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

MARIA DELIA VILLANUEVA,

 Plaintiff,

 v.

COMMISSIONER OF SOCIAL SECURITY,

 Defendant.

Case No. 1:18-cv-00004-EPG

ORDER GRANTING PLAINTIFF’S
COUNSEL’S MOTION FOR
ATTORNEY’S FEES PURSUANT TO 42
U.S.C. § 406(b)

(ECF No. 24)

On August, 18, 2020, Mark V. Kalagian of the Law Offices of Lawrence D. Rohlfling, counsel for Plaintiff Maria Delia Villanueva (“Plaintiff”), filed a motion for an award of attorney’s fees pursuant to 42 U.S.C. § 406(b). (ECF No. 24.) Plaintiff and the Commissioner of Social Security were each served with a copy of the motion. (*Id.* at 15.) Neither Plaintiff nor the Commissioner have filed an objection or other response to the motion.

For the reasons set forth below, the motion for an award of attorney’s fees is GRANTED in the amount of \$15,475.75. Plaintiff’s counsel shall reimburse Plaintiff for the \$4,500.00 in fees and expenses previously awarded pursuant to the Equal Access to Justice Act (“EAJA”). (*See* ECF No. 23.)

I. BACKGROUND

Plaintiff brought the underlying action seeking judicial review of a final administrative decision denying her claim for disability insurance benefits under the Social Security Act. (ECF No. 1.) On January 7, 2019, the Court entered an order and final judgment in favor of Plaintiff,

1 remanding the case for further administrative proceedings. (ECF Nos. 20, 21.) On March 11,
2 2019, the parties filed a stipulation for an award of \$4,500.00 in attorney fees under the EAJA.
3 (ECF No. 22.) The Court entered an order on the stipulation on March 12, 2019, awarding EAJA
4 attorney fees and expenses in the amount of \$4,500.00. (ECF No. 23.)

5 On remand, the Commissioner awarded benefits to Plaintiff, including retroactive
6 benefits. (ECF Nos. 24-3, 24-4.) The letter from the Commissioner states that Plaintiff was
7 awarded \$121,903.00 in past-due benefits and \$30,475.75 was withheld from that amount to pay
8 Plaintiff's representative. (ECF No. 24-4 at 3.)¹

9 On August 18, 2020, Plaintiff's counsel filed a motion seeking attorney fees in the amount
10 of \$15,475.75 pursuant to 42 U.S.C. § 406(b), with a credit to Plaintiff for the \$4,500.00 in EAJA
11 fees and expenses previously awarded. (ECF No. 24.) Plaintiff's counsel's section 406(b) motion
12 for attorney fees is currently pending before the Court.

13 **II. 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:

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

23 42 U.S.C. § 406(b)(1)(A) (emphasis added).

24 "In contrast to fees awarded under fee-shifting provisions such as 42 U.S.C. § 1988, the
25 [406(b)] fee is paid by the claimant out of the past-due benefits awarded; the losing party is not
26 responsible for payment." *Crawford v. Astrue*, 586 F.3d 1142, 1147 (9th Cir. 2009) (en banc)
27 (citing *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002)). Even though the section 406(b) attorney
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¹ On October 23, 2020, the Court directed the parties to file a joint statement setting forth the total amount of past-due benefits awarded to Plaintiff because the motion did not include a clear statement from the Social Security Administration regarding the total amount of past-due benefits. (ECF No. 25.) The parties filed a joint statement on November 13, 2020, confirming that Plaintiff's past-due benefits were calculated to be \$121,903.00 and the Commissioner withheld \$30,475.75 from Plaintiff's total past-due benefits for payment of attorneys' fees. (ECF No. 27.) Plaintiff received a payment of \$96,703.85, representing the \$121,903.00 in total past-due benefits, minus \$30,475.75 withheld for attorneys' fees, plus \$5,276.60 in ongoing benefits. (*Id.*)

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

7 The 25% maximum fee is not an automatic entitlement, and courts are required to ensure
8 that the requested fee is reasonable. *Gisbrecht*, 535 U.S. at 808-09 (holding that section 406(b)
9 does not displace contingent-fee agreements within the statutory ceiling; instead, section 406(b)
10 instructs courts to review for reasonableness fees yielded by those agreements). “Within the 25
11 percent boundary . . . the attorney for the successful claimant must show that the fee sought is
12 reasonable for the services rendered.” *Id.* at 807; *see also Crawford*, 586 F.3d at 1148 (holding
13 that section 406(b) “does not specify how courts should determine whether a requested fee is
14 reasonable” but “provides only that the fee must not exceed 25% of the past-due benefits
15 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,’ . . .
18 ‘looking first to the contingent-fee agreement, then testing it for reasonableness.’” *Crawford*, 586
19 F.3d at 1148 (quoting *Gisbrecht*, 535 U.S. at 793, 808). The United States Supreme Court has
20 identified several factors that may be considered in determining whether a fee award under a
21 contingent-fee agreement is unreasonable and therefore subject to reduction by the court: (1) the
22 character of the representation; (2) the results achieved by the representative; (3) whether the
23 attorney engaged in dilatory conduct in order to increase the accrued amount of past-due benefits;
24 and (5) the attorney’s record of hours worked and counsel’s regular hourly billing charge for non-
25 contingent cases. *Id.* (citing *Gisbrecht*, 535 U.S. at 807-08).

26 Here, the fee agreement between Plaintiff and the Law Offices of Lawrence D. Rohlifing,
27 LLP, which is signed by Plaintiff and counsel, provides:

28 If this matter requires judicial review of any adverse decision of the Social

1 Security Administration, the fee for successful prosecution of this matter is a
2 **separate 25% of the backpay awarded upon reversal of any unfavorable**
3 **ALJ decision for work before the court.** Attorney shall seek compensation
4 under the [EAJA] and such amount shall credit to the client for fees otherwise
5 payable for court work.

6 (ECF No. 24-2 (emphasis in original).)

7 The Court has considered the character of counsel's representation of Plaintiff and the
8 good results achieved by counsel, which included an award of benefits. Plaintiff's counsel
9 represents that the firm spent 23.3 hours of attorney time and 2.3 hours of paralegal time
10 representing Plaintiff in this matter. (ECF No. 24-5.) Counsel ultimately gained a favorable
11 decision in that the case was remanded to the Commissioner, who then awarded benefits to
12 Plaintiff. (ECF Nos. 24-3, 24-4.) There is no indication that a reduction of the award is warranted
13 due to any substandard performance by Plaintiff's counsel as counsel secured a successful result
14 for Plaintiff. There also is no evidence that counsel engaged in any dilatory conduct resulting in
15 delay.

16 Plaintiff's counsel seeks an award of \$15,475.75, which results in a blended hourly rate
17 for attorney and paralegal time of approximately \$604.52. The Ninth Circuit has found similar—
18 and in many cases, higher—effective hourly rates reasonable in social security contingency fee
19 arrangements. *See, e.g., Crawford*, 586 F.3d at 1153 (explaining that the majority opinion found
20 reasonable effective hourly rates equaling \$519, \$875, and \$902) (J. Clifton, concurring in part
21 and dissenting in part); *see also Patterson v. Apfel*, 99 F. Supp. 2d 1212, 1214 & n.2 (C.D. Cal.
22 2000) (noting that “a survey of several dozen cases in which attorney's fees were awarded in
23 social security cases suggests that the 33.75 hours spent by plaintiff's counsel falls within the
24 approved range,” and collecting cases). Further, the requested attorney fees award of \$15,475.75
25 is approximately 12.7% of past-due benefits awarded to Plaintiff. This amount does not exceed
26 25% of past-due benefits and is not excessive in relation to the past-due benefits awarded. *See*
27 *generally Ortega v. Comm'r of Soc. Sec.*, No. 1:12-cv-01030-AWI-SAB, 2015 WL 5021646, at
28 *3 (E.D. Cal. Aug. 21, 2015) (granting section 406(b) attorney fees in the amount of \$24,350.00);
Thomas v. Colvin, No. 1:11-cv-01291-SKO, 2015 WL 1529331, at *3 (E.D. Cal. Apr. 3, 2015)
(granting section 406(b) attorney fees in the amount of \$44,603.50); *Boyle v. Colvin*, No. 1:12-

1 cv-00954-SMS, 2013 WL 6712552, at *2 (E.D. Cal. Dec. 19, 2013) (granting section 406(b)
2 attorney fees in the amount of \$20,577.57); *Jamieson v. Astrue*, No. 1:09-cv-00490-LJO-DLB,
3 2011 WL 587096, at *2 (E.D. Cal. Feb. 9, 2011), *adopted by* 2011 WL 841363 (recommending
4 an award of section 406(b) attorney fees in the amount of \$34,500.00).

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

14 An award of attorney fees pursuant to section 406(b) in the amount of \$15,475.75 is
15 therefore appropriate. An award of section 406(b) fees, however, must be offset by any prior
16 award of attorney fees granted under the EAJA. *See* 28 U.S.C. § 2412; *Gisbrecht*, 535 U.S. at
17 796. Plaintiff was previously awarded \$4,500.00 in fees pursuant to the EAJA; as such, the
18 section 406(b) award will be offset by \$4,500.00 for a net award of \$10,975.75.

18 **III. CONCLUSION AND ORDER**

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

- 21 1. Plaintiff's counsel's motion for an award of attorney fees pursuant to 42 U.S.C. §
22 406(b) in the amount of \$15,475.75 is GRANTED;
- 23 2. Plaintiff's counsel is ordered to reimburse Plaintiff \$4,500.00 for the EAJA fees
24 previously awarded pursuant to 28 U.S.C. § 2412(d).

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3. The Clerk of the Court is respectfully directed to serve a copy of this Order on Plaintiff at the following address.

Maria Delia Villanueva
2147 N. Jackson Ave.
Fresno, CA 93703

IT IS SO ORDERED.

Dated: November 18, 2020

/s/ Eric P. Gray
UNITED STATES MAGISTRATE JUDGE