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

ANGELIC RENEE PALLESI,  
Plaintiff,  
v.  
ANDREW SAUL,  
Commissioner of Social Security<sup>1</sup>,  
Defendant.

Case No. 1:13-cv-01813-SKO  
**ORDER GRANTING IN PART  
PLAINTIFF’S COUNSEL’S UNOPPOSED  
MOTION FOR ATTORNEY’S FEES  
PURSUANT TO 42 U.S.C. § 406(b)**  
(Doc. 40)

**I. INTRODUCTION**

On July 1, 2020, counsel for Plaintiff Angelic Renee Pallesi filed a motion for an award of attorney’s fees pursuant to 42 U.S.C. § 406(b). (Doc. 40.) On July 2, 2020, the Court issued a minute order requiring Plaintiff and the Commissioner to file their responses in opposition or statements of non-opposition to Plaintiff’s counsel’s motion, if any, by no later than July 22, 2020. (Doc. 41.) Plaintiff and the Commissioner were served with copies of the motion for attorney’s fees and the minute order. (Docs. 41, 42.)

On July 15, 2020, the Commissioner filed a response taking no position on Plaintiff’s motion, noting that “the Commissioner’s role in this matter is one ‘resembling that of a trustee for the claimants’” and providing an “analysis of the fee request.” (Doc. 43.) Plaintiff did not file any

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<sup>1</sup> On June 17, 2019, Andrew Saul became the Commissioner of the Social Security Administration. *See* <https://www.ssa.gov/agency/commissioner.html> (last visited by the court on September 13, 2019). He is therefore substituted as the defendant in this action. *See* 42 U.S.C. § 405(g) (referring to the “Commissioner’s Answer”); 20 C.F.R. § 422.210(d) (“the person holding the Office of the Commissioner shall, in his official capacity, be the proper defendant”).

1 objection to the motion by the July 22, 2020 deadline and Plaintiff's counsel did not file a reply.  
2 (*See* Docket.)

3 For the reasons set forth below, Plaintiff's counsel's motion for an award of attorney's fees  
4 is granted to the extent that Plaintiff's counsel is awarded fees under 42 U.S.C. § 406(b) in the  
5 amount of \$14,536.35, which represents the amount requested of \$21,762 less the amount of fees  
6 counsel could have recovered under the Equal Access to Justice Act, 28 U.S.C. § 2412, had  
7 counsel requested them before this Court.

## 8 II. BACKGROUND

9 On November 7, 2013, Plaintiff brought the underlying action seeking judicial review of a  
10 final administrative decision denying her claim for disability benefits under the Social Security  
11 Act. (Doc. 1.) On April 8, 2015, Magistrate Judge Sandra M. Snyder affirmed the ALJ's decision  
12 to deny benefits. (Doc. 27.) On June 27, 2017, the U.S. Court of Appeals for the Ninth Circuit  
13 reversed the district court's decision and remanded the case. (Doc. 34.) On September 12, 2017,  
14 pursuant to the Ninth Circuit's directive, the Court reversed and remanded the case to the ALJ for  
15 further proceedings. (Doc. 36.) On October 5, 2017, Plaintiff's counsel filed a motion for  
16 attorney's fees under EAJA before the Ninth Circuit for the work performed by counsel. (*See*  
17 *Pallesi v. Berryhill*, Case No. 15-15943 (9th Cir. 2017), Doc. 36). The Commissioner opposed the  
18 motion, contending that the Commissioner's position in the action was substantially justified,  
19 precluding an award of fees under EAJA. (*Id.* Doc. 42.) On December 29, 2017, the Ninth Circuit  
20 denied Plaintiff's motion without explanation. (*See id.* Doc. 44) (stating simply that "Appellant's  
21 motion for attorney's fees is DENIED."). Plaintiff did not move for EAJA fees before this Court  
22 for work performed in this Court. (*See* Docket.)

23 On remand, the Commissioner found Plaintiff disabled as of June 28, 2010. (*See* Doc. 40-  
24 2 at 19.) On March 14, 2020, the Commissioner issued a letter to Plaintiff approving her claim for  
25 benefits and awarding her \$87,048 in back payments. (*See* Doc. 30-3 at 1-2.) On July 1, 2020,  
26 counsel filed a motion for attorney's fees in the amount of \$21,762—equal to exactly 25% of  
27 Plaintiff's past-due benefits—with no offset of EAJA fees, because no EAJA fees were previously  
28 awarded. (Doc. 40.) It is counsel's § 406(b) motion for attorney's fees that is currently pending

1 before the Court.

### 2 III. DISCUSSION

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

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

12 42 U.S.C. § 406(b)(1)(A) (emphasis added). “In contrast to fees awarded under fee-shifting  
13 provisions such as 42 U.S.C. § 1988, the fee is paid by the claimant out of the past-due benefits  
14 awarded; the losing party is not responsible for payment.” *Crawford v. Astrue*, 586 F.3d 1142,  
15 1147 (9th Cir. 2009) (en banc) (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002)). The  
16 Commissioner has standing to challenge the award, despite that the § 406(b) attorney’s fee award  
17 is not paid by the government. *Craig v. Sec’y Dep’t of Health & Human Servs.*, 864 F.2d 324, 328  
18 (4th Cir. 1989), *abrogated on other grounds in Gisbrecht*, 535 U.S. at 807. The goal of fee  
19 awards under § 406(b) is to provide adequate incentive to represent claimants while ensuring that  
20 the usually meager disability benefits received are not greatly depleted. *Cotter v. Bowen*, 879 F.2d  
21 359, 365 (8th Cir. 1989), *abrogated on other grounds in Gisbrecht*, 535 U.S. at 807.

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

Generally, “a district court charged with determining a reasonable fee award under

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

11 Here, the fee agreement between Plaintiff and counsel, signed by Plaintiff and her counsel,  
12 attorney Monica Perales of the Law Offices of Lawrence D. Rohlifing, provides, in relevant part:

13 If this matter requires judicial review of any adverse decision of the Social  
14 Security Administration, the fee for successful prosecution of this matter is a  
15 **separate 25% of the past due benefits awarded upon reversal of any  
unfavorable ALJ decision for work before the court.**

16 (Doc. 40-1 (signed October 6, 2013).)

17 The Court has considered the character of counsel’s representation of Plaintiff and the  
18 good results achieved by counsel, which included an award of benefits. As Plaintiff’s counsel, the  
19 Law Offices of Lawrence D. Rohlifing spent 38.8 hours representing Plaintiff, ultimately gaining a  
20 favorable decision in that the Court remanded the case to the Commissioner for further  
21 proceedings. (Doc. 40-4 (time sheets accounting for 38.8 attorney and paralegal hours spent  
22 representing Plaintiff before this Court).) There is no indication that a reduction of the award is  
23 warranted due to any substandard performance by Plaintiff’s counsel, at least as far as the ultimate  
24 outcome of the case is concerned, as counsel secured a successful result for Plaintiff. There is also  
25 no evidence that counsel engaged in any dilatory conduct resulting in delay.

26 The effective hourly rate requested by Plaintiff’s counsel here equals approximately \$560  
27 per hour. This hourly rate is not excessive when compared to what the Ninth Circuit has approved  
28 in cases involving social security contingency fee arrangements. *See Crawford*, 586 F.3d 1142,

1 1153 (9th Cir. 2009) (explaining that the majority opinion found reasonable effective hourly rates  
2 equaling \$519, \$875, and \$902) (J. Clifton, concurring in part and dissenting in part); *see also*  
3 *Thomas v. Colvin*, No. 1:11-cv-01291-SKO, 2015 WL 1529331, at \*2-3 (E.D. Cal. Apr. 3,  
4 2015) (upholding an effective hourly rate of \$1,093.22 for 40.8 hours of work); *Jamieson v.*  
5 *Astrue*, No. 1:09CV0490 LJO DLB, 2011 WL 587096, at \*2 (E.D. Cal. Feb. 9, 2011) (upholding  
6 an effective hourly rate of \$1,169.49 for 29.5 hours of work); *Palos v. Colvin*, No. CV  
7 15-04261-DTB, 2016 WL 5110243, at \*2 (C.D. Cal. Sept. 20, 2016) (upholding an effective  
8 hourly rate of \$1,546.39 for 9.7 hours of work); *Villa v. Astrue*, No. CIV-S-06-0846 GGH, 2010  
9 WL 118454, at \*1-2 (E.D. Cal. Jan. 7, 2010) (approving § 406(b) fees exceeding \$1,000 per hour  
10 for 10.4 hours of work, and noting that “[r]educing § 406(b) fees after *Crawford* is a dicey  
11 business”).

12 Further, Plaintiff’s counsel’s requested amount of \$21,762 does not exceed 25% of the  
13 past-due benefits awarded and are not excessive in relation to the past-due award. *See generally*  
14 *Ortega v. Comm’r of Soc. Sec.*, No. 1:12-cv-01030-AWI-SAB, 2015 WL 5021646, at \*3 (E.D.  
15 Cal. Aug. 21, 2015) (granting petition for an award of attorney’s fees pursuant to § 406(b) in the  
16 amount of \$24,350.00); *Thomas*, 2015 WL 1529331, at \*3 (granting petition for an award of  
17 attorney’s fees pursuant to § 406(b) in the amount of \$44,603.50); *Boyle v. Colvin*, No. 1:12-cv-  
18 00954-SMS, 2013 WL 6712552, at \*2 (E.D. Cal. Dec. 19, 2013) (granting petition for an award  
19 of attorney’s fees pursuant to § 406(b) in the amount of \$20,577.57); *Jamieson*, 2011 WL 587096,  
20 at \*2 (recommending an award of attorney’s fees pursuant to § 406(b) in the amount of \$34,500).

21 In making this determination, the Court recognizes the contingent-fee nature of this case  
22 and counsel’s assumption of risk in agreeing to represent Plaintiff under such terms. “District  
23 courts generally have been deferential to the terms of contingency fee contracts in § 406(b) cases.”  
24 *Hearn v. Barnhart*, 262 F. Supp. 2d 1033, 1037 (N.D. Cal. 2003) (“Because attorneys like Mr.  
25 Sackett contend with a substantial risk of loss in Title II cases, an effective hourly rate of only  
26 \$450 in successful cases does not provide a basis for this court to lower the fee to avoid a  
27 ‘windfall.’” (quoting *Gisbrecht*, 535 U.S. at 807)). Attorneys who agree to represent claimants  
28 pursuant to a contingent fee agreement assume the risk of receiving no compensation for their time

1 and effort if the action does not succeed. *Id.* Here, Plaintiff’s attorney accepted substantial risk of  
2 loss in representing Plaintiff, whose application had already been denied at the administrative  
3 level. Plaintiff agreed to the contingent fee arrangement. (*See* Doc. 40-1.) Plaintiff’s counsel  
4 secured a reversal and remand of the case and, ultimately, an award of benefits to Plaintiff. (*See*  
5 Docs. 40-2, 40-3.)

6 Thus, an award of attorney’s fees pursuant to § 406(b) in the amount of \$21,762 would,  
7 ordinarily, be appropriate. An award of § 406(b) fees, however, must be offset by any prior award  
8 of attorney’s fees granted under the EAJA. 28 U.S.C. § 2412; *Gisbrecht*, 535 U.S. at 796. Where  
9 counsel fails to request EAJA fees before the district court at all, “[c]ourts have routinely reviewed  
10 attorneys’ efforts (or lack thereof) to collect an EAJA fee award in analyzing a later § 406(b) fee  
11 request.” *Kocan v. Colvin*, Case No. 2:14-cv-01058-JAD-NJK, 2016 WL 888828, at \*2 (D. Nev.  
12 Feb. 16, 2016); *Floyd v. Colvin*, No. 15-cv-02551-TMP, 2019 WL 2571264, at \*3 (W.D. Tenn.  
13 June 21, 2019). This is because a failure to seek EAJA fees operates to penalize the claimant by  
14 depriving the claimant of the refund of EAJA fees awarded by the government. *See Horton v.*  
15 *Commissioner of Social Security*, No. 2:14-cv-00083, 2018 WL 4701588, at \*1 (M.D. Tenn. Oct.  
16 1, 2018) (“When an attorney does not file for EAJA fees but instead only files for fees under §  
17 406(b), the plaintiff does not receive the benefit of having the lower award refunded to her”);  
18 *Wolfe v. Colvin*, No. 14-11397, 2016 WL 7650793, at \*2 (“To prevent plaintiffs from being  
19 penalized as a result of counsels’ failures to apply for EAJA fees to which they were entitled,  
20 courts have either reduced the Subsection (b) award by an amount equal to the foregone EAJA  
21 fees, or taken counsels’ failures to apply for EAJA fees into account in determining a reasonable  
22 fee for their services.”).

23 Plaintiff’s counsel offers no explanation for the failure to move for EAJA fees before this  
24 Court and cites no case to support the request for 25% of past-due benefits in § 406(b) fees despite  
25 failing to request EAJA fees. Plaintiff’s counsel’s motion simply states that “[t]his Court should  
26 order the payment of attorney fees in the amount of \$21,762.00 with a credit to plaintiff for the  
27 EAJA fees previously paid in the amount of \$0.00.” (Doc. 40 at 1.) Plaintiff’s counsel also states  
28 that “since no fees were granted under EAJA, there is no need to reimburse [Plaintiff].” (*Id.* at 3.)

1 The Court is persuaded by the reasoning of the above-mentioned cases and, in the absence of any  
2 explanation from Plaintiff's counsel, will reduce Plaintiff's counsel's award under § 406(b) by the  
3 amount of EAJA fees Plaintiff may have been entitled to if Plaintiff had requested them. Plaintiff  
4 attached a calculation of the time expended on the case and the total EAJA fees that could be  
5 expected of \$7,225.65. (Doc. 40-4.) As explained above, the Court finds Plaintiff's counsel's  
6 hourly rate and time expended reasonable, and will accept Plaintiff's counsel's calculation as to  
7 the EAJA amount that would have been awarded had it been requested.

8 Accordingly, the Court will reduce the requested § 406(b) award amount of \$21,762 by the  
9 amount of EAJA fees that Plaintiff's counsel could have recovered if counsel had requested EAJA  
10 fees—\$7,225.65—and award Plaintiff's counsel \$14,536.35.<sup>2</sup> See, e.g., *Kocan*, 2016 WL 888828,  
11 at \*2.

#### 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 § 406(b) are reasonable, subject to an offset of the amount of EAJA fees that  
15 Plaintiff's counsel could have recovered if counsel had requested them. Accordingly, IT IS  
16 ORDERED that:

17 1. Plaintiff's counsel's motion for an award of attorney's fees pursuant to 42 U.S.C. §  
18 406(b), (Doc. 40), is granted in part, to the extent that Plaintiff's counsel is awarded \$14,536.35 in  
19 § 406(b) fees, to be paid out of the amount withheld by the Commissioner from Plaintiff's past-  
20 due benefits; and

21 2. Counsel for Plaintiff shall file on the Court's docket proof of service of this order  
22 upon Plaintiff at his current or last known address.

23 IT IS SO ORDERED.

24 Dated: August 17, 2020

25 /s/ Sheila H. Oberto  
26 UNITED STATES MAGISTRATE JUDGE

27  
28 <sup>2</sup> \$21,762 - \$7,225.65 = \$14,536.35.