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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

JUAN P. ORTIZ,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting  
Commissioner of Social Security,

Defendant.

Case No. 1:13-cv-01792-GSA

ORDER GRANTING MOTION  
FOR ATTORNEY’S FEES

(Doc. 25)

**I. INTRODUCTION**

On September 24, 2018, Plaintiff’s counsel, Lawrence D. Rohlfig, Esq., filed a Motion for Attorney’s Fees pursuant to 42 U.S.C. § 406(b). Doc. 25. Plaintiff Juan P. Ortiz and Defendant had already been served with the motion on September 23, 2018. Doc. 25 at 10. In keeping with the role resembling that of a trustee for Plaintiff, the Commissioner filed a response to Plaintiff’s counsel’s motion but did not oppose the motion. Doc. 27. *See generally, Gisbrecht v. Barnhart*, 535 U.S. 789, 798 n. 6 (2002). Plaintiff did not file any objections. For the reasons set forth below, the Motion for Attorney’s Fees is GRANTED.

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1           **II.     BACKGROUND**

2           On November 4, 2013, Plaintiff brought the underlying action seeking judicial review of  
3 a final administrative decision denying his claim for disability benefits under the Social Security  
4 Act. Doc. 1. Plaintiff was represented by counsel pursuant to a contingent fee agreement. Doc.  
5 25-1. On March 27, 2015, this Court reversed Commissioner’s denial of disability benefits in  
6 part and remanded the case for further proceedings. Doc. 26.

7           Subsequently, the parties stipulated to attorney’s fees under the Equal Access to Justice  
8 Act (“EAJA”) in the amount of \$3900.00. Docs. 23 & 24. Plaintiff’s attorney now seeks an  
9 award of attorney fees in the amount of \$12,600.00 pursuant to 42 U.C.S. § 406(b). In support of  
10 the motion, counsel filed evidence indicating that Plaintiff was awarded approximately  
11 \$74,726.00 in retroactive disability benefits. Doc. 25 at 8; Doc. 25-3. Counsel is seeking  
12 approximately 17% of the retroactive benefits awarded for attorney’s fees.

13           **III.     DISCUSSION**

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

17                   Whenever a court renders a judgment favorable to a claimant under  
18 this subchapter who was represented before the court by an  
19 attorney, the court may determine and allow as part of its judgment  
20 a reasonable fee for such representation, *not in excess of 25 percent*  
21 *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 ....

22 42 U.S.C. § 406(b)(1)(A) (emphasis added). “In contrast to fees awarded under fee-shifting  
23 provisions such as 42 U.S.C. § 1988, the fee is paid by the claimant out of the past-due benefits  
24 awarded; the losing party is not responsible for payment.” *Crawford v. Astrue*, 586 F.3d 1142,  
25 1147 (9th Cir.2009) (*en banc*) (citing *Gisbrecht*, 535 U.S. at 789, 802). The Commissioner has  
26 standing to challenge the award, despite the fact that the Section 406(b) attorney's fee award is  
27 not paid by the government. *Craig v. Sec’y, Dep’t of Health & Human Servs.*, 864 F.2d 324, 328  
28 (4th Cir.1989), *abrogated on other grounds in Gisbrecht*, 535 U.S. at 807. The goal of fee

1 awards under Section 406(b) is to provide adequate incentive to represent claimants while  
2 ensuring that the usually meager disability benefits received are not greatly depleted. *Cotter v.*  
3 *Bowen*, 879 F.2d 359, 365 (8th Cir.1989), *abrogated on other grounds in Gisbrecht*, 535 U.S. at  
4 807.

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

13 Generally, “a district court charged with determining a reasonable fee award under  
14 § 406(b)(1)(A) must respect ‘the primacy of lawful attorney-client fee arrangements,’ ... ‘looking  
15 first to the contingent-fee agreement, then testing it for reasonableness.’ ” *Crawford*, 586 F.3d at  
16 1148 (quoting *Gisbrecht*, 535 U.S. at 793, 808). The United States Supreme Court has identified  
17 several factors that may be considered in determining whether a fee award under a contingent-fee  
18 agreement is unreasonable and therefore subject to reduction by the court: (1) the character of the  
19 representation; (2) the results achieved by the representative; (3) whether the attorney engaged in  
20 dilatory conduct in order to increase the accrued amount of past-due benefits; (4) whether the  
21 benefits are large in comparison to the amount of time counsel spent on the case; and (5) the  
22 attorney's record of hours worked and counsel's regular hourly billing charge for non-contingent  
23 cases. *Id.* (citing *Gisbrecht*, 535 U.S. at 807–08).

24 Here, the fee agreement between Plaintiff and counsel provides that the fee for successful  
25 prosecution in judicial review of an adverse decision of the Social Security Administration is  
26 25% of the backpay awarded upon reversal of an unfavorable ALJ decision. Doc. 25-1 at 1. The  
27 Court has considered counsel's representation of Plaintiff and the results achieved. Plaintiff's  
28 counsel indicates that a total of 23 hours was expended litigating Plaintiff's case in the district

1 court. Doc. 25 at 8. There is no indication that a reduction of the award is warranted due to any  
2 substandard performance by counsel in this matter. Counsel is an experienced attorney who  
3 secured a successful result for Plaintiff.

4 There is also no evidence that counsel engaged in any dilatory conduct resulting in  
5 excessive delay. Moreover, the \$12,600.00 amount represents less than 17% of the past-due  
6 benefits paid to Plaintiff (as opposed to 25%) and is not excessive in relation to the past-due  
7 award. *See generally Martinez v. Colvin*, 2016 WL 1600184 at \*2 (E.D. Cal. Apr. 21, 2016) (No.  
8 1:13-CV-01491-BAM) (awarding \$12,000.00 for 15 hours of attorney time and 3.7 hours of  
9 paralegal time); *Viera v. Comm'r of Soc. Sec.*, 2013 WL 5934400 at \*5 (E.D. Cal. Nov. 5, 2013)  
10 (No. 2:11-cv-2342-KJN) (awarding attorney's fees pursuant to Section 406(b) in the amount of  
11 \$12,250.00 for 18.5 hours of work); *Dearden v. Comm'r of Soc. Sec.*, 2014 WL 6612036 at \*2  
12 (E.D. Cal. Nov. 20, 2014) (No. 1:12-cv-120-BAM) (granting attorney's fees pursuant to Section  
13 406(b) in the amount of \$16,474.00 for 24.7 hours); *Knudsen v. Colvin*, 2015 WL 4205319 at \*2  
14 (C.D. Cal. July 15, 2015) (No. CV 11-05093-JEM) (awarding attorney's fees in the amount of  
15 \$26,000.00, approximately 20% of past due benefits). In making this determination, the Court  
16 also recognizes the contingent-fee nature of this case and counsel's assumption of risk in  
17 agreeing to represent Plaintiff under such terms. *See Hearn v. Barnhart*, 262 F.Supp.2d 1033,  
18 1037 (N.D.Cal.2003) (“Because attorneys like Mr. Sackett contend with a substantial risk of loss  
19 in Title II cases, an effective hourly rate of only \$450 in successful cases does not provide a basis  
20 for this court to lower the fee to avoid a windfall.”).

21 An award of Section 406(b) fees, however, must be offset by any prior award of  
22 attorney's fees granted under the EAJA. 28 U.S.C. § 2412; *Gisbrecht*, 535 U.S. at 796. Here,  
23 Plaintiff's counsel has already been awarded EAJA fees in the amount of \$3900.00. Therefore,  
24 any Section 406(b) fees awarded must be off-set by \$3900.00 and refunded to Plaintiff.

#### 25 **IV. CONCLUSION AND ORDER**

26 For the reasons stated above, the fees sought by Plaintiff's counsel pursuant to Section  
27 406(b) are reasonable. Accordingly, IT IS HEREBY ORDERED that:

28 1. The Motion for Attorney's Fees (Doc. 25) pursuant to Section 406(b) in the amount of  
\$12,600.00 is GRANTED. The agency shall pay to Lawrence Rohlfing the amount awarded in

1 this order to the extent that there are funds available and any balance remaining to the  
2 representative payee appointed to receive payments and manage them on Plaintiff's behalf;

3 2. Plaintiff's counsel is ordered to refund to Plaintiff \$3900.00 of the Section 406(b) fees  
4 awarded to as an offset for EAJA fees previously awarded pursuant to 28 U.S.C. § 2412(d).  
5 Plaintiff's counsel is directed to make such payment to the representative payee appointed by the  
6 Social Security Administration to receive payments and manage them of Plaintiff's behalf;

7 3. The Clerk of the Court is directed to serve a copy of this order on Plaintiff Juan P.  
8 Ortiz, 1155 Green St., Hanford, CA 93230.

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10 IT IS SO ORDERED.

11 Dated: November 13, 2018

/s/ Gary S. Austin  
UNITED STATES MAGISTRATE JUDGE

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