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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

THOMAS F. KIESZEK,  
Plaintiff,

v.

MICHAEL J. ASTRUE,  
Commissioner of Social  
Security,  
Defendant.

Case No. EDCV 05-0840 JTL

ORDER AWARDING ATTORNEY FEES  
PURSUANT TO 42 U.S.C. SECTION 406(b)

**BACKGROUND**

On September 8, 2005, Thomas F. Kieszek ("plaintiff") filed a Complaint seeking review of the Commissioner's denial of plaintiff's application for Disability Insurance Benefits. On September 17, 2005, plaintiff and Michael J. Astrue, Commissioner of Social Security ("defendant") filed a Consent to Proceed Before United States Magistrate Judge Jennifer T. Lum. Thereafter, on March 7, 2006, defendant filed an Answer to the Complaint. On May 4, 2006, the parties filed their Joint Stipulation.

On August 17, 2006, this Court remanded the case to allow the Administrative Law Judge ("ALJ") to fully explain his assessment of the opinion of plaintiff's treating physician and remedy the errors outlined in the Court's Memorandum Opinion and Order. On October 3, 2006, the Court entered an Order granting plaintiff's counsel the sum of \$1,957.00 in attorney fees pursuant to the Equal Access to Justice Act ("EAJA").

1 After further administrative proceedings, the ALJ determined that plaintiff was entitled  
2 to benefits. (See Declaration of William M. Kuntz ["Kuntz Decl."] ¶ 3, Exh. 2B). Thereafter, the  
3 Commissioner sent plaintiff a Notice of Award indicating an award of retroactive benefits in the  
4 sum of \$37,689.00. (See Kuntz Decl. ¶ 4, Exh. 3).

5 On August 22, 2008, plaintiff filed a Motion for Attorney's Fees pursuant to 42 U.S.C.  
6 Section 406(b) ("Motion") with an attached Declaration of William M. Kuntz. On August 28,  
7 2008, defendant filed a Response to Plaintiff's Counsel's Motion for Attorney Fees Pursuant to  
8 42 U.S.C. § 406(b) ("Response").

## 9 10 **DISCUSSION**

11 Congress authorized payment of a reasonable fee for representation of a successful  
12 social security claimant in court. 42 U.S.C. § 406(b). A "reasonable fee" cannot be in excess  
13 of 25 percent of the past-due benefits to which the claimant is entitled by his or her judgment.  
14 42 U.S.C. § 406(b)(1)(A); see Clark v. Astrue, 529 F.3d 1211, 1215-18 (9th Cir. 2008). This  
15 fee provision is not intended to displace contingent fee agreements as a means to set fees for  
16 representation of social security benefit claimants. Gisbrecht v. Barnhart, 535 U.S. 789, 807  
17 (2002). Nor does it imply that all contingent fee agreements that provide for fees up to 25  
18 percent of the past-due benefits awarded are reasonable per se. Id. Instead, in order to  
19 recover fees under Section 406(b), an attorney for a successful claimant must show that the  
20 fee sought is within the 25 percent boundary and that the fee sought is reasonable for the  
21 services rendered in the course of his or her representation before the district court. Id. at 807-  
22 08

23 Accordingly, even when a contingent fee falls within the 25 percent boundary, the court  
24 may reduce the fee if the court finds it unreasonable. Id. at 807. In order to determine whether  
25 a fee is reasonable, courts have considered the attorney's recovery based on the character of  
26 the representation and the results the representation achieved. Id. at 808. For example, if the  
27 attorney is responsible for delay, "a reduction is in order so that the attorney will not profit from  
28 the accumulation of benefits during the pendency of the case in court." Gisbrecht, 535 U.S. at

1 808. Similarly, if the benefits are large in comparison to the amount of time counsel spent on  
2 the case, a downward adjustment is in order to avoid a windfall for the attorney. Id.; see also  
3 Ellick v. Barnhart, 445 F. Supp. 2d 1166, 1173 (C.D. Cal. 2006) (“Counsel spent very little time  
4 on the case in comparison to the amount of benefits now owing, and the issues briefed in the  
5 summary judgment motion were neither novel nor complex.”). If the contingent fee is found to  
6 be unreasonable, the court must adjust the attorney’s recovery accordingly. Gisbrecht, 535  
7 U.S. at 808.

8 Here, plaintiff is a successful social security claimant and plaintiff’s attorney may be  
9 awarded a reasonable fee under Section 406(b). See 42 U.S.C. § 406(b)(1)(A) (“Whenever a  
10 court renders a judgment favorable to a claimant under [Title II] who was represented before  
11 the court by an attorney, the court may determine and allow as part of its judgment a  
12 reasonable fee for such representation, not in excess of 25 percent of the total of the past-due  
13 benefits to which the claimant is entitled by reason of such judgment . . .”).

14 On August 10, 2004, plaintiff entered into a contingent fee agreement with his attorney.  
15 (See Kuntz Decl. ¶ 2, Exh. 1). Under the terms of the contingent fee agreement, plaintiff  
16 agreed that his counsel would receive a fee equal to 25 percent of the total retroactive benefits  
17 and the award was not to exceed \$5,300.00. (See Kuntz Decl. ¶ 2, Exh. 1). Thus, the  
18 contingent fee agreement provides for a fee that falls within the acceptable range provided by  
19 Section 406(b). In addition, there is no basis to find, and none is alleged, that the contingent  
20 fee agreement itself is invalid based on fraud or other grounds.

21 Upon finding a valid contingent fee agreement between a successful social security  
22 claimant and his or her attorney, the Court must determine whether the contingent fee is  
23 reasonable for the services rendered. Gisbrecht, 535 U.S. at 807. Here, plaintiff’s counsel  
24 proposes to collect a fee of \$3,422.00 based on 12.0 hours of attorney time for representation  
25 before the district court. (Motion at 7; Kuntz Decl. ¶ 5, Exh. 4). Defendant notes that such a  
26 fee results in an effectively hourly rate of \$285.17. (Response at 8).

27 To assess the reasonableness of counsel’s fee pursuant to the terms of the contingent  
28 fee agreement, the Court has reviewed the record summarizing the time plaintiff’s counsel

1 spent working on the case before the district court. See Gisbrecht, 535 U.S. at 808-09. (See  
2 Motion at 7; Kuntz Decl. ¶ 5, Exh. 4). After considering the reasonableness of the fee request  
3 in light of the particular circumstances of this case and the risks associated with representation  
4 of numerous social security claimants on a contingent fee basis, the Court finds that \$3,422.00  
5 for 12.0 hours of attorney time for representation before the district court is reasonable.

6  
7 **CONCLUSION**

8 Based upon the foregoing, plaintiff's motion for attorney fees is **GRANTED**. Attorney  
9 fees under Section 406(b) are awarded in the gross amount of \$3,422.00, to be paid out of the  
10 sums withheld by the Commissioner from the benefits awarded to plaintiff. Upon payment by  
11 the Commissioner of such amount to plaintiff's counsel, plaintiff's counsel shall reimburse  
12 plaintiff in the amount of \$1,957.00 to offset the fee award that the Commissioner has already  
13 paid to counsel under the EAJA.

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15 DATED: November 13, 2008

16 /s/-Jennifer T. Lum  
17 JENNIFER T. LUM  
18 UNITED STATES MAGISTRATE JUDGE  
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