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6 **UNITED STATES DISTRICT COURT**

7 EASTERN DISTRICT OF CALIFORNIA

8
9 BILLY RAY WHALEY,

10 Plaintiff,

11 v.

12 COMMISSIONER OF SOCIAL SECURITY,

13 Defendant.

Case No. 1:14-cv-01719-SAB

ORDER GRANTING PETITIONER'S
MOTION FOR ATTORNEY FEES
PURSUANT TO 42 U.S.C. § 406(b)

(ECF No. 29)

14
15 Petitioner Monica Perales ("Counsel"), attorney for Plaintiff Billy Ray Whaley
16 ("Plaintiff"), filed the instant motion for attorney fees on February 14, 2018. (ECF No. 29.)
17 Counsel requests fees in the amount of \$18,212.25 pursuant to 42 U.S.C. § 406(b)(1). Plaintiff
18 has not filed an objection to the fee request.

19 **I.**

20 **BACKGROUND**

21 Plaintiff filed the instant complaint challenging the denial of social security benefits on
22 October 31, 2014. (ECF No. 1.) On March 29, 2016, the magistrate judge's order issued finding
23 that the ALJ erred. (ECF No. 25.) The Court entered judgment in Plaintiff's favor and the
24 action was remanded. (ECF No. 26.)

25 On June 24, 2016, the parties filed a stipulation for an award of attorney fees pursuant to
26 the Equal Access to Justice Act ("EAJA"). (ECF No. 27.) On June 24, 2016, an order issued
27 awarding Plaintiff attorney fees of \$5,000.00 as authorized by 28 U.S.C. § 2412. (ECF No. 28.)
28

1 On remand, the ALJ found that Plaintiff was disabled from March 3, 2011 through June
2 1, 2015, and past-due benefits were awarded in the amount of \$90,461.00.¹ (ECF Nos. 29-3, 29-
3 4.) The Commissioner withheld \$22,615.25 from the past-due benefit for attorney fees. (ECF
4 No. 29-4 at 1.) This amount equals 25 percent of the retroactive benefit award. (Id.)

5 In the instant motion, Petitioner seeks \$18,212.25 for 24.7 hours of attorney time and
6 4.25 hours of paralegal time spent working on Plaintiff's case in federal court.

7 II.

8 LEGAL STANDARD

9 In relevant part, 42 U.S.C. § 406(b)(1)(A) provides that when a federal court “renders a
10 judgment favorable to a claimant . . . who was represented before the court by an attorney,” the
11 court may allow reasonable attorney fees “not in excess of 25 percent of the total of the past-due
12 benefits to which the claimant is entitled by reason of such judgment.” The payment of such
13 award comes directly from the claimant's benefits. 42 U.S.C. § 406(b)(1)(A).

14 The Supreme Court has explained that a district court reviews a petition for section
15 406(b) fees “as an independent check” to assure that the contingency fee agreements between the
16 claimant and the attorney will “yield reasonable results in particular cases.” Gisbrecht v.
17 Barnhart, 535 U.S. 789, 807 (2002). The district court must respect “the primacy of lawful
18 attorney-client fee agreements,” and is to look first at the contingent-fee agreement, and then test
19 it for reasonableness.” Crawford v. Astrue, 586 F.3d 1142, 1148 (9th Cir. 2009). Agreements
20 seeking fees in excess of twenty-five percent of the past-due benefits awarded are not
21 enforceable. Crawford, 586 F.3d at 1148. The attorney has the burden of demonstrating that the
22 fees requested are reasonable. Gisbrecht, 535 U.S. at 808; Crawford, 586 F.3d at 1148.

23 In determining the reasonableness of an award, the district court should consider the
24 character of the representation and the results achieved. Gisbrecht, 535 U.S. at 800. Ultimately,

25
26 ¹ The Court calculates the past-due benefits amount by multiplying the amount withheld by 4 since the amount
27 withheld was 25% of past-due benefits. Petitioner indicates that she calculated the past-due benefits amount by
28 adding the amount withheld to the amount that was paid to Plaintiff. However, the notice of change in benefits
indicates that Plaintiff is entitled to retirement benefits from Social Security beginning July 2017. (ECF No. 29-4 at
1.) The Court notes that the amount that there is less than a \$500.00 difference between the amount of past-due
benefits calculated by Petitioner and the Court.

1 an award of section 406(b) fees is offset by an award of attorney fees granted under the EAJA.
2 Gisbrecht, 535 U.S. at 796.

3 The Ninth Circuit has identified several factors that a district court can examine under
4 Gisbrecht in determining whether the fee was reasonable. In determining whether counsel met
5 her burden to demonstrate that the requested fees are reasonable, the court may consider (1) the
6 standard of performance of the attorney in representing the claimant; (2) whether the attorney
7 exhibited dilatory conduct or caused excessive delay which resulted in an undue accumulation of
8 past-due benefits; and (3) whether the requested fees are excessively large in relation to the
9 benefits achieved when taking into consideration the risk assumed in these cases. Crawford, 586
10 F.3d at 1151.

11 **III.**
12 **DISCUSSION**

13 The Court has conducted an independent check to insure the reasonableness of the
14 requested fees in relation to this action. Gisbrecht, 535 U.S. at 807-808. Here, the fee agreement
15 between Plaintiff and Petitioner provides for a fee consisting of “25% of the backpay awarded
16 upon reversal of any unfavorable ALJ decision for work before the court.” (Social Security
17 Representation Agreement, ECF No. 29-2.) Plaintiff has been awarded benefits from March 3,
18 2011 through June 1, 2015, in the amount of \$90,461.00. (ECF Nos. 29-3, 29-41 at 1.) In
19 determining the reasonableness of the fees requested, the Court is to apply the test mandated by
20 Gisbrecht.

21 There is no indication that a reduction of fees is warranted for substandard performance.
22 Counsel is an experienced, competent attorney who secured a successful result for Plaintiff.
23 Although this action does involve just over four years of backpay and the favorable decision by
24 the ALJ was issued almost six years after Plaintiff’s application for disability benefits, there is no
25 indication that Counsel was responsible for any substantial delay in the court proceedings.
26 Plaintiff agreed to a 25 percent fee at the outset of the representation and Petitioner is seeking
27 payment of \$18,212.25. This is 20.1 percent of the backpay award. The \$18,212.25 fee is not
28 excessively large in relation to the past-due award of \$90,461.00. In making this determination,

1 the Court recognizes the contingent nature of this case and Petitioner's assumption of the risk of
2 going uncompensated. Hearn v. Barnhart, 262 F.Supp.2d 1033, 1037 (N.D. Cal. 2003).

3 In support of the motion, Petitioner submits a log of the time spent in prosecuting this
4 action. (ECF No. 29-5.) The log demonstrates that Petitioner spent 24.7 hours on this action and
5 a paralegal spent 4.25 hour on this action, for a total of 28.95 hours spent on this action. (Id.)
6 When considering the total amount requested by Petitioner, the fee request translates to \$629.09
7 per hour for the time of both Petitioner and her paralegal. In Crawford, the appellate court found
8 that a fee of \$875 and \$902 per hour, for time of both attorneys and paralegals, was not
9 excessive. Crawford, 486 F.3d at 1152 (dissenting opinion).

10 The Court finds that the requested fees are reasonable when compared to the amount of
11 work Petitioner performed in representing Plaintiff in court. Petitioner's representation of the
12 claimant resulted in the action being remanded for further proceedings and ultimately benefits
13 were awarded. Counsel also submitted a detailed billing statement which supports her request.
14 (ECF No. 29-5.)

15 The award of Section 406(b) fees is offset by any prior award of attorney fees granted
16 under the EAJA. 28 U.S.C. § 2412; Gisbrecht, 535 U.S. at 796. In this instance, Petitioner
17 received a prior award of EAJA fees of \$5,000.00, so the award of fees under Section 406(b)
18 must be offset by \$5,000.00.

19 IV.

20 ORDER

21 For the reasons stated above, the Court finds that the fees sought by Petitioner pursuant to
22 Section 406(b) are reasonable. Accordingly, IT IS HEREBY ORDERED that:

- 23 1. Petitioner's motion for an award of attorney fees pursuant to Section 406(b) in the
24 amount of \$18,212.25 is GRANTED;
- 25 2. Pursuant to counsel's request, this amount shall be paid directly to the Law
26 Offices of Lawrence D. Rohlfing. The Commissioner is to remit to Plaintiff the
27 remainder of his withheld benefits; and
- 28 3. Petitioner is ordered to refund to Plaintiff \$5,000.00 of the Section 406(b) fees

1 awarded as an offset for EAJA fees previously awarded pursuant to 28 U.S.C. §
2 2412(d).

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4 IT IS SO ORDERED.

5 Dated: March 13, 2018



UNITED STATES MAGISTRATE JUDGE

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