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

STEVEN EDWARDS,)	NO. ED CV 14-1798-E
)	
Plaintiff,)	
)	
v.)	ORDER RE: COUNSEL'S "MOTION
)	
NANCY A. BERRYHILL, ACTING)	FOR ATTORNEY FEES PURSUANT TO
COMMISSIONER OF SOCIAL SECURITY)	
ADMINISTRATION, ^{1/})	42 U.S.C. § 406(b), etc."
)	
Defendant.)	
)	

PROCEEDINGS

On July 27, 2017, counsel for Plaintiff filed "Counsel's Notice of Motion and Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b), etc." ("the Motion") with exhibits ("Motion Ex."). The Motion seeks \$22,560.23 in fees from the Administration, with an order to reimburse Plaintiff for: (1) the \$6,000 the Administration previously awarded under 28 U.S.C. § 406(a) for counsel's time spent before the Administration; and (2) the \$2,400 the Government previously paid in

^{1/} Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Nancy A. Berryhill is hereby substituted as the defendant in this action.

1 fees under 28 U.S.C. § 2412(d) (the Equal Access to Justice Act
2 ("EAJA")). Counsel submits that the order requested would result in a
3 net fee to counsel of \$14,160.23 for 20.9 hours of work counsel and
4 his paralegals performed before this Court under a contingent fee
5 agreement with Plaintiff.

6
7 On August 11, 2017, Defendant filed a response that purportedly
8 takes no position regarding whether the requested fee is "reasonable."
9 Defendant's response suggests, however, that a calculation of the *de*
10 *facto* hourly rate counsel seeks ranges from \$1,514.11 for attorney and
11 paralegal time, to \$2,108.43 for only attorney time. See Defendant's
12 Response, p. 4 n.3. The Court has taken the Motion under submission
13 without oral argument. See Minute Order, filed July 28, 2017.

14
15 **BACKGROUND**

16
17 Plaintiff filed a complaint on September 8, 2014, seeking review
18 of the Commissioner's denial of disability benefits. The parties
19 filed a consent to proceed before a United States Magistrate Judge on
20 September 29, 2014. Plaintiff filed a motion for summary judgment on
21 March 11, 2015. Defendant filed a motion for summary judgment on
22 June 4, 2015. On July 14, 2015, the Court denied the parties' motions
23 and remanded this matter to the Commissioner for further
24 administrative action, finding that the Administrative Law Judge's
25 reasoning did not suffice to support an adverse credibility finding.
26 See Memorandum Opinion and Order of Remand and Judgment (Docket Nos.
27 21-22). On September 29, 2015, upon the parties' stipulation, the
28 Court awarded EAJA fees in the amount of \$2,400, payable to

1 Plaintiff's counsel (Docket Nos. 23-26).

2
3 On remand, the Administration conducted additional proceedings
4 that resulted in an award of past-due Supplemental Security Income
5 ("SSI") of \$2,975.92 and past-due Disability Insurance Benefits
6 ("DIB") of \$87,265.00, for a total of \$90,240.92 in past-due benefits.
7 See Motion Ex. 9, p. 2, and Ex. 10, p. 3.^{2/} From these awards, the
8 Administration withheld for the payment of attorney fees \$22,560.23
9 (i.e., \$743.98 from past-due SSI, plus \$21,816.25 from past-due DIB).
10 See Motion, p. 1; Motion Ex. 9, p. 2, and Ex. 10, p. 4. Counsel now
11 seeks the entirety of this amount under Section 406(b). See id. As
12 indicated above, counsel already has received \$6,000 under Section
13 406(a) for work performed before the Administration. Without citing
14 any supporting authority, counsel urges the Court to order a
15 reimbursement to Plaintiff of the Section 406(a) fees. See Motion, p.
16 1; Motion Ex. 10, p. 3.

17
18 In support of the Motion, counsel has submitted copies of the fee
19 agreements between counsel and Plaintiff dated August 17, 2011, and
20 August 20, 2014. See Motion, Exs. 1B and 4. These agreements provide
21 for a contingent fee of the lesser of 25 percent of past-due benefits
22 or \$6,000 under Section 406(a), and an additional fee of 25 percent of

23 ///

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25 _____
26 ^{2/} Plaintiff claims that past-due SSI totaled \$2,231.94. See Motion,
27 p. 4. However, that amount represented SSI only through January of
28 2016. See Motion Ex. 9, p. 2. The Administration withheld from past-
due SSI \$743.98 for the payment of attorney fees, which is 25 percent
of \$2,975.92. See id.

1 any award of past-due benefits under Section 406(b). See id.^{3/}
2 Counsel also submitted a billing itemization reflecting that counsel
3 worked 10.7 hours and counsel's paralegals worked either 9.33 hours or
4 10.2 hours representing Plaintiff before the Court. See Motion Ex.
5 14.^{4/} This billing itemization shows that all of counsel's 10.7 hours
6 were spent preparing Plaintiff's motion for summary judgment, and six
7 of the 9.33 paralegal hours were spent preparing the Motion. Id.

8
9 **APPLICABLE LAW**

10
11 Section 406(b) (1) of Title 42 provides:

12
13 Whenever a court renders a judgment favorable to a claimant
14 . . . who was represented before the court by an attorney,
15 the court may determine and allow as part of its judgment a
16 reasonable fee for such representation, not in excess of
17 25 percent of the total of the past-due benefits to which
18 the claimant is entitled . . . In case of any such judgment,
19

20 ^{3/} There is no legal prohibition against recovering more than 25
21 percent of past-due benefits for combined work before the
22 Administration and the Court. See Clark v. Astrue, 529 F.3d 1211,
23 1215-16 (9th Cir. 2008) (holding that 25 percent cap on fees under
24 Section 406(b) is not a cap for total fees under Sections 406(a) and
25 (b)); accord Laboy v. Colvin, 631 Fed. App'x 468, 468-69 (9th Cir.
26 2016).

27 ^{4/} The itemized billing for counsel's paralegals reflects a total of
28 560 minutes (9.33 hours), whereas the "Total Paralegal Hours" are
reported as 1.95 + 2.25 + 6 hours (a total of 10.2 hours). See Motion
Ex. 14; see also Motion, p. 6 (representing that total paralegal hours
are 10.2 hours). The Court has accepted only the itemized billing from
the statement and consequently has limited the recoverable paralegal
time to 9.33 hours.

1 no other fee may be payable . . . for such representation
2 except as provided in this paragraph. 42 U.S.C. §
3 406(b) (1) (A) .
4

5 According to the United States Supreme Court, section 406(b)
6
7 does not displace contingent-fee agreements as the primary
8 means by which fees are set for successfully representing
9 Social Security benefits claimants in court. Rather,
10 § 406(b) calls for court review of such arrangements as an
11 independent check, to assure that they yield reasonable
12 results in particular cases. Congress has provided one
13 boundary line: Agreements are unenforceable to the extent
14 that they provide for fees exceeding 25 percent of the past-
15 due benefits. Within this 25 percent boundary . . . the
16 attorney for the successful claimant must show that the fee
17 sought is reasonable for the services rendered. Gisbrecht
18 v. Barnhart, 535 U.S. 789, 807 (2002) (citations omitted)
19 (emphasis added) ("Gisbrecht").
20

21 The hours spent by counsel representing the claimant and
22 counsel's "normal hourly billing charge for noncontingent-fee cases"
23 may aid "the court's assessment of the reasonableness of the fee
24 yielded by the fee agreement." Id. at 808. The Court appropriately
25 may reduce counsel's recovery

26
27 based on the character of the representation and the results
28 the representative achieved. If the attorney is responsible

1 for delay, for example, a reduction is in order so that the
2 attorney will not profit from the accumulation of benefits
3 during the pendency of the case in court. If the benefits
4 are large in comparison to the amount of time counsel spent
5 on the case, a downward adjustment is similarly in order.

6
7 Id. (citations omitted) (emphasis added). Gisbrecht does not instruct
8 precisely how a district court should quantify the "downward
9 adjustment" when the court concludes such an adjustment is "in
10 order."

11 12 **DISCUSSION**

13
14 For the reasons discussed below, the Court has concluded that a
15 downward adjustment is "in order" in the present case. Despite the
16 primacy of the fee agreement, which provides for a separate contingent
17 fee of 25 percent for Section 406(b) fees, Plaintiff's counsel has
18 failed to prove that the total Section 406(b) fee sought is
19 "reasonable." See Gisbrecht, 535 U.S. at 807; 42 U.S.C. §
20 406(b) (1) (A).

21
22 Examining the reasonableness factors identified in Gisbrecht, the
23 Court concludes that neither "the character of the representation" nor
24 "the results the representative achieved" suggest the unreasonableness
25 of the fee sought. Counsel's representation of Plaintiff before the
26 Court resulted in a remand. Counsel filed and served a pro forma
27 complaint, consented to proceed before a Magistrate Judge, and
28 prepared a motion for summary judgment. Nothing suggests that

1 counsel's representation was substandard or that the results achieved
2 did not well serve Plaintiff's interests.

3
4 It does not appear that Plaintiff's counsel was directly
5 responsible for any significant delays in the initial administrative
6 proceedings or in the proceedings before this Court.^{5/} There did
7 occur an unexplained delay in the administrative proceedings following
8 this Court's remand, however. The Court remanded the matter to the
9 Administration on July 14, 2015 (Docket Nos. 21-22). Yet, the Appeals
10 Council did not remand the matter to the Administrative Law Judge
11 until October 14, 2016. See Motion Exs. 6-7. The Appeals Council's
12 remand did not occur until after Plaintiff's counsel followed up on
13 August 2, 2016 (over a year after the Court's remand). See id. A
14 fully favorable administrative decision issued on February 1, 2017
15 (Motion Ex. 8). Accordingly, it appears that approximately a year of
16 past-due benefits accrued with no apparent work from counsel or the
17 Administration. The accumulated SSI from February 1, 2016, until the
18 favorable decision on February 1, 2017, is negligible (i.e.,
19 approximately \$629.92). See Motion Ex. 9, p. 2. The accumulated DIB
20 for that period, however, is much more substantial (\$1,434.20 per
21 month from February 2016 until November 2016, and \$1,438.50 per month
22 from December 2016 for a total of \$17,219). See Motion Ex. 10, p. 1.

23
24 ^{5/} Plaintiff's counsel began representing Plaintiff on or around
25 August 7, 2011. See Motion Ex. 1A. On August 31, 2011, counsel
26 applied for benefits for Plaintiff. See Motion Ex. 8, p. 1. Following
27 a hearing, an Administrative Law Judge issued an unfavorable decision
28 on April 11, 2013 (id.). The Appeals Council denied Plaintiff's
request for review on August 6, 2014 (Motion Ex. 3). Counsel lodged a
complaint with this Court on August 29, 2014 (Docket No. 1), and
thereafter met all the deadlines imposed by the Court.

1 Twenty-five percent of this amount is \$4,304.75. If counsel were
2 proposing to receive the entire 25 percent of past-due benefits under
3 Section 406(b) while retaining the \$6,000 in Section 406(a) fees
4 already awarded, the Court might well conclude that a downward
5 adjustment should occur because of delay. Since counsel has offered
6 to refund the Section 406(a) fees to Plaintiff, however, the Court
7 finds no cause on grounds of delay to reduce the Section 406(b) fees
8 requested. Compare Ashing v. Astrue, 798 F. Supp. 2d 1143, 1146 (C.D.
9 Cal. 2011) (discerning a windfall where a substantial amount of past-
10 due benefits resulted from delay at the administrative level and
11 awarding reduced fees).

12
13 If the Court's analysis of counsel's fee request were to end
14 here, the fee requested could be deemed "reasonable." However,
15 Gisbrecht further instructs that where "the benefits are large in
16 comparison to the amount of time counsel spent on the case," the fee
17 resulting from a 25 percent contingency fee agreement can be
18 unreasonable such that a downward adjustment could be "in order."
19 Gisbrecht, 535 U.S. at 808. Here, Plaintiff reportedly recovered
20 \$90,240.92 in past-due benefits, counsel spent only 10.7 hours before
21 the Court and counsel's paralegals spent only 9.33 hours before the
22 Court. Counsel has requested a Section 406(b) award of the total 25
23 percent withholding of \$22,560.23, (with a reimbursement to Plaintiff
24 of the \$6,000 previously awarded under Section 406(a)), for a net

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1 Section 406(b) award of \$16,560.23.^{6/}

2
3 If the Court considers the entire Section 406(b) request of
4 \$22,560.23, the *de facto* hourly rate for combined counsel and itemized
5 paralegal time (10.7 hours + 9.33 hours for a total of 20.03 hours),
6 would be approximately \$1,126.32 per hour (i.e., \$22,560.23 / 20.03
7 hours).^{7/} Deducting the cost of paralegal time at the reported EAJA
8 hourly rates (i.e., \$165 per hour for 8.25 hours + \$140 per hour for
9 the remaining 1.08 hours)^{8/} of \$1,512.45, the remaining fee of
10 \$21,047.78 (i.e., \$22,560.23 - \$1,512.45) counsel is seeking for 10.7
11 of counsel's time yields a *de facto* hourly rate of \$1,967.08 (i.e.,
12 \$21,047.78 / 10.7 hours).

13
14 If the Court considers a net Section 406(b) award of \$16,560.23,
15 the *de facto* hourly rate for combined counsel and itemized paralegal
16 time would be approximately \$826.77 (i.e., \$16,560.23 / 20.03 hours).

17
18 ^{6/} Any award made under Section 406(b) must be offset by the \$2,400
19 in fees counsel previously recovered under the EAJA, but such offset
20 does not effectively reduce the amount of fees counsel will have
recovered for time spent before the Court.

21 ^{7/} Plaintiff's counsel's calculation of a *de facto* hourly rate of
22 \$1,079.44 is based on the total withholding for both Section 406(a) and
23 Section 406(b) fee awards, divided by 20.9 hours (the total hours
reported for counsel and the unitemized alleged total time for his
paralegals). See Motion, p. 7 & Ex. 14.

24 ^{8/} As explained in Footnote 4, the Court has accepted the itemized
25 billing for paralegal time of 560 total minutes as an accurate
26 reporting of the time the paralegals spent. The Court has given
27 counsel the benefit of the doubt and assumed that 495 minutes (i.e.,
135 minutes referenced in the "Total Paralegal Hours" plus 360
28 additional itemized minutes) (or 8.25 hours), are billable at the
higher paralegal rate, leaving the remaining 65 minutes (or 1.08 hours)
billable at the lower rate. See Motion Ex. 14.

1 Deducting the cost of paralegal time at the reported EAJA hourly rates
2 of \$1,512.45, the remaining fee of \$15,047.78 (i.e., \$16,520.23 -
3 \$1,512.45) counsel is seeking for the 10.7 hours of counsel's time
4 yields a *de facto* hourly rate of approximately \$1,406.33 (i.e.,
5 \$15,047.78 / 10.7 hours).

6
7 An attorney seeking section 406(b) fees has the burden of proving
8 that the fee sought is reasonable based on the facts of the particular
9 case. See Gisbrecht, 535 U.S. at 807-08. The reasonableness of the
10 fee sought in this case turns primarily on how the Court views the *de*
11 *facto* hourly rates. Counsel has offered little or no suggestion
12 regarding how the Court should view the *de facto* hourly rates beyond
13 citing Crawford v. Astrue, 586 F.3d 1142 (9th Cir. 2009) ("Crawford").
14 In Crawford, the Ninth Circuit approved effective hourly rates for
15 combined paralegal and attorney time as high as \$902. See Motion at
16 7. The present case is materially distinguishable from Crawford,
17 however.

18
19 In each of the three cases consolidated in Crawford, unlike here,
20 counsel requested section 406(b) fees far less than the agreed-upon 25
21 percent of past-due benefits (i.e., from 13.94 to 16.95 percent of
22 past-due benefits). In each of the three cases, unlike here, addition
23 of the section 406(a) fees awarded and the section 406(b) fees
24 requested did not equal 25 percent of past-due benefits. Id. at 1145-
25 46; see also Washington v. Barnhart, CV 03-6884-AN, "Counsel's Motion
26 for Attorney Fees Pursuant to 42 U.S.C. § 406(b), etc.", p. 3 (Docket
27 No. 16) (counsel recovered \$7,000 in section 406(a) fees, and the
28 entire fee sought would not equal 25 percent of past-due benefits);

1 Trejo v. Barnhart, CV 98-5662-RNB, "Order Granting in Part Counsel's
2 Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b)" (Docket No.
3 22) (counsel recovered \$13,000 in section 406(a) fees, and the entire
4 fee sought would not equal 25 percent of past-due benefits); Crawford
5 v. Barnhart, CV 00-11884-AN, "Counsel's Motion for Attorney Fees
6 Pursuant to 42 U.S.C. § 406(b), etc.", pp. 3-4 n.1 (Docket No. 22)
7 (counsel recovered \$4,000 in section 406(a) fees, and the entire fee
8 sought would not equal 25 percent of past-due benefits).^{2/} In each of
9 the three cases, the district court further reduced the section 406(b)
10 fees to avoid a perceived windfall, and based the reduction on an
11 enhanced lodestar calculation. See Crawford, 586 F.3d at 1144, 1145-
12 46.

13
14 The Crawford Court found that the district court's reduced fee
15 awards did not comply with Gisbrecht because the awards "rest[ed] on
16 lodestar calculations and reject[ed] the primacy of lawful attorney-
17 client fee agreements." Crawford, 586 F.3d at 1150 (quoting
18 Gisbrecht, 535 U.S. at 793). The Crawford Court stated that the
19 district court may not start with the lodestar calculation, and may
20 consider the lodestar calculation "only as an aid in assessing the
21 reasonableness of the fee." Id. at 1151 (emphasis original).
22 According to Crawford, because the fees requested in each of the three
23 cases were "significantly lower" than the 25 percent "bargained for"
24 amounts, the fees requested were not "excessively large in relation to
25

26
27 ^{2/} The Court takes judicial notice of the docket and records in the
28 underlying actions appealed in Crawford. See Mir v. Little Company of
Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988) (court may take judicial
notice of court records).

1 the benefits achieved," and no downward adjustment was required. Id.
2 at 1151. The fees the Crawford Court ultimately approved as
3 reasonable translated to *de facto* hourly rates for combined paralegal
4 and attorney time of \$519 in one case, \$875 in another, and \$902 in
5 the third. Id. at 1153.^{10/}

6
7 Thus, according to Crawford, a section 406(b) request under a
8 contingency fee agreement that translates to a *de facto* hourly rate of
9 as much as \$902 for combined attorney and paralegal time does not
10 present a circumstance where "the benefits are large in comparison to
11 the amount of time spent on the case," (assuming all other relevant
12 considerations are the same as the considerations existing in
13 Crawford). The present case is materially distinguishable. As noted
14 above, unlike the plaintiffs' attorneys in Crawford, Plaintiff's
15 counsel is not seeking a total recovery far less than the full 25
16 percent fee.^{11/} Plaintiff's counsel is seeking the full 25 percent
17 fee; the total fees counsel has sought to recover under Section 406(a)
18 and Section 406(b) equal 25 percent of past-due benefits.

19
20 Moreover, in the present case, unlike Crawford, the paralegal
21 hours comprise almost half of the reported time (9.33 paralegal hours
22 to 10.7 counsel hours). By contrast, in the three consolidated cases

24 ^{10/} These *de facto* hourly rates are taken from Judge Clifton's
25 concurring and dissenting opinion in Crawford. The Crawford majority
26 opinion did not take issue with Judge Clifton's calculation of these
rates. See Crawford, 586 F.3d at 1145-46.

27 ^{11/} "The attorneys [in the Crawford cases] themselves suggested that
28 the full 25% fee provided for by their fee agreements would be
unreasonable." Crawford, 586 F.3d at 1150 n.8.

1 in Crawford, the reported times were: (1) 4.5 paralegal hours and 19.5
2 counsel hours (Crawford); (2) 4.7 paralegal hours and 17.45 counsel
3 hours (Washington); and (3) 2.6 paralegal hours and 26.9 counsel hours
4 (Trejo). See Crawford, 586 F.3d at 1145-46. The Crawford Court may
5 have deemed reasonable the combined attorney and paralegal hourly
6 rates in those three consolidated cases in part because, in all three
7 cases, the attorney time dwarfed the paralegal time. Such is not the
8 circumstance in the present case.

9
10 This Court looks to the allocation of time spent and the fee
11 requested to determine if some downward adjustment is in order to
12 account for the substantial time spent by the paralegals relative to
13 the time spent by counsel. In Quinnin v. Colvin, 2013 WL 5786988, at
14 *4 (D. Or. Oct. 28, 2013) ("Quinnin"), the court awarded a reduced fee
15 of approximately 15 percent of past-due benefits yielding a *de facto*
16 hourly rate of \$1,240 for attorney time and \$620 for paralegal time,
17 where most of the work in the case had been done by a paralegal. The
18 court assumed the paralegal's billable rates were half of attorney
19 rates and found a *de facto* hourly rate of \$1,000 for attorney time and
20 \$500 for paralegal time "a helpful guide" in assessing reasonableness.
21 See id. If this Court follows the \$1,000/\$500 *de facto* rates the
22 Quinnin court found helpful, a reasonable award in this case would be
23 \$15,365 for combined counsel and paralegal time (*i.e.*, 10.7 counsel
24 hours x \$1,000 = \$10,700; 9.33 paralegal hours x \$500 = \$4,665).
25 Here, counsel's total Section 406(b) fee request of \$22,560.23 well
26 exceeds that amount, and the net 406(b) request of \$16,560.23 exceeds
27 that amount by \$1,195.23.

28 ///

1 This Court previously has approved a *de facto* hourly rate for
2 attorney time of \$1,100 per hour. See Farnworth v. Colvin, CV 12-400-
3 E (C.D. Cal. Dec. 2, 2013) (Docket No. 22) (order awarding reduced
4 fees of \$1,100 per hour for work performed in 2012, in comparison to
5 the Crawford award for work done prior to 2009; award was half of
6 original request for a fee which equated to a \$2,199 *de facto* hourly
7 rate). Following Quinnin's logic, and assuming that a reasonable *de*
8 *facto* hourly rate for counsel is \$1,100 per hour, and a reasonable *de*
9 *facto* rate for a paralegal is \$550 per hour, a reasonable Section
10 406(b) award in this case would be \$16,901.50 (i.e., 10.7 counsel
11 hours x \$1,100 = \$11,770; 9.33 paralegal hours x \$550 = \$5,131.50).
12 This calculation yields an amount which is \$341.27 more than the
13 \$16,560.23 net Section 406(b) fee counsel seeks (though far less than
14 the total Section 406(b) fee sought). The net fee requested also
15 appears reasonable when the Court considers the fact that: (1) all of
16 counsel's work in this case occurred in 2015 and the paralegals' work
17 occurred in 2013, 2014, and 2017; and (2) in Farnworth, all of the
18 work occurred in 2012.

19
20 Accordingly, the Court finds that the net Section 406(b) fee
21 counsel seeks of \$16,560.23 is reasonable. This award, together with
22 the \$6,000 in section 406(a) fees counsel already received, will
23 provide counsel with 25 percent of past-due benefits. As in the pre-
24 Crawford decision of Ellick v. Barnhart, 445 F. Supp. 2d 1166, 1173
25 (C.D. Cal. Aug. 17, 2006), this Court acknowledges the regrettable
26 imprecision of the analysis through which the Court has determined a
27 "reasonable" fee.

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ORDER

Section 406(b) fees are allowed in the amount of \$16,560.23 to be paid out of the sums withheld by the Commissioner from Plaintiff's benefits. Counsel shall reimburse Plaintiff in the amount of \$2,400 previously paid by the Government under the EAJA. Counsel need not reimburse Plaintiff for the \$6,000 in fees counsel previously received from the Administration under Section 406(a).

IT IS SO ORDERED.

DATED: September 6, 2017.

/s/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE