

1 WO
2
3
4
5
6
7

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**
10

11 Alan Snyder,

12 Plaintiff,

13 v.

14 Nancy A. Berryhill, Acting Commissioner
15 of Social Security Administration,

16 Defendant.

No. CV 15-00516-TUC-BPV

ORDER

17
18 Pending before the Court is Plaintiff's Application for Award of Attorney's Fees
19 and Costs under 42 U.S.C. §406(b) of the Social Security Act with accompanying
20 exhibits. (Doc. 18). Defendant has filed a Response in opposition (Doc. 19). For the
21 following reasons, the Court grants Plaintiff's Motion in part.

22 **I. Discussion**

23 Plaintiff filed this action in November 2015, seeking review of the denial of his
24 application for benefits under the Social Security Act for disability and supplemental
25 security income. (Doc. 5). Thereafter, the parties stipulated to remand the matter to the
26 Administrative Law Judge for further proceedings, and the Court remanded the matter
27 pursuant to the stipulation. (Docs. 15, 16). Upon remand, Plaintiff was granted disability
28 benefits.

1 Plaintiff now seeks attorney's fees in the amount of \$12,155.85 pursuant to 42
2 U.S.C. § 406(b). The record reflects that the Court has not previously awarded attorney's
3 fees pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d).

4 Plaintiff's counsel, Amy Foster, states that "considering the risks and benefits, the
5 reasonable hourly billing rate for an attorney with 14 years of legal experience who
6 handles cases on a contingency basis is in excess of \$500.00 per hour. This rate has been
7 found reasonable by District Courts throughout the Country." (Doc. 18-1 at ¶5). Ms.
8 Foster also indicates that Plaintiff entered a 25% contingency fee agreement. (Doc. 18-1
9 at ¶9; *see also* Doc. 18-3).

10 Defendant objects to the amount of fees sought given that Ms. Foster spent only
11 three hours litigating the case in federal court. (Doc. 19). Defendant points out that
12 "[f]or 3 hours of work before the district court, a fee of \$12,155.85 would amount to an
13 hourly rate of \$4,051.95, in a case where the parties were able to reach a stipulated
14 settlement agreement for remand without the need for Plaintiff's attorney to draft an
15 opening brief." (*Id.* at 4). Defendant contends that an award of more than \$2,250.00, i.e.,
16 \$750.00 per hour, would constitute an improper windfall under § 406(b). Plaintiff did not
17 file a Reply and, thus, has not objected to the government's position.

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

26 The record reflects that Plaintiff entered into a contingent-fee agreement wherein
27 he agreed to pay attorney's fees not to exceed 25%. (Doc. 18-3). The Supreme Court,
28 when discussing the term "reasonable fee" as used in § 406(b), concluded that "§ 406(b)

1 does not displace contingent-fee agreements as the primary means by which fees are set
2 for successfully representing Social Security benefits claimants in court. Rather, § 406(b)
3 calls for court review of such arrangements as an independent check, to assure that they
4 yield reasonable results in particular cases.” *Gisbrecht*, 535 U.S. at 807 (footnote
5 omitted). The Court also pointed out that “Congress has provided one boundary line:
6 Agreements are unenforceable to the extent that they provide for fees exceeding 25
7 percent of the past-due benefits.” *Id.* (citing 42 U.S.C. § 406(b)(1)(A)) (footnote
8 omitted). In assessing reasonableness of the fee sought, district courts should consider the
9 results achieved and may properly apply a reduction if the attorney provided substandard
10 representation or engaged in dilatory conduct in order to increase the accrued amount of
11 past-due benefits, or if the benefits are out of proportion to the time spent on the case,
12 thereby resulting in a windfall to counsel. *Crawford v. Astrue*, 586 F.3d 1142, 1148,
13 1151 (9th Cir. 2009) (citing *Gisbrecht*, 535 U.S. at 808) *see also* *Gisbrecht*, 535 U.S. at
14 808. (the court should “disallow windfalls for lawyers” (internal quotation marks and
15 citation omitted)). In making its assessment, the district court may consider the lodestar
16 calculation as an aid, if necessary. *Crawford*, 586 F.3d at 1148. The attorney bears the
17 burden of establishing that the fee sought is reasonable. *Id.* (citing *Gisbrecht*, 535 U.S. at
18 807).

19 In applying *Gisbrecht*, the Ninth Circuit has emphasized that district courts “must
20 respect ‘the primacy of lawful attorney-client fee agreements, . . . looking first to the
21 contingent-fee agreement, then testing it for reasonableness.’” *Crawford*, 586 F.3d at
22 1148 (quoting *Gisbrecht*, 535 U.S. at 793, 808). Here, the fee agreement between
23 Plaintiff and counsel provided for a 25% contingency fee consistent with *Gisbrecht*. The
24 parties do not dispute that the \$12,155.85 sought by Plaintiff’s counsel constitutes 25% of
25 the past-due amount awarded to Plaintiff.

26 With regard to the reasonableness of the fees sought, Defendant correctly points
27 out that counsel can only receive fees for “the attorney’s work before a federal court on
28 behalf of the Social Security claimant in connection with the action that resulted in past-

1 due benefits.” *Parrish v. Commissioner of Social Sec. Admin.*, 698 F.3d 1215, 1220 (9th
2 Cir. 2012); *cf. Clark v. Astrue*, 529 F.3d 1211, 1215 (9th Cir. 2008) (“the plain text of §
3 406(b) limits only the award of attorney’s fees for representation of a Social Security
4 claimant before the district court”). Plaintiff’s counsel has submitted a time record
5 indicating that she seeks compensation for time spent on the case during the
6 administrative proceeding after this Court remanded the matter. (Doc. 18-2). Counsel’s
7 time spent on the matter in administrative proceedings subsequent to the remand order
8 does not fall within the ambit of § 406(b). *Cf. Parrish*, 698 F.3d at 1220-21. The time
9 record reflects that Plaintiff’s counsel spent 3.0 hours working on the case before this
10 Court. (18-2 (entries from October 2, 2015 through March 16, 2016)).

11 On the instant record, there is no indication of any substandard performance by
12 Plaintiff’s counsel or that she engaged in any unreasonable delay. Instead, counsel
13 achieved a favorable result for Plaintiff and should be compensated to recognize the risks
14 attendant to contingent fee litigation. Although Plaintiff’s counsel states that a fee in
15 excess of \$500.00 per hour is reasonable, she provides no support for the conclusion that
16 over \$4,000 per hour is a reasonable amount in this case. Plaintiff’s counsel has the
17 burden to establish the reasonableness of the fees sought. *Gisbrecht*, 535 U.S. at 807.

18 The government has asserted that an hourly rate of \$750.00 in this case is
19 reasonable, and Plaintiff has not objected. The amount suggested by the government is
20 more than double the \$250.00 rate that attorneys practicing disability law in the District
21 of Arizona are awarded “per hour on Court Long Term Disability claims.” (Doc. 18-1 at
22 ¶7). “In cases of this type, the Ninth Circuit sitting *en banc* has approved effective hourly
23 rates of \$519, \$875, and \$902 without finding that they are unreasonable.” *Young v.*
24 *Colvin*, 2014 WL 590335, *1 (D. Ariz. Feb. 14, 2014) (citing *Crawford*, 586 F.3d at
25 1153). Thus, upon consideration of the *Gisbrecht* reasonableness factors, in addition to
26 the risk involved in the contingency fee arrangement in this case, the Court concludes
27 that a fee award of \$2,250.00 is reasonable in this case. Any greater award would result
28

1 in an improper windfall to Plaintiff's counsel contrary to *Gisbrecht*.

2 **II. Conclusion**

3 For the foregoing reasons,

4 IT IS ORDERED that Plaintiff's Application for Award of Attorney's Fees and
5 Costs under 42 U.S.C. § 406(b) of the Social Security Act is GRANTED IN PART to the
6 extent that Plaintiff's counsel is AWARDED \$2,250.00 in attorney's fees pursuant to 42
7 U.S.C. § 406(b).

8 IT IS FURTHER ORDERED that Plaintiff's Motion is DENIED to the extent that
9 he seeks an award of fees in excess of \$2,250.00.

10 The Clerk of Court is DIRECTED to amend the judgment in this matter
11 accordingly.

12 Dated this 14th day of February, 2018.

13
14
15 
16 _____
17 Bernardo P. Velasco
18 United States Magistrate Judge
19
20
21
22
23
24
25
26
27
28