
9 Act” (Doc. 22), is GRANTED and the Court hereby AWARDS Plaintiff’s counsel
10 \$10,700.00 in attorney’s fees pursuant to 42 U.S.C. § 406(b).

11 IT IS FURTHER ORDERED that Plaintiff’s counsel shall refund to Plaintiff the
12 lesser of the fee awarded pursuant to 42 U.S.C. § 406(b) and the fees previously awarded
13 pursuant to the Equal Access to Justice Act.

14 Dated this 30th day of October, 2017.

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19 Bernardo P. Velasco
20 United States Magistrate Judge
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