

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

VERONICA MARCOS,

Case No. 1:09-cv-01622-SKO

Plaintiff,

**ORDER GRANTING PLAINTIFF’S
COUNSEL’S MOTION FOR
ATTORNEY’S FEES PURSUANT TO
42 U.S.C. § 406(b)**

v.

CAROLYN W. COLVIN,
Acting Commissioner of Social Security,

(Doc. 19)

Defendants.

I. INTRODUCTION

On May 13, 2015, counsel for Plaintiff, Lars A. Christenson¹, Esq., filed a motion for an award of attorneys’ fees pursuant to 42 U.S.C. § 406(b). (Doc. 32.) Plaintiff was served with a

¹ Lars A. Christenson filed the motion on his own behalf as well as on behalf of Robert D. Christenson. Robert D. Christenson was the original attorney representing Plaintiff in the initial denial of benefits with the Social Security Administration and the subsequent appeal in federal court.

Plaintiff retained Robert D. Christenson and the Christenson Law Firm on November 1, 2006. (Doc. 19, Exh. E, p. 2.) When Robert D. Christenson passed away in January of 2013, Lars A. Christenson took over work as Plaintiff’s counsel and represented Plaintiff in the second remand with the Social Security Administration. Plaintiff continued her representation by the Christenson Law Firm and retained Lars A. Christenson on June 25, 2013, under virtually identical terms to those under which she had retained Robert D. Christenson. (Doc. 19, Exh. E, p. 1.)

The motion for an award of attorneys’ fees comprises compensation for the work of both Robert D. Christenson and Lars A. Christenson. See *Kespohl v. Northern Trust Co.*, 236 N.E. 2d 268 (Ill. 1978) (attorneys’ fees for the deceased attorney are recoverable by the surviving attorneys in the firm where client permitted surviving attorneys in firm to continue the case through its conclusion); *Green County v. Lewis*, 164 S.W. 489 (Ky. 1914) (same); *Baxter v. Billings*, 83 F. 790 (8th Cir. 1890) (same). See also *Roe v. Sears, Roebuck & Co.*, 132 F.2d 829 (7th Cir. 1943) (recovery permissible for the fair value of services deceased attorney had rendered pursuant to the contingent fee contract); *Sargent v. New York Cent. & H. R. R. Co.*, 103 N.E. 164 (N.Y. 1913) (extent of recoverable permissible to representative of deceased attorney was the full reasonable value of the services rendered under the contract, but must not exceed the sum or rate fixed by the contract).

1 copy of the motion for attorney’s fees by mail on May 22, 2015. (Doc. 21.) On June 12, 2015, the
2 Court issued a minute order extending the time for Plaintiff Veronica Marcos (“Plaintiff”) and the
3 Commissioner to file any objection to Plaintiff’s counsel’s motion to June 24, 2015. (Doc. 22.) A
4 copy of the minute order was served on the Plaintiff and the Commissioner on June 12, 2015.
5 (Doc. 23.) No opposition was filed. For the reasons set forth below, the motion for an award of
6 attorney’s fees is GRANTED.

7 **II. BACKGROUND**

8 Plaintiff brought the underlying action seeking judicial review of a final administrative
9 decision denying her claim for disability benefits under the Social Security Act. (Doc. 1.) The
10 parties stipulated to remand the action to the Commissioner for further administrative action
11 pursuant to 42 U.S.C. § 405(g), sentence four, for further evaluation of the medical evidence and
12 credibility determinations. (Docs. 14; 15.) Judgment was entered in favor of Plaintiff and against
13 the Commissioner on April 16, 2010. (Doc. 16.) On May 10, 2010, the parties stipulated to an
14 award of attorney fees and expenses under the Equal Access to Justice Act (“EAJA”). (Docs. 17;
15 18.) Robert D. Christenson was awarded \$981.76 in attorney fees under the EAJA. (Doc. 18.)

16 On August 30, 2013, the Commissioner issued a decision finding Plaintiff disabled.
17 (Doc. 19, Exh. D.) On December 21, 2014, the Commissioner issued a notice that retroactive
18 disability benefits had been awarded to Plaintiff and that \$14,884.75, representing 25 percent of
19 Plaintiff’s past-due benefits, had been withheld from Plaintiff’s award of disability benefits for
20 payment of any applicable attorney’s fees. (Doc. 19.) On May 13, 2015, Lars A. Christenson
21 filed a motion for attorney’s fees in the amount of \$5,052.25, with an offset of \$981.76 for EAJA
22 fees already awarded. (Doc. 19.) It is counsel’s Section 406(b) motion for attorney’s fees that is
23 currently pending before the Court.

24 **III. DISCUSSION**

25 Pursuant to the Social Security Act, attorneys may seek a reasonable fee for cases in which
26 they have successfully represented social security claimants. Section 406(b) provides the
27 following in relevant part:

28 //

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

5 42 U.S.C. § 406(b)(1)(A) (emphasis added). “In contrast to fees awarded under fee-shifting
6 provisions such as 42 U.S.C. § 1988, the fee is paid by the claimant out of the past-due benefits
7 awarded; the losing party is not responsible for payment.” *Crawford v. Astrue*, 586 F.3d 1142,
8 1147 (9th Cir. 2009) (en banc) (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002)). The
9 Commissioner has standing to challenge the award, despite that the Section 406(b) attorney’s fee
10 award is not paid by the government. *Craig v. Sec’y Dep’t of Health & Human Servs.*, 864 F.2d
11 324, 328 (4th Cir. 1989), abrogated on other grounds in *Gisbrecht*, 535 U.S. at 807. The goal of
12 fee awards under Section 406(b) is to provide adequate incentive to represent claimants while
13 ensuring that the usually meager disability benefits received are not greatly depleted. *Cotter v.*
14 *Bowen*, 879 F.2d 359, 365 (8th Cir. 1989), abrogated on other grounds in *Gisbrecht*, 535 U.S. at
15 807.

16 The twenty-five percent (25%) maximum fee is not an automatic entitlement, and courts
17 are required to ensure that the requested fee is reasonable. *Gisbrecht*, 535 U.S. at 808-09 (Section
18 406(b) does not displace contingent-fee agreements within the statutory ceiling; instead, Section
19 406(b) instructs courts to review for reasonableness fees yielded by those agreements). “Within
20 the 25 percent boundary . . . the attorney for the successful claimant must show that the fee sought
21 is reasonable for the services rendered.” *Id.* at 807; see also *Crawford*, 586 F.3d at 1148 (holding
22 that Section 406(b) “does not specify how courts should determine whether a requested fee is
23 reasonable” but “provides only that the fee must not exceed 25% of the past-due benefits
24 awarded”).

25 Generally, “a district court charged with determining a reasonable fee award under
26 § 406(b)(1)(A) must respect ‘the primacy of lawful attorney-client fee arrangements,’ . . . ‘looking
27 first to the contingent-fee agreement, then testing it for reasonableness.’” *Crawford*, 586 F.3d at
28 1148 (quoting *Gisbrecht*, 535 U.S. at 793, 808). The United States Supreme Court has identified

1 several factors that may be considered in determining whether a fee award under a contingent-fee
2 agreement is unreasonable and therefore subject to reduction by the court: (1) the character of the
3 representation; (2) the results achieved by the representative; (3) whether the attorney engaged in
4 dilatory conduct in order to increase the accrued amount of past-due benefits; (4) whether the
5 benefits are large in comparison to the amount of time counsel spent on the case; and (5) the
6 attorney's record of hours worked and counsel's regular hourly billing charge for non-contingent
7 cases. *Id.* (citing *Gisbrecht*, 535 U.S. at 807-08).

8 Here, the fee agreement between Plaintiff and Robert D. Christenson provides:

9 "We agree that if SSA favorably decides my claim at the Appeals Council level;
10 or at the ALJ hearing level after a decision by the Appeals Council or Federal
11 Court; or if a Federal Court favorably decides my case, **I will pay my attorney a
12 fee equal to 25% or all past-due benefits in my Social Security and/or SSI
13 disability claims.**"

14 (Doc. 19, Exh. E, p. 2 (signed November 1, 2006).)

15 The fee agreement between Plaintiff and Lars A. Christenson further provides:

16 "We agree that if SSA favorably decides my claim at a 2nd (second) decision at
17 the Appeals Council level; or at the ALJ level after a 2nd (second) decision by the
18 Appeals Council; or at any level after a 2nd (second) decision by the Appeals
19 Council; or at the ALJ hearing level after a decision by a Federal Court; or if a
20 Federal Court favorably decides my case, **I will pay my attorney a fee equal to
21 25% of all past-due benefits in my Social Security and/or SSI disability
22 claims.**"

23 (Doc. 19, Exh. E, p. 1 (signed June 25, 2013).) The Court has considered the character of
24 counsel's representation of Plaintiff and the good results achieved by counsel, which included an
25 award of benefits. As Plaintiff's counsel, Robert D. Christenson spent over 39.6 hours
26 representing Plaintiff prior to his death (Doc. 19, pp. 3, 6-11) and Lars A. Christenson then spent
27 an additional 8.9 hours representing Plaintiff, ultimately gaining a favorable decision after remand
28 to the agency (Doc. 19, pp. 3, 6-11; Exh. D.) There is no indication that a reduction of the award
is warranted due to any substandard performance by Plaintiff's counsel as counsel secured a
successful result for Plaintiff. There is also no evidence that either Robert D. Christenson or Lars
A. Christenson engaged in any dilatory conduct resulting in delay.

//

1 Attorney's fees in the amount of \$5,052.25 represents less than 25% of the past-due
2 benefits paid to Plaintiff and are not excessive in relation to the past-due award. (Doc. 19.) See
3 generally Taylor v. Astrue, No. 1:06-cv-00957-SMS, WL 836740, at *2 (E.D. Cal. Mar. 4, 2011)
4 (granting petition for an award of attorney's fees pursuant to Section 406(b) in the amount of
5 \$20,960.00); Jamieson v. Astrue, No. 1:09-cv-00490-LJO-DLB, WL 587096, at *2 (E.D. Cal. Feb.
6 9, 2011) (recommending an award of attorney's fees pursuant to Section 406(b) in the amount of
7 \$34,500.00); Logan-Laracuenta v. Astrue, No. 1:07-cv-00983-SMS, WL 4689519, at *2 (E.D.
8 Cal. Nov. 10, 2010) (granting petition for attorney's fees pursuant to Section 406(b) in the amount
9 of \$23,558.62).

10 In making this determination, the Court recognizes the contingent-fee nature of this case
11 and counsel's assumption of risk in agreeing to represent Plaintiff under such terms. See Hearn v.
12 Barnhart, 262 F. Supp. 2d 1033, 1037 (N.D. Cal. 2003) ("Because attorneys like Mr. Sackett
13 contend with a substantial risk of loss in Title II cases, an effective hourly rate of only \$450 in
14 successful cases does not provide a basis for this court to lower the fee to avoid a 'windfall.'"
15 (quoting Gisbrecht, 535 U.S. at 807)).

16 An award of Section 406(b) fees, however, must be offset by any prior award of attorney's
17 fees granted under the EAJA. 28 U.S.C. § 2412; Gisbrecht, 535 U.S. at 796. Plaintiff was
18 awarded \$901.76 in fees pursuant to the EAJA; as such, the fee award will be offset by \$901.76.

19 **IV. CONCLUSION AND ORDER**

20 For the reasons stated above, the Court concludes that the fees sought by Plaintiff's
21 counsel pursuant to Section 406(b) are reasonable.

22 Accordingly, IT IS ORDERED that Plaintiff's counsel's motion for an award of attorney's
23 fees pursuant to Section 406(b) in the amount of \$5,052.25 is GRANTED subject to an offset of
24 \$901.76 for EAJA fees previously awarded.

25
26 IT IS SO ORDERED.

27 Dated: June 30, 2015

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

28