

1 was entered in accordance with the Court’s order. (ECF No. 18.) On remand, the Commissioner
2 awarded benefits to Plaintiff. (ECF Nos. 21-2.) On December 9, 2016, the parties filed a
3 stipulation for an award of \$5,225 in attorney fees under EAJA (ECF No. 19), and on September
4 12, 2016, the Court entered an order on the stipulation, awarding EAJA attorney fees and
5 expenses in the amount of \$5,225. (ECF No. 20.)

6 On August 25, 2018, the Commissioner issued a notice that retroactive disability benefits
7 had been awarded to Plaintiff, and that \$19,667, representing 25% of Plaintiff’s past-due benefits,
8 had been withheld from Plaintiff’s award of disability benefits for payment of any applicable
9 attorney fees. (ECF No. 21-2 at 3.) The notice does not, however, specify the total amount of
10 past-due benefits awarded to Plaintiff. (*Id.*) Although the parties agree that \$19,667 represents
11 25% of the past-due benefits (ECF No. 21 at 1; ECF No. 23 at 1), a subsequent letter from the
12 Commissioner, dated July 1, 2019, states that \$15,522 was being withheld, “which represents the
13 balance of 25 percent of the past-due benefits payable” to Plaintiff. (ECF No. 21-6.)

14 On July 9, 2019, Plaintiff’s counsel filed a motion for attorney fees in the amount of
15 \$15,522, with an offset of \$5,225 for EAJA fees already awarded. (ECF No. 21.) Plaintiff’s
16 counsel states in the motion that 25% of past-due benefits is \$19,667, but does not explain or
17 discuss the July 1, 2019, letter stating that \$15,522 “represents the balance of 25 percent of the
18 past-due benefits.” Defendant, however, indicates that the \$4,145 difference between the \$19,667
19 amount stated in the August 25, 2018, notice and the \$15,522 amount set forth in the July 1,
20 2019, letter represents a fee received by Plaintiff’s counsel under 42 U.S.C. § 406(a). (ECF No.
21 23 at 2 (“Counsel indicated that she received fee under 42 U.S.C. § 406(a) in the amount of
22 \$4,145.00, and has reduced her request by that amount.”).)

23 Plaintiff’s counsel’s § 406(b) motion for attorney fees is now before the Court.

24 **II. DISCUSSION**

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

27 Whenever a court renders a judgment favorable to a claimant under this subchapter
28 who was represented before the court by an attorney, the court may determine and
allow as part of its judgment a reasonable fee for such representation, *not in excess*

1 of 25 percent of the total of the past-due benefits to which the claimant is entitled
2 by reason of such judgment, and the Commissioner of Social Security may . . .
3 certify the amount of such fee for payment to such attorney out of, and not in
4 addition to, the amount of such past-due benefits

4 42 U.S.C. § 406(b)(1)(A) (emphasis added).

5 “In contrast to fees awarded under fee-shifting provisions such as 42 U.S.C. § 1988, the
6 [406(b)] fee is paid by the claimant out of the past-due benefits awarded; the losing party is not
7 responsible for payment.” *Crawford v. Astrue*, 586 F.3d 1142, 1147 (9th Cir. 2009) (en banc)
8 (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002)). Even though the § 406(b) attorney fees
9 award is not paid by the government, the Commissioner has standing to challenge the award.
10 *Craig v. Sec’y Dep’t of Health & Human Servs.*, 864 F.2d 324, 328 (4th Cir. 1989), *abrogated on*
11 *other grounds in Gisbrecht*, 535 U.S. at 807. The goal of fee awards under § 406(b) is to provide
12 adequate incentive to represent claimants while ensuring that the usually meager disability
13 benefits received are not greatly depleted. *Cotter v. Bowen*, 879 F.2d 359, 365 (8th Cir. 1989),
14 *abrogated on other grounds in Gisbrecht*, 535 U.S. at 807.

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

23 Generally, “a district court charged with determining a reasonable fee award under
24 § 406(b)(1)(A) must respect ‘the primacy of lawful attorney-client fee arrangements,’ . . .
25 ‘looking first to the contingent-fee agreement, then testing it for reasonableness.’” *Crawford*, 586
26 F.3d at 1148 (quoting *Gisbrecht*, 535 U.S. at 793, 808). The United States Supreme Court has
27 identified several factors that may be considered in determining whether a fee award under a
28 contingent-fee agreement is unreasonable and therefore subject to reduction by the court: (1) the

1 character of the representation; (2) the results achieved by the representative; (3) whether the
2 attorney engaged in dilatory conduct in order to increase the accrued amount of past-due benefits;
3 (4) whether the benefits are large in comparison to the amount of time counsel spent on the case;
4 and (5) the attorney’s record of hours worked and counsel’s regular hourly billing charge for non-
5 contingent cases. *Id.* (citing *Gisbrecht*, 535 U.S. at 807-08).

6 Here, the fee agreement between Plaintiff and her attorney, Shellie Lott of Cerney Kreuze
7 & Lott, LLP, was signed by Plaintiff and counsel, and provides:

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

12 If Attorney prevails before the Federal Court, Attorney will make application to
13 the court to order SSA to pay attorney fees in accordance with the Equal Access
14 to Justice Act (“EAJA”). . . .

15

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

21 (ECF No. 21-3.)

22 The Court has considered the character of counsel’s representation of Plaintiff and the
23 good results achieved by counsel, which includes an award of benefits. Plaintiff’s counsel
24 represents that she spent 28.4 hours of attorney time representing Plaintiff in this matter,
25 ultimately gaining a favorable decision in that the case was remanded to the Commissioner, who
26 then awarded benefits to Plaintiff. (ECF No. 21-4 (time record showing 28.4 attorney hours
27 representing Plaintiff before the district court).) There is no indication that a reduction of the
28 award is warranted due to any substandard performance by Plaintiff’s counsel as counsel secured
a successful result for Plaintiff. There also is no evidence that counsel engaged in any dilatory
conduct resulting in delay.

Plaintiff’s counsel seeks an award of \$15,522, which results in an hourly rate of \$547. The
Ninth Circuit has found similar—and in some cases, higher—effective hourly rates reasonable in

1 social security contingency fee arrangements. *See, e.g., Crawford*, 586 F.3d at 1153 (explaining
2 that the majority opinion found reasonable effective hourly rates equaling \$519, \$875, and \$902)
3 (J. Clifton, concurring in part and dissenting in part); *see also Patterson v. Apfel*, 99 F. Supp. 2d
4 1212, 1214 & n.2 (C.D. Cal. 2000) (noting that “a survey of several dozen cases in which
5 attorney's fees were awarded in social security cases suggests that the 33.75 hours spent by
6 plaintiff's counsel falls within the approved range,” and collecting cases).

7 Further, the requested attorney fees award of \$15,522 does not exceed 25% of past-due
8 benefits, and is not excessive in relation to the past-due benefits awarded.¹ *See generally Ortega*
9 *v. Comm'r of Soc. Sec.*, No. 1:12-cv-01030-AWI-SAB, 2015 WL 5021646, at *3 (E.D. Cal.
10 Aug. 21, 2015) (granting § 406(b) attorney fees in the amount of \$24,350); *Thomas v. Colvin*, No.
11 1:11-cv-01291-SKO, 2015 WL 1529331, at *3 (E.D. Cal. Apr. 3, 2015) (granting § 406(b)
12 attorney fees in the amount of \$44,603.50); *Boyle v. Colvin*, No. 1:12-cv-00954-SMS, 2013 WL
13 6712552, at *2 (E.D. Cal. Dec. 19, 2013) (granting § 406(b) attorney fees in the amount of
14 \$20,577.57); *Jamieson v. Astrue*, No. 1:09-cv-00490-LJO-DLB, 2011 WL 587096, at *2 (E.D.
15 Cal. Feb. 9, 2011) (recommending an award of § 406(b) attorney fees in the amount of \$34,500),
16 *adopted by* 2011 WL 841363.

17 In making this determination, the Court recognizes the contingent-fee nature of this case
18 and counsel's assumption of risk in agreeing to represent Plaintiff under such terms. “District
19 courts generally have been deferential to the terms of contingency fee contracts in § 406(b)
20 cases.” *Harris v. Barnhart*, 262 F. Supp. 2d 1033, 1037 (N.D. Cal. 2003). Attorneys who agree to
21 represent claimants pursuant to a contingent fee agreement assume the risk of receiving no
22 compensation for their time and effort if the action does not succeed. *Id.* Here, Plaintiff's attorney
23 accepted substantial risk of loss in representing Plaintiff, whose application had already been
24 denied at the administrative level. Plaintiff agreed to the contingent fee, and counsel successfully
25 secured a remand and ultimately an award of substantial benefits to Plaintiff.

26 ¹ As noted previously, the information provided to the Court does not include a statement by the Social
27 Security Administration of the total past-due benefits awarded. The information states that \$19,667 represents 25% of
28 past-due benefits (ECF No.21-1 at 3), but subsequently states that \$15,522 “represents the balance of 25 percent of
the past-due benefits” (ECF No. 21-6 at 1). The \$4,145 difference is apparently the result of a fee received by
Plaintiff's counsel under 42 U.S.C. § 406(a). (*See* ECF No. 23 at 2.)

1 An award of attorney fees pursuant to § 406(b) in the amount of \$15,522 is, therefore,
2 appropriate. An award of § 406(b) fees, however, must be offset by any prior award of attorney
3 fees granted under the EAJA. *See* 28 U.S.C. § 2412; *Gisbrecht*, 535 U.S. at 796. Plaintiff was
4 previously awarded \$5,225 in fees pursuant to the EAJA; as such, the § 406(b) award will be
5 offset by \$5,225.

6 **III. CONCLUSION AND ORDER**

7 For the reasons stated above, the Court finds that the attorney fees sought by Plaintiff's
8 counsel pursuant to § 406(b) are reasonable. Accordingly, IT IS ORDERED:

9 1. Plaintiff's counsel's motion for an award of attorney fees pursuant to 42 U.S.C. §
10 406(b) in the amount of \$15,522 (ECF No. 21) is GRANTED;

11 2. Plaintiff's counsel is ordered to reimburse Plaintiff \$5,225 of the § 406(b) fees
12 awarded as an offset for the EAJA fees previously awarded pursuant to 28 U.S.C. § 2412(d).

13 3. The Clerk of the Court is respectfully directed to serve a copy of this Order on Susan
14 Rae Wares, 1760 Faith Home Road, Ceres CA 95307.

15
16 IT IS SO ORDERED.

17 Dated: September 11, 2019

18 /s/ Eric P. Gray
19 UNITED STATES MAGISTRATE JUDGE
20
21
22
23
24
25
26
27
28