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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MICHAEL L. MORRISON,)	NO. ED CV 05-516-E
)	
Plaintiff,)	
)	
v.)	OPINION AND ORDER GRANTING
)	
MICHAEL J. ASTRUE, ¹ COMMISSIONER)	IN PART COUNSEL'S MOTION FOR
OF SOCIAL SECURITY ADMINISTRATION,)	
)	ATTORNEY FEES PURSUANT TO
)	
Defendant.)	42 U.S.C. SECTION 406(b)
_____)	

PROCEEDINGS

On November 27, 2007, counsel for Plaintiff filed a "Notice of Motion and Motion for Award of Attorney's Fees [42 USC § 406(b)]" ("the Motion"), seeking \$19,904.13. Defendant filed a response on December 26, 2007, which purportedly takes no position as to whether the requested fee is reasonable, but notes certain factors for the Court's consideration. The Court has taken the Motion under submission without oral argument. See Local Rule 7-15; December 4, 2007 Minute Order.

¹ Michael J. Astrue is substituted as Commissioner of Social Security pursuant to Fed. R. Civ. P. 25(d)(1).

1 **BACKGROUND**

2
3 Plaintiff filed a complaint on June 13, 2005, seeking review
4 of the Commissioner's denial of benefits.² Following Defendant's
5 answer, Plaintiff filed a motion for summary judgment. The motion
6 for summary judgment asserted that the Commissioner's denial should
7 be reversed, and benefits should be awarded, because: (1) the
8 Administrative Law Judge ("ALJ") allegedly failed to evaluate
9 properly the opinion of Plaintiff's treating physicians; (2) the ALJ
10 allegedly failed to evaluate properly Plaintiff's subjective
11 complaints; (3) the ALJ allegedly failed to evaluate properly
12 Plaintiff's sister's testimony in determining Plaintiff's residual
13 functional capacity; and (4) the ALJ allegedly erred in applying the
14 Grids to determine Plaintiff's residual functional capacity, given
15 Plaintiff's asserted non-exertional limitations. See "Plaintiff's
16 Notice and Motion for Summary Judgment," filed May 19, 2006.

17
18 On June 22, 2006, the Court remanded the matter to the Social
19 Security Administration for further proceedings pursuant to sentence
20 four of 42 U.S.C. section 405(g). The Court found that the ALJ erred
21 by rejecting Plaintiff's treating physicians' opinion without stating

22
23 ² Plaintiff filed an application for benefits with the
24 Social Security Administration that was denied initially and on
25 reconsideration. See Administrative Record, filed October 25, 2005
26 ("A.R.") pp. 63-74, 78-80. An Administrative Law Judge then
27 conducted a hearing and issued an unfavorable decision on May 11,
28 2004. A.R. 17-25, 310-61. Plaintiff's counsel reportedly began
representing Plaintiff on May 10, 2005, after the Appeals Council
denied review of the unfavorable decision. See Motion, p. 2; see
also A.R. 5-7 (Appeals Council denial); Exhibit C to Motion
(retainer agreement).

1 specific, legitimate reasons for doing so, or without adequate
2 inquiry. The ALJ also erred by relying on the Grids to find
3 Plaintiff could perform work existing in the national economy. See
4 "Memorandum Opinion and Order of Remand," filed June 22, 2006, pp. 3-
5 6. The Court entered a judgment accordingly. See "Judgment" filed
6 June 22, 2006.

7
8 Following remand, the Administration conducted proceedings
9 that resulted in a favorable decision for Plaintiff and an award of
10 past-due benefits from January 2002, totaling \$100,816.50. See
11 Exhibit B filed with the Motion. The Commission withheld \$25,204.13
12 from this award for attorney fees based on the parties' fee
13 agreement. See Exhibits B and C to Motion.

14
15 Counsel now moves for \$19,904.13 in fees pursuant to the fee
16 agreement. See Motion, p. 2. This amount represents 25 percent of
17 past due benefits, less \$5,300 in administrative fees counsel has
18 recovered under 42 U.S.C. § 406(a). From this award, counsel
19 proposes to credit Plaintiff with \$3,601.16, the "presumptive award"
20 of attorney fees counsel could have recovered under the Equal Access
21 to Justice Act ("EAJA"),³ for a net fee of \$16,302.97. See Motion,
22

23 ³ Counsel admits he inadvertently did not seek EAJA fees.
24 See Motion, p. 14. Attorneys who successfully represent social
25 security claimants in court may be awarded fees under both the EAJA
26 and section 406(b), but the attorney must refund to the claimant
27 the amount of the smaller fee awarded. See 28 U.S.C. § 2412.
28 Gisbrecht v. Barnhart, 535 U.S. 789, 796 (2002) ("Fee awards may be
made under both [the EAJA and section 406(b)], but the claimant's
attorney must refund to the claimant the amount of the smaller
fee.") (internal quotation omitted). The Court declines to decide

(continued...)

1 pp. 2, 15; 28 U.S.C. § 2412(d)(1)(A)-(B) (EAJA).

2
3 **APPLICABLE LAW**
4

5 Under 42 U.S.C. section 406(b), the Court may allow attorney
6 fees in a "reasonable" amount, not to exceed 25 percent of the total
7 past-due benefits awarded to the claimant. The Court has an
8 independent duty to ensure that a section 406(b) contingency fee is
9 reasonable. See id.; Gisbrecht v. Barnhart, 535 U.S. 789 (2002)
10 ("Gisbrecht").⁴

11 ///

12 _____
13 ³(...continued)
14 whether Plaintiff would have been entitled to an EAJA award had
15 counsel made a timely application, or the amount of any such
16 hypothetical award. See 28 U.S.C. § 2412(d)(1)(A)-(B) (noting
17 requirements for fee recovery); see also Clinton v. City of New
18 York, 524 U.S. 417, 429-30 (1998) ("Article III of the Constitution
19 confines the jurisdiction of the federal courts to actual Cases and
20 Controversies . . ."). Any potential issue concerning the effect
21 of counsel's failure to file an EAJA application should remain, in
22 the first instance at least, a matter between Plaintiff and
23 counsel.

24 ⁴ Section 406(b)(1) provides:

25 Whenever a court renders a judgment favorable to a
26 claimant . . . who was represented before the court by an
27 attorney, the court may determine and allow as part of
28 its judgment a reasonable fee for such representation,
not in excess of 25 percent of the total of the past-due
benefits to which the claimant is entitled . . . In case
of any such judgment, no other fee may be payable . . .
for such representation except as provided in this
paragraph.

See 42 U.S.C. § 406(b)(1)(A). Section 406(b) supplements section
406(a), which provides that the Commissioner may award attorney
fees to a successful claimant's counsel for work performed before
the Social Security Administration. See 42 U.S.C. § 406(a).

1 The United States Supreme Court has explained that section
2 406(b):

3
4 . . . does not displace contingent-fee agreements as
5 the primary means by which fees are set for
6 successfully representing Social Security benefits
7 claimants in court. Rather, § 406(b) calls for court
8 review of such arrangements as an independent check, to
9 assure that they yield reasonable results in particular
10 cases. Congress has provided one boundary line:
11 Agreements are unenforceable to the extent that they
12 provide for fees exceeding 25 percent of the past-due
13 benefits. Within this 25 percent boundary . . . the
14 attorney for the successful claimant must show that the
15 fee sought is reasonable for the services rendered.

16
17 Gisbrecht at 807 (citations omitted).

18
19 When a contingency fee falls within the 25 percent boundary,
20 as here, Gisbrecht instructs that the Court appropriately may reduce
21 counsel's recovery:

22
23 . . . based on the character of the representation and
24 the results the representative achieved. If the
25 attorney is responsible for delay, for example, a
26 reduction is in order so that the attorney will not
27 profit from the accumulation of benefits during the
28 pendency of the case in court. If the benefits are

1 large in comparison to the amount of time counsel spent
2 on the case [thereby resulting in a windfall], a
3 downward adjustment is similarly in order.
4

5 Id. at 808 (citations omitted) (emphasis added); see also Straw v.
6 Bowen, 866 F.2d 1167, 1169-70 (9th Cir. 1989) (in traditional, non-
7 contingency fee analysis, the court multiplies reasonable hours
8 expended by the prevailing market rate to arrive at a "lodestar
9 figure"; the court may adjust the lodestar figure by considering the
10 factors identified in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67,
11 70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976), to the extent
12 the lodestar figure does not already subsume such factors).
13 Gisbrecht does not instruct precisely how a district court should
14 quantify the "downward adjustment" when the court concludes such an
15 adjustment is "in order."
16

17 Justice Scalia dissented in Gisbrecht, expressing concern that
18 the majority opinion "does nothing whatever to subject [section
19 406(b)] fees to anything approximating a uniform rule of law."
20 Gisbrecht, 535 U.S. at 809. Justice Scalia's concern may have been
21 well-founded. As this Court recently discussed in Ellick v.
22 Barnhart, 445 F. Supp. 2d 1166 (C.D. Cal. 2006), a survey of the
23 cases applying Gisbrecht to section 406(b) fee requests reveals
24 considerable divergence and scant evidence of any "uniform rule of
25 law." See Ellick, 445 F. Supp. 2d at 1168-72, for a summary of the
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1 reported decisions.⁵

2

3 ⁵ At the time of the Ellick decision, there were 43
4 reported decisions applying Gisbrecht to section 406(b) fee
5 requests. There have been fourteen reported decisions so applying
6 Gisbrecht since Ellick. See Ugorek v. Astrue, 2008 WL 169737 (M.D.
7 Fla. Jan. 17, 2008) (reducing claimed fee to an hourly rate of \$250
8 with an approximate multiplier of 2.25); Lapatra v. Astrue, 2008 WL
9 125462 (W.D.N.Y. Jan. 9, 2008) (awarding full 25 percent fee
10 requested notwithstanding *de facto* hourly rate of \$631.42, given
11 that the time spent was reasonable and the attorney achieved
12 excellent results); Wise v. Astrue, 2008 WL 110926 (S.D. Ala. Jan.
13 9, 2008) (awarding fee requested which yielded a *de facto* hourly
14 rate of \$520.55 for time spent before the court, and which was less
15 than 25 percent of past-due benefits); Causey v. Astrue, 2008 WL
16 111318 (D.S.C. Jan. 8, 2008) (awarding full 25 percent fee
17 requested which yielded *de facto* hourly rate of \$301.25); Johnson
18 v. Commissioner of Social Sec., 2007 WL 4614884 (M. D. Fla. Dec.
19 31, 2007) (awarding full 25 percent fee requested which yielded *de*
20 *facto* hourly rate of \$584.81, where counsel had over 30 years of
21 experience representing disabled people and where case was "fairly
22 involved"); Cintron v. Commissioner of Social Sec., 2007 WL 4482573
23 (M.D. Fla. Dec. 18, 2007) (awarding 25 percent fee requested which
24 yielded a *de facto* hourly rate of \$241.93 for time spent before the
25 court, where majority of fee available had already been recovered
26 under section 406(a)); Garcia v. Astrue, 500 F. Supp. 2d 1239 (C.D.
27 Cal. 2007) (awarding fee requested which yielded *de facto* hourly
28 rate of \$214.94 and which was less than 25 percent of past-due
benefits); Blizzard v. Astrue, 496 F. Supp. 2d 320 (S.D.N.Y. 2007)
(awarding fees equating to 25 percent of past-due benefits as
provided in fee agreement, and refusing to calculate *de facto*
hourly rate to justify "reasonableness" determination); Benton v.
Commissioner of Social Sec., 2007 WL 2027320 (E.D.N.Y. May 17,
2007) (awarding reduced fee resulting in a *de facto* hourly rate of
\$447.76 where fee requested would amount to windfall at \$1,334.17
per hour); Vilkas v. Commissioner of Social Sec., 2007 WL 1498115
(M.D. Fla. May 14, 2007) (awarding counsel's reduced request
amounting to 5 percent of past-due benefits notwithstanding *de*
facto hourly rate of \$1,121.86); Koester v. Astrue, 482 F.Supp.2d
1078, 1083 n. 5 (E.D. Wisc. 2007) (awarding fee that with offsets
equated to 25 percent of past-due benefits; court rejected
argument that award should be reduced based on *de facto* hourly rate
of \$580.67, opining that such rates should be given little weight);
Robbins v. Barnhart, 2007 WL 675654 (D. Kan. Feb. 28, 2007)
(awarding fee resulting in *de facto* hourly rate of \$26.91 more than
counsel's standard rate as reasonable and noting that counsel
worked five years on the case to obtain a favorable decision);

(continued...)

1 DISCUSSION

2
3 Having reviewed the papers on file in this case in light of
4 Gisbrecht and its progeny, the Court concludes that counsel has not
5 met counsel's burden of showing the reasonableness of the fees
6 requested. See 42 U.S.C. § 406(b); Gisbrecht, 535 U.S. at 807.
7 Counsel's office achieved a favorable result for Plaintiff and should
8 be compensated above normal hourly fees to recognize the risks of
9 contingent litigation. See, e.g., Hearn v. Barnhart, 262 F. Supp. 2d
10 1033, 1037 (N.D. Cal. 2003) (quoting Dodson v. Commissioner of Social
11 Security, 2002 WL 31927589 (W.D. Va. Oct. 22, 2002): "Congress has
12 indicated the permissibility, within limits, of rewarding attorneys
13 for assuming the risk of going uncompensated for representing Social
14 Security claimants."). However, the \$100,816.50 in past-due benefits
15 Plaintiff recovered is large in comparison to the amount of time
16 spent on the case by counsel's office.

17
18 Counsel reports that since 1980 he has practiced exclusively
19 in the area of Social Security law. See Motion, p. 12. Counsel
20 argues that the value of his services should be assessed at
21 approximately \$500 per hour according to hourly rates derived from

22 _____
23 ⁵(...continued)
24 Jakob v. Barnhart, 2006 WL 3707888 (N.D. Cal. Dec. 14, 2006)
25 (awarding amount sought yielding *de facto* hourly rate of \$603.28
26 where counsel's standard hourly rate was \$475.00); Briem v.
27 Barnhart, 2006 WL 3374955 (W.D.N.Y. Nov. 17, 2006) (awarding fees
28 equating to 25 percent of past-due benefits as provided by the fee
agreement, noting time and effort counsel expended at the
administrative level and counsel's level of experience in finding
the fee request reasonable; the court did not mention the *de facto*
hourly rate of \$612.50 for time spent before the court).

1 the 2007 Survey of Law Firm Economics - Consolidated Metropolitan
2 Analysis - San Francisco - Oakland - San Jose, California. See
3 Motion, p. 12; Exhibit E filed with the Motion. Contrary to
4 counsel's argument, rates other than the normal hourly rates of
5 social security counsel do not materially aid the Court's assessment
6 of reasonableness. See Gisbrecht, 535 U.S. at 808 (the hours spent by
7 counsel representing the claimant and counsel's "normal hourly
8 billing charge for noncontingent-fee cases" may aid "the court's
9 assessment of the reasonableness of the fee yielded by the fee
10 agreement."); see also Ellick v. Barnhart, supra, 445 F. Supp. 2d at
11 1173 n.18 (this Court previously discussing the same issue);
12 Grunseich v. Barnhart, supra, 439 F. Supp. 2d 1034, n.3 (rejecting
13 reliance on surveys of this type); but cf. Cherry v. Astrue, Case No.
14 EDCV 05-393-E, Opinion and Order Granting in Part Counsel's Motion
15 for Attorney Fees Pursuant to 42 U.S.C. Section 406(b), filed
16 December 3, 2007 (this Court adopting a standard or prevailing hourly
17 rate of \$250 for counsel in similar cases involving section 406(b)
18 fee requests); Wood v. Astrue, Case No. CV 01-7622-E, Order Granting
19 in Part Counsel's Motion for Attorney Fees Pursuant to 42 U.S.C. §
20 406(b), filed June 11, 2007 (same).

21
22 Counsel spent 22.25 hours representing Plaintiff before the
23 Court. See Motion, p. 11; Exhibit D filed with the Motion. If
24 compensated at \$500 per hour, counsel would receive \$11,125.00 for
25 time spent before the Court. Counsel asserts that his fee request of
26 \$16,302.97 (i.e., \$25,204.13 - \$5,300 in Section 406(a) fees -
27 \$3,601.16 "presumptive" EAJA award), is reasonable to compensate him
28 for the contingent risk in this case.

1 While the contingent risk in the present case should be
2 compensated reasonably, it should not be compensated as richly as
3 counsel suggests. Under the circumstances of this case, to do as
4 counsel suggests would not be faithful to Gisbrecht. See Gisbrecht
5 at 808 ("If the benefits are large in comparison to the amount of
6 time counsel spent on the case, a downward adjustment is . . . in
7 order"). Counsel spent very little time on the case in comparison to
8 the amount of benefits now owing, and the issues briefed in the
9 summary judgment motion were neither novel nor complex.⁶

10
11 The Court finds that a downward adjustment from a full
12 contingency fee award is required in this case to arrive at a fee
13 that is "reasonable for the services rendered." After surveying the
14 case law, and after considering the nature of the contingent risk and
15 the substantial benefits obtained for Plaintiff, the Court finds that
16 a fee of \$13,906.25 is a reasonable fee for the representation of
17 Plaintiff before this Court under Gisbrecht and the fee agreement
18 between counsel and Plaintiff. This award reasonably represents 2.5
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26 ⁶ Counsel does not argue that any of the issues raised in
27 Plaintiff's complaint or motion for summary judgment were
28 particularly novel or complex, nor could counsel persuasively so
argue.

1 times an hourly rate of \$250 for counsel⁷ (or a *de facto* hourly rate
2 of \$625). See Brannen v. Barnhart, 2004 WL 1737443 (E.D. Tex.
3 Jul. 22, 2004) (awarding fee that was roughly 1.01 times counsel's
4 normal hourly rate for counsel's time spent before the court, where
5 past-due benefits exceeded \$100,000); Wallace v. Barnhart, 2004 WL
6 883447 (N.D. Iowa Apr. 22, 2004) (awarding fee that was 1.25
7 counsel's normal hourly rate); Hearn v. Barnhart, 262 F. Supp. 2d at
8 1035 (awarding fee that was roughly 1.5 times counsel's normal hourly
9 rate, where past-due benefits exceeded \$100,000, and where claimant
10 alleged a variety of ailments not susceptible to clear and
11 straightforward forms of proof); Mitchell v. Barnhart, 376 F. Supp.
12 2d 916, 923 (S.D. Iowa 2005) (awarding fee that was 1.64 times
13 counsel's normal hourly rate); Coppett v. Barnhart, 242 F. Supp. 2d
14 1380, 1381 (S.D. Ga. 2002) (awarding fee that was roughly twice
15 counsel's normal hourly rate); Roark v. Barnhart, 221 F. Supp. 2d at
16 1021 (same); Ugorek v. Astrue, 2008 WL 169737 (M.D. Fla. Jan. 17,
17 2008) (awarding fee that approximated 2.25 times an hourly rate of
18 \$250); Ogle v. Barnhart, 2003 WL 22956419 (D. Me. Dec. 12, 2003)

19
20 ⁷ Although counsel has not reported any reliable evidence
21 to establish his standard hourly rates, in similar cases the Court
22 has chosen a standard or prevailing hourly rate of \$250 for counsel
23 (multiplied by a factor of 2.5 for a *de facto* hourly rate of \$625).
24 See, e.g., Wood v. Astrue, Case No. CV 01-7622-E, Order Granting in
25 Part Counsel's Motion for Attorney Fees Pursuant to 42 U.S.C. §
26 406(b) filed June 11, 2007; see also Gisbrecht, 535 U.S. at 808
27 (counsel's normal hourly billing rates can aid court's
28 interpretation of reasonableness); Hodges-Williams v. Barnhart, 400
F. Supp. 2d 1093, 1099-1100 (N.D. Ill. Dec. 6, 2005) (reducing fees
to a *de facto* hourly rate judge deemed reasonable based on judge's
own experience in private practice and with the court); Van Lewis
v. Barnhart, 2004 WL 3454545 *1 (W.D. Va. Jun. 11, 2004) (reducing
fees to *de facto* hourly rate generally approved by court in
noncontingency fee cases).

1 (awarding fee that was 2.5 times counsel's normal hourly rate, where
2 past-due benefits exceeded \$100,000 and issues litigated were not
3 complex); Van Nostrand v. Barnhart, 2005 WL 1168428 (W.D. Tex. May
4 12, 2005) (same); cf. Yarnevic v. Apfel, 359 F. Supp. 2d 1363, 1365-
5 66 (N.D. Ga. Feb. 18, 2005) (awarding fee that was roughly 2.85 times
6 counsel's standard hourly rate, where past-due benefits exceeded
7 \$100,000); Droke v. Barnhart, 2005 WL 2174397 (W.D. Tenn. Sep. 6,
8 2005) (awarding fee that was roughly 5.54 times counsel's normal
9 hourly rate where counsel achieved "exceptional" results); Claypool
10 v. Barnhart, 294 F. Supp. 2d 829, 830 (S.D. W. Va. 2003) (awarding
11 fee that was roughly 5.73 times counsel's normal hourly rate, where
12 past-due benefits totaled almost \$200,000, and counsel faced
13 difficulties with the case and went through four levels of review);
14 and Whitehead v. Barnhart, 2006 WL 681168 (W.D. Mo. Apr. 7, 2006)
15 (awarding fee that was roughly 6.55 times counsel's normal hourly
16 rate, where counsel argued novel, case-specific and risky position
17 and past-due benefits exceeded \$100,000).

18
19 As in Ellick, the Court acknowledges the regrettable
20 imprecision of its analysis. After Gisbrecht, counsel and their
21 clients cannot predict with any degree of certainty what courts will
22 award as "reasonable" fees under section 406(b), particularly where
23 the benefits are large in comparison to the amount of time spent by
24 counsel. And, absent further guidance from Congress or from the
25 appellate courts, district courts cannot have any degree of
26 confidence that their section 406(b) awards will be consistent with
27 what the law intends.

28 ///

1 **CONCLUSION**

2

3 The Motion is granted in part. Section 406(b) fees are
4 allowed in the amount of \$13,906.25 to be paid out of past due
5 benefits. The parties shall proceed accordingly.

6

7 IT IS SO ORDERED.

8

9 DATED: February 7, 2008.

10

11 _____/S/_____
12 CHARLES F. EICK
13 UNITED STATES MAGISTRATE JUDGE

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