

1 **II. BACKGROUND**

2 Plaintiff brought the underlying action seeking judicial review of a final administrative
3 decision denying his claim for disability benefits under the Social Security Act. (Doc. 1.) The
4 Court reversed the Commissioner’s denial of benefits and remanded the case to the agency for
5 further proceedings. (Doc. 17.) Judgment was entered in favor of Plaintiff and against the
6 Commissioner on March 16, 2015. (Doc. 18.) On June 11, 2015, the parties stipulated to an
7 award of \$5,600 in attorney fees under EAJA (Doc. 20), and on June 29, 2015, the Court entered
8 the stipulated order (Doc. 21).

9 On remand, the Commissioner issued a decision finding Plaintiff disabled. (See Doc. 22,
10 Ex. 1, Declaration of Shellie Lott (“Lott Decl.”) at 1.) On July 27, 2016, the Commissioner issued
11 a notice that retroactive disability benefits had been awarded to Plaintiff and that \$16,276.75,
12 representing 25% of Plaintiff’s past-due benefits, had been withheld from Plaintiff’s award of
13 disability benefits for payment of any applicable attorney’s fees. (Doc. 22, Ex. 2.) On November
14 15, 2016, counsel filed a motion for attorney’s fees in the amount of \$16,276.75, with an offset of
15 \$5,600.00 for EAJA fees already awarded, for a net award of \$10,676.75. (See Doc. 22.) It is
16 counsel’s section 406(b) motion for attorney’s fees that is currently pending before the Court.

17 **III. DISCUSSION**

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

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

28 42 U.S.C. § 406(b)(1)(A) (emphasis added). “In contrast to fees awarded under fee-shifting
provisions such as 42 U.S.C. § 1988, the fee is paid by the claimant out of the past-due benefits
awarded; the losing party is not responsible for payment.” *Crawford v. Astrue*, 586 F.3d 1142,
1147 (9th Cir. 2009) (en banc) (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002)). The

1 Commissioner has standing to challenge the award, despite that the section 406(b) attorney’s fee
2 award is not paid by the government. *Craig v. Sec’y Dep’t of Health & Human Servs.*, 864 F.2d
3 324, 328 (4th Cir. 1989), *abrogated on other grounds in Gissbrecht*, 535 U.S. at 807. The goal of
4 fee awards under section 406(b) is to provide adequate incentive to represent claimants while
5 ensuring that the usually meager disability benefits received are not greatly depleted. *Cotter v.*
6 *Bowen*, 879 F.2d 359, 365 (8th Cir. 1989), *abrogated on other grounds in Gissbrecht*, 535 U.S. at
7 807.

8 The 25% maximum fee is not an automatic entitlement, and courts are required to ensure
9 that the requested fee is reasonable. *Gissbrecht*, 535 U.S. at 808-09 (Section 406(b) does not
10 displace contingent-fee agreements within the statutory ceiling; instead, section 406(b) instructs
11 courts to review for reasonableness fees yielded by those agreements). “Within the 25 percent
12 boundary . . . the attorney for the successful claimant must show that the fee sought is reasonable
13 for the services rendered.” *Id.* at 807; *see also Crawford*, 586 F.3d at 1148 (holding that section
14 406(b) “does not specify how courts should determine whether a requested fee is reasonable” but
15 “provides only that the fee must not exceed 25% of the past-due benefits awarded”).

16 Generally, “a district court charged with determining a reasonable fee award under
17 § 406(b)(1)(A) must respect ‘the primacy of lawful attorney-client fee arrangements,’ . . . ‘looking
18 first to the contingent-fee agreement, then testing it for reasonableness.’” *Crawford*, 586 F.3d at
19 1148 (quoting *Gissbrecht*, 535 U.S. at 793, 808). The United States Supreme Court has identified
20 several factors that may be considered in determining whether a fee award under a contingent-fee
21 agreement is unreasonable and therefore subject to reduction by the court: (1) the character of the
22 representation; (2) the results achieved by the representative; (3) whether the attorney engaged in
23 dilatory conduct in order to increase the accrued amount of past-due benefits; (4) whether the
24 benefits are large in comparison to the amount of time counsel spent on the case; and (5) the
25 attorney’s record of hours worked and counsel’s regular hourly billing charge for non-contingent
26 cases. *Id.* (citing *Gissbrecht*, 535 U.S. at 807-08).

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1 Here, the fee agreement between Plaintiff and Shellie Lott of Cerney Kreuze & Lott, LLP,
2 signed by Plaintiff and counsel, provides:

3 This is a contingent fee contract. If Attorney prevails before the Federal Court,
4 and if Claimant is subsequently awarded benefits by the Social Security
5 Administration (“SSA”), Claimant agrees to pay Attorney a fee for Federal Court
work equal to 25% of the past-due benefits.

6 [. . .]

7 If Claimant subsequently is awarded benefits after the remand from Federal
8 Court, Claimant will owe Attorney the difference between the 25% fee specified
9 above and the amount paid by SSA in accordance with EAJA. Applicable
regulations require approval by the Court of the fee requested, and the Court must
determine if the fee is reasonable.

10 (Doc. 22, Ex. 3 (signed September 4, 2013).)

11 The Court has considered the character of counsel’s representation of Plaintiff and the
12 good results achieved by counsel, which included an award of benefits. As Plaintiff’s counsel,
13 Shellie Lott spent 32.1 hours representing Plaintiff, ultimately gaining a favorable decision in that
14 the Commissioner’s decision was reversed and remanded to the agency for reconsideration. (Lott
15 Decl., Ex. 4 (time sheet accounting for 32.1 attorney hours spent representing Plaintiff before the
16 district court).) There is no indication that a reduction of the award is warranted due to any
17 substandard performance by Plaintiff’s counsel as counsel secured a successful result for Plaintiff.
18 There is also no evidence that counsel engaged in any dilatory conduct resulting in delay.

19 Attorney’s fees in the amount of \$16,276.75 do not exceed 25% of the past-due benefits
20 awarded and are not excessive in relation to the past-due award. (*See* Doc. 22, Ex. 2.) *See*
21 *generally Taylor v. Astrue*, No. 1:06-cv-00957-SMS, WL 836740, at *2 (E.D. Cal. Mar. 4, 2011)
22 (granting petition for an award of attorney’s fees pursuant to section 406(b) in the amount of
23 \$20,960.00); *Jamieson v. Astrue*, No. 1:09-cv-00490-LJO-DLB, WL 587096, at *2 (E.D. Cal. Feb.
24 9, 2011) (recommending an award of attorney’s fees pursuant to section 406(b) in the amount of
25 \$34,500.00); *Logan-Laracuenta v. Astrue*, No. 1:07-cv-00983-SMS, WL 4689519, at *2 (E.D.
26 Cal. Nov. 10, 2010) (granting petition for attorney’s fees pursuant to section 406(b) in the amount
27 of \$23,558.62).

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

7 An award of attorney's fees pursuant to section 406(b) in the amount of \$16,276.75 is,
8 therefore, appropriate. An award of section 406(b) fees, however, must be offset by any prior
9 award of attorney's fees granted under the EAJA. 28 U.S.C. § 2412; *Gisbrecht*, 535 U.S. at 796.
10 Plaintiff was previously awarded \$5,600.00 in fees pursuant to the EAJA; as such, the fee award
11 will be offset by \$5,600.00 for a net award of \$10,676.75.

12 **IV. CONCLUSION AND ORDER**

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

15 Accordingly, IT IS ORDERED that Plaintiff's counsel's motion for an award of attorney's
16 fees pursuant to section 406(b) in the amount of \$16,276.75 is GRANTED, subject to an offset of
17 \$5,600.00 for EAJA fees previously awarded, for a net award of \$10,676.75.

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19 IT IS SO ORDERED.

20 Dated: January 11, 2017

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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