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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KIMBERLY GATES,

Plaintiff,

v.

NANCY A. BERRYHILL¹, Acting
Commissioner of Social Security,

Defendant.

Case No. EDCV 14-0020-KK

ORDER GRANTING MOTION FOR
ATTORNEY FEES PURSUANT TO
42 U.S.C. § 406(B)

I.

INTRODUCTION

Plaintiff Kimberly Gates's ("Plaintiff's") counsel, Erika Bailey Drake of Drake & Drake, P.C. ("Counsel"), filed a Motion for Attorney's Fees Pursuant to 42 U.S.C. § 406(b) ("Motion"). The Motion seeks an award in the amount of \$25,082.25 for representing Plaintiff in an action to obtain Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB"), with a refund to Plaintiff of \$3,300.00 for the Equal Access to Justice Act ("EAJA") fees previously awarded.

¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security Administration. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court substitutes Nancy A. Berryhill as Defendant in the instant case.

1 The parties have consented to the jurisdiction of the undersigned United
2 States Magistrate Judge, pursuant to 28 U.S.C. § 636(c). For the reasons stated
3 below, the Court grants the Motion.

4 **II.**

5 **RELEVANT BACKGROUND**

6 On January 13, 2014, Plaintiff filed the Complaint in this action. See ECF
7 Docket No. (“Dkt.”) 3, Compl. Plaintiff alleged defendant Carolyn B. Colvin,
8 Acting Commissioner of Social Security (“Defendant”) improperly denied
9 Plaintiff’s applications for SSI and DIB. Id. at 2-3. On October 15, 2014, the Court
10 found Defendant erred in denying Plaintiff benefits, and entered Judgment
11 reversing and remanding the case to Defendant for further administrative
12 proceedings. Dkt. 25, Judgment.

13 On December 22, 2014, the Court awarded Counsel EAJA fees in the
14 amount of \$3,300.00. Dkt. 27, Order Granting EAJA Fees.

15 On June 30, 2017, pursuant to 42 U.S.C. § 406(b), Counsel filed the instant
16 Motion seeking the amount of \$25,082.25 for representing Plaintiff in the
17 underlying proceedings before the Court. Dkt. 28, Mot. In the Motion, Counsel
18 states she “will refund to Plaintiff EAJA fees previously awarded in the amount of
19 \$3,300.” Id. at 1. According to Counsel, 17.7 hours of attorney time were
20 expended on Plaintiff’s case. Itemized Hours, Dkt. 28, Ex. 3. Counsel, therefore,
21 seeks compensation pursuant to a contingency fee agreement stating Plaintiff “will
22 pay representative a fee equal to the lesser of 25% of [Plaintiff’s] past-due benefits
23 or the dollar amount established pursuant to 42 USC Section 206(a)(2)(A), which
24 is currently set at, \$6,000, but may be increased from time to time by the
25 Commissioner of Social Security.” Contingency Fee Agreement, Dkt. 28, Ex. 2.

26 On June 30, 2017, Plaintiff was served with the Motion and informed she had
27 a right to file a response to the Motion. Dkt. 25, Mot. at 2, 9. Plaintiff failed to file
28 a timely response. On July 6, 2017, Defendant filed a Non-Opposition to the

1 Motion stating she “has no objection to the fee request.” Dkt. 29, Non-Opposition
2 at 4. Thus, the Court deems this matter submitted.

3 **III.**

4 **DISCUSSION**

5 **A. APPLICABLE LAW**

6 Pursuant to 42 U.S.C. § 406(b) (“Section 406(b)”):

7 Whenever a court renders a judgment favorable to a claimant under
8 this subchapter who was represented before the court by an attorney,
9 the court may determine and allow as part of its judgment a reasonable
10 fee for such representation, not in excess of 25 percent of the total of
11 the past-due benefits to which the claimant is entitled by reason of
12 such judgment, and the Commissioner of Social Security may . . .
13 certify the amount of such fee for payment to such attorney out of, and
14 not in addition to, the amount of such past-due benefits.

15 42 U.S.C. § 406(b)(1)(A). Thus, “a prevailing [disability] claimant’s [attorney’s]
16 fees are payable only out of the benefits recovered; in amount, such fees may not
17 exceed 25 percent of past-due benefits.” Gisbrecht v. Barnhart, 535 U.S. 789, 792,
18 122 S. Ct. 1817, 152 L. Ed. 2d 996 (2002).

19 Where a claimant entered into a contingent fee agreement with counsel, a
20 court must apply Section 406(b) “to control, not to displace, fee agreements
21 between Social Security benefits claimants and their counsel.” Id. at 793. A court
22 should not use a “lodestar method,” under which a district court “determines a
23 reasonable fee by multiplying the reasonable hourly rate by the number of hours
24 reasonably expended on the case.” Crawford v. Astrue, 586 F.3d 1142, 1148 (9th
25 Cir. 2009) (en banc) (citation omitted). Rather, where the claimant and counsel
26 entered into a lawful contingent fee agreement, courts that use the “lodestar”
27 method as the starting point to determine the reasonableness of fees requested
28 under Section 406(b) improperly “reject the primacy of lawful attorney-client fee

1 agreements.” Gisbrecht, 535 U.S. at 793. Thus, courts should not apply lodestar
2 rules in cases where the claimant and counsel reached a contingent fee agreement
3 because:

4 [t]he lodestar method under-compensates attorneys for the risk they
5 assume in representing [social security] claimants and ordinarily
6 produces remarkably smaller fees than would be produced by starting
7 with the contingent-fee agreement. A district court’s use of the
8 lodestar to determine a reasonable fee thus ultimately works to the
9 disadvantage of [social security] claimants who need counsel to
10 recover any past-due benefits at all.

11 Crawford, 586 F.3d at 1149.

12 However, even in contingency fee cases, a court has “an affirmative duty to
13 assure that the reasonableness of the fee [asserted by counsel] is established.” Id.
14 The court must examine “whether the amount need be reduced, not whether the
15 lodestar amount should be enhanced.” Id. The court may consider factors such as
16 the character of the representation, the results achieved, the ratio between the
17 amount of any benefits awarded and the time expended, and any undue delay
18 attributable to counsel that caused an accumulation of back benefits in determining
19 whether a lawful contingent fee agreement is reasonable. See Gisbrecht, 535 U.S.
20 at 808; Crawford, 586 F.3d at 1151.

21 **B. ANALYSIS**

22 Here, Counsel seeks a reasonable fee under Section 406(b). Plaintiff
23 retained Counsel to represent her in federal court in her appeal from the
24 administrative denial of benefits, and agreed to pay Counsel a contingency fee of
25 twenty-five percent of any past due benefits obtained. See Contingency Fee
26 Agreement, Dkt. 28, Ex. 2. Consideration of the factors set forth in Gisbrecht and
27 Crawford warrants no reduction of the fee Counsel seeks.

1 The record discloses no issue regarding the quality or efficiency of Counsel’s
2 representation before this Court, or any misconduct or delay by Counsel. Counsel
3 obtained a favorable outcome for Plaintiff, ultimately resulting in a remand for
4 further administrative proceedings and an award of past due benefits. See Dkt. 25,
5 Judgment; Notice of Award, Dkt. 28, Ex. 1. Further, the 17.7 hours expended to
6 litigate this case was reasonable and within the approved range for social security
7 disability cases. See Patterson v. Apfel, 99 F. Supp. 2d 1212, 1214 & n.2 (C.D. Cal.
8 2000) (noting that “a survey of several dozen cases in which attorney’s fees were
9 awarded in social security cases suggests that the 33.75 hours spent by plaintiff’s
10 counsel falls within the approved range”).

11 In addition, a fee of \$25,082.25 based on 17.7 hours of attorney time is
12 reasonable. See Itemized Hours, Dkt. 28, Ex. 3. The Court finds Counsel’s
13 effective hourly rate of approximately \$1,417.08 reasonable under the
14 circumstances. Dkt. 28 at 5; see Villa v. Astrue, 2010 WL 118454, at *1-2 (E.D.
15 Cal. Jan. 7, 2010) (approving Section 406(b) fees exceeding \$1,000.00 per hour,
16 and noting “[r]educing [Section] 406(b) fees after Crawford is a dicey business”).
17 Further, post-Gisbrecht decisions have approved contingent fee agreements
18 yielding hourly rates greater than the rate Counsel seeks. See, e.g., Daniel v.
19 Astrue, 2009 WL 1941632, at *2-3 (C.D. Cal. July 2, 2009) (approving fees
20 amounting to \$1,491.25 per hour). Hence, in light of the hours Counsel expended,
21 the Section 406(b) fee award amount Counsel requests does not represent an unfair
22 windfall to Counsel.

23 Finally, nothing in the record suggests any overreaching in the making of the
24 fee agreement or any impropriety on the part of Counsel in representing Plaintiff.
25 Counsel assumed the risk of nonpayment inherent in a contingency agreement and
26 Counsel’s efforts proved successful for Plaintiff. Accordingly, the Court finds the
27 Section 406(b) fees Counsel requests reasonable.

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IV.
ORDER

Based on the foregoing, **IT IS HEREBY ORDERED:** (1) Counsel’s Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b) is **GRANTED**; and (2) Defendant is directed to pay Counsel the sum of \$25,082.25 with a reimbursement to Plaintiff for EAJA fees previously awarded in the amount of \$3,300.

Dated: July 21, 2017



HONORABLE KENLY KIYA KATO
United States Magistrate Judge