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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

TAMI LANE HENSHAW,
Plaintiff,
v.
ANDREW SAUL,
Commissioner of Social Security¹,
Defendant.

Case No. 1:14-cv-01788-SKO
**ORDER GRANTING PLAINTIFF'S
COUNSEL'S UNOPPOSED MOTION
FOR ATTORNEY'S FEES PURSUANT
TO 42 U.S.C. § 406(b)**
(Doc. 30)

I. INTRODUCTION

On September 6, 2019, counsel for Plaintiff Tami Lanea Henshaw ("Plaintiff") filed a motion for an award of attorney's fees pursuant to 42 U.S.C. § 406(b). (Doc. 30.) On September 9, 2019, 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 September 27, 2019. (Doc. 31.) Plaintiff and the Commissioner were served with copies of the motion for attorney's fees and the minute order. (Doc. 32.) On September 12, 2019, the Commissioner filed a statement of non-opposition, stating that the Commissioner "has no objection to the fee request." (Doc. 33.) Plaintiff did not file any objection to the motion by the September 27, 2019 deadline. (*See* Docket.)

¹ 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 For the reasons set forth below, Plaintiff’s counsel’s motion for an award of attorney’s fees
2 is granted in the amount of \$20,550, subject to an offset of \$5,784.52 in fees already awarded
3 pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), on July 6, 2016 (*see*
4 Doc. 29).

5 II. BACKGROUND

6 Plaintiff brought the underlying action seeking judicial review of a final administrative
7 decision denying her claim for disability benefits under the Social Security Act. (Doc. 1.) On
8 February 11, 2016, the Court reversed and remanded the case and judgment was entered in favor of
9 Plaintiff and against the Commissioner on the same day. (Docs. 23, 24.) On July 6, 2016, the Court
10 granted in part Plaintiff’s opposed motion for EAJA fees, in the amount of \$5,784.52. (Doc. 29.)

11 On remand, the Commissioner found Plaintiff disabled as of July 16, 2008. (*See* Doc. 30-2
12 at 1.) On August 31, 2019, the Commissioner issued a letter to Plaintiff approving her claim for
13 benefits and awarding her \$102,075.52 in back payments through July 2019. (*See* Doc. 30-2 at 1,
14 3.) On September 6, 2019, counsel filed a motion for attorney’s fees in the amount of \$20,550,
15 equal to 20.1% of Plaintiff’s back benefits, with an offset of \$5,784.52 for EAJA fees already
16 awarded. (Doc. 30.) It is counsel’s § 406(b) motion for attorney’s fees that is currently pending
17 before the Court.

18 III. DISCUSSION

19 Pursuant to the Social Security Act, attorneys may seek a reasonable fee for cases in which
20 they have successfully represented social security claimants. § 406(b) provides the 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 by*
25 *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

26 42 U.S.C. § 406(b)(1)(A) (emphasis added). “In contrast to fees awarded under fee-shifting
27 provisions such as 42 U.S.C. § 1988, the fee is paid by the claimant out of the past-due benefits
28 awarded; the losing party is not responsible for payment.” *Crawford v. Astrue*, 586 F.3d 1142, 1147

1 (9th Cir. 2009) (en banc) (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002)). The
2 Commissioner has standing to challenge the award, despite that the § 406(b) attorney’s fee award is
3 not paid by the government. *Craig v. Sec’y Dep’t of Health & Human Servs.*, 864 F.2d 324, 328
4 (4th Cir. 1989), *abrogated on other grounds in Gisbrecht*, 535 U.S. at 807. The goal of fee awards
5 under § 406(b) is to provide adequate incentive to represent claimants while ensuring that the usually
6 meager disability benefits received are not greatly depleted. *Cotter v. Bowen*, 879 F.2d 359, 365
7 (8th Cir. 1989), *abrogated on other grounds in Gisbrecht*, 535 U.S. at 807.1

8 The 25% maximum fee is not an automatic entitlement, and courts are required to ensure
9 that the requested fee is reasonable. *Gisbrecht*, 535 U.S. at 808-09 (§ 406(b) does not displace
10 contingent-fee agreements within the statutory ceiling; instead, § 406(b) instructs courts to review
11 for reasonableness fees yielded by those agreements). “Within the 25 percent boundary . . . the
12 attorney for the successful claimant must show that the fee sought is reasonable for the services
13 rendered.” *Id.* at 807; *see also Crawford*, 586 F.3d at 1148 (holding that section 406(b) “does not
14 specify how courts should determine whether a requested fee is reasonable” but “provides only that
15 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 *Gisbrecht*, 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 *Gisbrecht*, 535 U.S. at 807–08).

27 Here, the fee agreement between Plaintiff and counsel, signed by Plaintiff and her counsel,
28 attorney Jacqueline A. Forslund, provides:

1 THE CLIENT authorizes JAF to seek fees from their past due benefits totaling up
2 to 25% of all past due benefits, pursuant to 42 U.S.C. § 406(b), if the CLIENT is
3 awarded benefits by the Court on appeal, or the Social Security Administration after
the Court remands the case to the Social Security Administration for further
proceedings.

4 (Doc. 30-1 (signed October 31, 2014).)

5 The Court has considered the character of counsel’s representation of Plaintiff and the good
6 results achieved by counsel, which included an award of benefits. As Plaintiff’s counsel, attorney
7 Jacqueline Forslund spent 41.1 hours representing Plaintiff, ultimately gaining a favorable decision
8 in that the Court remanded the case to the Commissioner for further proceedings. (Doc. 30 at 1;
9 Doc. 30-3 (time sheets accounting for 41.1 attorney hours spent representing Plaintiff before this
10 Court).) There is no indication that a reduction of the award is warranted due to any substandard
11 performance by Plaintiff’s counsel as counsel secured a successful result for Plaintiff. There is also
12 no evidence that counsel engaged in any dilatory conduct resulting in delay.

13 The effective hourly rate requested by Plaintiff’s counsel here equals \$500 per hour. This
14 hourly rate is not excessive when compared to what the Ninth Circuit has approved in cases
15 involving social security contingency fee arrangements. *See Crawford*, 586 F.3d 1142, 1153 (9th
16 Cir. 2009) (explaining that the majority opinion found reasonable effective hourly rates equaling
17 \$519, \$875, and \$902) (J. Clifton, concurring in part and dissenting in part); *see also Thomas v.*
18 *Colvin*, No. 1:11-cv-01291-SKO, 2015 WL 1529331, at *2-3 (E.D. Cal. Apr. 3, 2015) (upholding
19 an effective hourly rate of \$1,093.22 for 40.8 hours of work); *Jamieson v. Astrue*, No. 1:09CV0490
20 LJO DLB, 2011 WL 587096, at *2 (E.D. Cal. Feb. 9, 2011) (upholding an effective hourly rate of
21 \$1,169.49 for 29.5 hours of work); *Palos v. Colvin*, No. CV 15-04261-DTB, 2016 WL 5110243,
22 at *2 (C.D. Cal. Sept. 20, 2016) (upholding an effective hourly rate of \$1,546.39 for 9.7 hours of
23 work); *Villa v. Astrue*, No. CIV-S-06-0846 GGH, 2010 WL 118454, at *1-2 (E.D. Cal. Jan. 7,
24 2010) (approving § 406(b) fees exceeding \$1,000 per hour for 10.4 hours of work, and noting that
25 “[r]educing § 406(b) fees after *Crawford* is a dicey business”).

26 Further, attorney’s fees in the amount of \$20,550 do not exceed (and are in fact less than)
27 25% of the past-due benefits awarded and are not excessive in relation to the past-due award. *See*
28 *generally Ortega v. Comm’r of Soc. Sec.*, No. 1:12-cv-01030-AWI-SAB, 2015 WL 5021646, at

1 *3 (E.D. Cal. Aug. 21, 2015) (granting petition for an award of attorney’s fees pursuant to § 406(b)
2 in the amount of \$24,350.00); *Thomas*, 2015 WL 1529331, at *3 (granting petition for an award of
3 attorney’s fees pursuant to § 406(b) in the amount of \$44,603.50); *Boyle v. Colvin*, No. 1:12-cv-
4 00954-SMS, 2013 WL 6712552, at *2 (E.D. Cal. Dec. 19, 2013) (granting petition for an award of
5 attorney’s fees pursuant to § 406(b) in the amount of \$20,577.57); *Jamieson*, 2011 WL 587096, at
6 *2 (recommending an award of attorney’s fees pursuant to § 406(b) in the amount of \$34,500).

7 In making this determination, the Court recognizes the contingent-fee nature of this case and
8 counsel’s assumption of risk in agreeing to represent Plaintiff under such terms. “District courts
9 generally have been deferential to the terms of contingency fee contracts in § 406(b) cases.” *Hearn*
10 *v. Barnhart*, 262 F. Supp. 2d 1033, 1037 (N.D. Cal. 2003) (“Because attorneys like Mr. Sackett
11 contend with a substantial risk of loss in Title II cases, an effective hourly rate of only \$450 in
12 successful cases does not provide a basis for this court to lower the fee to avoid a ‘windfall.’”
13 (quoting *Gisbrecht*, 535 U.S. at 807)). Attorneys who agree to represent claimants pursuant to a
14 contingent fee agreement assume the risk of receiving no compensation for their time and effort if
15 the action does not succeed. *Id.* Here, Plaintiff’s attorney accepted substantial risk of loss in
16 representing Plaintiff, whose application had already been denied at the administrative level.
17 Plaintiff agreed to the contingent fee. (See Doc. 30-1.) Working efficiently and effectively, the
18 attorney secured a reversal and remand, and ultimately, the award of substantial benefits to Plaintiff.
19 (See Docs. 23, 24, 30-2.)

20 An award of attorney’s fees pursuant to section 406(b) in the amount of \$20,550 is, therefore,
21 appropriate. An award of § 406(b) fees, however, must be offset by any prior award of attorney’s
22 fees granted under the EAJA. 28 U.S.C. § 2412; *Gisbrecht*, 535 U.S. at 796. Plaintiff was
23 previously awarded \$5,784.52 in fees pursuant to the EAJA; as such, counsel shall refund such
24 amount to Plaintiff.

25 IV. CONCLUSION AND ORDER

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

- 28 1. Plaintiff’s counsel’s unopposed motion for an award of attorney’s fees pursuant to

1 42 U.S.C. § 406(b) in the amount of \$20,550, (Doc. 30), is granted;

2 2. Plaintiff's counsel shall refund to Plaintiff \$5,784.52 of the § 406(b) fees awarded as
3 an offset for the EAJA fees previously awarded pursuant to 28 U.S.C. § 2412(d), (*see* Doc. 29); and

4 3. Counsel for Plaintiff shall file on the Court's docket proof of service of this order
5 upon Plaintiff at her current or last known address.

6
7 IT IS SO ORDERED.

8 Dated: October 8, 2019

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE

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