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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID R. DOBSON,
Plaintiff,
v.
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

No. 2:09-cv-1460-KJN

ORDER

Pending before the court is plaintiff’s counsel’s motion for aid in execution of the court’s prior order awarding attorneys’ fees under 42 U.S.C. § 406(b) and for sanctions against the Commissioner, filed on October 28, 2013, and presently set for hearing on December 5, 2013. (ECF No. 43.)¹ Subsequently, on November 21, 2013, the Commissioner filed a timely opposition to plaintiff’s counsel’s motion, along with a motion for clarification of the court’s prior order awarding fees, or in the alternative, for partial relief under Federal Rule of Civil Procedure 60(b). (ECF No. 44.) Upon reviewing the parties’ briefing, the court finds that oral argument would not be of material assistance in resolving the motions, and therefore vacates the

¹ This case was referred to the undersigned pursuant to E.D. Cal. L.R. 302(c)(15), and both parties voluntarily consented to proceed before a United States Magistrate Judge for all purposes. (ECF Nos. 9, 10, 13.)

1 December 5, 2013 hearing and submits the motions on the record and briefs on file pursuant to
2 Local Rule 230(g).

3 After careful consideration of the parties' briefing and the applicable law, and for the
4 reasons discussed below, the court denies plaintiff's counsel's motion for aid in execution of the
5 court's prior order and the imposition of sanctions against the Commissioner. The court also
6 grants the Commissioner's motion for clarification, or in the alternative, partial relief under
7 Federal Rule of Civil Procedure 60(b).

8 BACKGROUND

9 The facts and procedural history of this case were extensively outlined in the court's
10 previous orders (see, e.g., ECF Nos. 31, 39), and need not be exhaustively recounted here.
11 Briefly stated, on November 5, 2010, the court granted plaintiff's motion for a remand pursuant to
12 sentence six of 42 U.S.C. § 405(g). (ECF No. 31.) Following remand, on June 21, 2011, an
13 administrative law judge ultimately issued a fully favorable decision, finding that plaintiff had
14 been disabled as of August 1, 2005, as originally alleged. (See ECF No. 32-1.) Consistent with
15 the fully favorable decision, this court entered judgment for plaintiff on June 29, 2012. (ECF
16 Nos. 33, 34.)

17 Subsequently, on September 25, 2012, plaintiff's counsel filed a motion for attorneys' fees
18 and costs under both the Equal Access to Justice Act ("EAJA") and 42 U.S.C. § 406(b). (ECF
19 No. 36.) On November 20, 2012, the court denied the request for fees and costs under the EAJA,
20 finding that the Commissioner's position had been substantially justified. (ECF No. 39.)
21 Furthermore, because plaintiff's counsel's request for fees under 42 U.S.C. § 406(b) was not
22 adequately supported by appropriate documentation and briefing at the time, the court also denied
23 that request, but without prejudice to plaintiff's counsel re-filing a properly supported request for
24 such fees. (Id.)

25 Thereafter, on February 26, 2013, plaintiff's counsel filed a renewed motion for attorneys'
26 fees under 42 U.S.C. § 406(b). (ECF No. 40.) On March 18, 2013, the court granted that motion,
27 ordering that "[t]he Commissioner shall pay plaintiff's counsel in this case the sum of \$8,631.87
28 in attorneys' fees under 42 U.S.C. § 406(b). The remainder withheld from the back benefits

1 awardable to plaintiff, including any auxiliary benefits, shall be disbursed to plaintiff.” (ECF No.
2 42.) The court’s order clearly contemplated that the withheld past-due benefits would be
3 sufficient to cover the fee award.

4 The instant motions followed.

5 DISCUSSION

6 Plaintiff’s counsel argues that the Commissioner failed to comply with the court’s order
7 awarding attorneys’ fees under 42 U.S.C. § 406(b) in two ways: (1) by improperly deducting
8 processing fees from the attorneys’ fees paid to plaintiff’s counsel pursuant to the court’s order;
9 and (2) by failing to pay plaintiff’s counsel that portion of the court’s section 406(b) fee award
10 that exceeds the past due benefits withheld by the Commissioner. Each contention is addressed
11 separately below.

12 Processing Fees

13 Title 42 U.S.C. § 406(a) allows for an award of fees for representation of a claimant
14 during the administrative proceedings before the Commissioner, whereas 42 U.S.C. § 406(b)
15 authorizes an award of fees for representation of a claimant before a court. Plaintiff’s counsel
16 argues that the Commissioner improperly deducted processing fees or assessments from the
17 attorneys’ fees paid to plaintiff’s counsel pursuant to the court’s order, because “the fee directed
18 by the Court was a 406b fee for which there is no reduction for processing such as there is for
19 direct payment of 406a fees.” (ECF No. 43 at 4.) Plaintiff’s counsel is mistaken.

20 Title 42 U.S.C. § 406(d)(1) provides that “[w]henver a fee for services is required to be
21 certified for payment to an attorney from a claimant’s past-due benefits pursuant to subsection
22 (a)(4) or (b)(1) of this section, the Commissioner shall impose on the attorney an assessment
23 calculated in accordance with paragraph (2).” Furthermore, 42 U.S.C. § 406(d)(3) states that
24 “[t]he Commissioner may collect the assessment imposed on an attorney under paragraph (1) by
25 offset from the amount of the fee otherwise required by subsection (a)(4) or (b)(1) of this section
26 to be certified for payment to the attorney from a claimant’s past-due benefits.” Thus, the statute
27 makes clear that processing fees or assessments also apply to, and may be deducted from, direct
28 payments made to attorneys pursuant to section 406(b) fee awards.

1 Portion of Fee Award Exceeding Withheld Past-Due Benefits

2 Plaintiff’s counsel also contends that the Commissioner impermissibly refuses to pay
3 plaintiff’s counsel the portion of the court’s section 406(b) fee award exceeding the amount of
4 past-due benefits that the Commissioner had withheld. Plaintiff’s counsel essentially reasons that
5 the court’s order unambiguously awards him \$8,631.87, that the Commissioner still owes him
6 \$1,785.70, and that the Commissioner’s failure to pay the entire \$8,631.87 is sanctionable.

7 The Commissioner explains its position as follows:

8 The Commissioner understood the Court’s Order to mean that she
9 was required to pay the remainder of the twenty-five percent (25%)
10 of Plaintiff’s due benefits to attorney Weems, consistent with the
11 Social Security Act (Act). The Act authorizes the Social Security
12 Administration (SSA) to withhold a maximum of 25 percent from a
13 claimant’s past-due benefits and make those funds available to pay
14 fees for the claimant’s representation at the administrative and
15 judicial levels. In this case, SSA paid the total of 25% of the
16 Plaintiff’s past due benefits (\$12,895.00)² to Plaintiff’s
17 representatives for administrative level and court level
18 representation pursuant to sections 406(a) and (b); SSA paid
19 \$5,341.33 to Plaintiff’s administrative level representative, and
20 \$7,553.67 to his court-level attorney Weems.

21 Accordingly, the Commissioner respectfully requests that the Court
22 clarify the Order by explaining that SSA was required to pay the
23 remainder of the 25% of Plaintiff’s past due benefits to attorney
24 Weems and that attorney Weems should look to Plaintiff for any
25 amount that exceeds twenty-five percent. If the Court intended that
26 SSA pay fees in excess of available funds, the Commissioner
27 requests that the Court modify its order under Rule 60(b) of the
28 Federal Rules of Civil Procedure, to provide that SSA was required
to pay only the remainder of the 25% of Plaintiff’s past due benefits
to attorney Weems.

(ECF No. 44 at 3-4.) Stated differently, the Commissioner concedes that plaintiff’s counsel is
still entitled to \$1,078.20 for section 406(b) fees (the difference between the \$8,631.87 awarded

² Plaintiff’s past-due benefits were at times recalculated to effectuate the various ALJ decisions in the case, and the history of these calculations are outlined in detail in the Declaration of Michael Rodo in support of the Commissioner’s opposition to plaintiff’s counsel’s motion. (See Declaration of Michael Rodo, ECF No. 44-1 [“Rodo Decl.”].) According to the Commissioner’s final calculations, plaintiff and his child’s past due benefits were \$51,580.00. The amount of attorneys’ fees to be withheld by the Commissioner from such past-due benefits was thus 25% of \$51,580.00, which is \$12,895.00. (Rodo Decl. ¶ 12.)

1 and the \$7,553.67 already paid by the Commissioner from plaintiff's withheld past-due benefits
2 towards attorneys' fees and the associated processing fees), but that plaintiff's counsel needs to
3 look to his client for payment of such remaining fees.³

4 Although the court's prior order may conceivably be read literally as making the
5 Commissioner liable for the entire amount of section 406(b) fees, that interpretation is not
6 plausible when viewed in the context of the applicable law.

7 Title 42 U.S.C. § 406(a)(4), the provision addressing fees for representation of a claimant
8 during the administrative proceedings, states that "if the claimant is determined to be entitled to
9 past-due benefits under this subchapter and the person representing the claimant is an attorney,
10 the Commissioner of Social Security *shall*...certify for payment out of such past-due benefits...to
11 such attorney an amount equal to so much of the maximum fee as does not exceed 25 percent of
12 such past-due benefits..." (emphasis added). In contrast to this mandatory language, 42 U.S.C. §
13 406(b)(1)(A), the provision addressing fees for representation of a claimant before a court, is
14 permissive and provides that "whenever a court renders a judgment favorable to a claimant under
15 this subchapter who was represented before the court by an attorney, the court may determine and
16 allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent
17 of the total of the past-due benefits to which the claimant is entitled by reason of such judgment,
18 and the Commissioner *may*...certify the amount of such fee for payment to such attorney *out of,*
19 *and not in addition to, the amount of such past-due benefits. In case of any such judgment, no*
20 *other fee may be payable or certified for payment for such representation except as provided in*
21 *this paragraph.*" (emphasis added). In light of this statutory framework, the Commissioner has
22 established a general policy of withholding a maximum of 25% of past-due benefits for direct
23 payment of fees authorized by the Commissioner under section 406(a), a court under section

24
25 ³ As noted above, plaintiff's counsel's motion actually claims that the Commissioner still owes
26 him \$1,785.70. However, that amount appears to include recovery of the properly-assessed
27 processing fees. Furthermore, since the filing of plaintiff's counsel's motion, the Commissioner
28 corrected a previous withholding mistake for plaintiff's child's benefits and paid plaintiff's
counsel an additional \$668.50, waiving any processing fee. (Rodo Decl. ¶¶ 20-21.) As such, the
Commissioner correctly contends that plaintiff's counsel remains entitled to \$1,078.20 for section
406(b) fees.

1 406(b), or both. HALLEX I-1-2-9, I-1-2-71; POMS GN 03920.060.⁴

2 In this framework, withheld past-due benefits may sometimes be insufficient to pay all
3 awarded attorneys' fees. The Ninth Circuit Court of Appeals has held that courts may award up
4 to 25 percent of past-due benefits in attorneys' fees for representation before the courts under 42
5 U.S.C. § 406(b), regardless of fees already authorized for representation before the Commissioner
6 under 42 U.S.C. § 406(a). Clark v. Astrue, 529 F.3d 1211, 1215, 1218 (9th Cir. 2008). Thus, the
7 combined fees awarded under sections 406(a) and 406(b) may exceed 25% of a claimant's past-
8 due benefits. As such, the amount of fees that may be awarded to plaintiff's counsel and the
9 amount that the Commissioner withholds and pays directly to plaintiff's counsel are two
10 independent calculations. Even though an attorney may be awarded a combined fee under
11 sections 406(a) and 406(b) that exceeds 25 percent of a claimant's past-due benefits, the
12 Commissioner only *withholds* 25 percent of past-due benefits for direct payment to the attorney
13 and may not be required to pay any additional fees to counsel. See 42 U.S.C. §§ 406(a)(4),
14 (b)(1)(A). Accordingly, if the amount of past-due benefits withheld is insufficient to cover all
15 fees awarded at the administrative and court levels, the claimant's counsel must recover the
16 difference from the claimant.

17 This scheme was expressly recognized by the Tenth Circuit Court of Appeals:

18 In order to protect an attorney from non-payment at the agency
19 and/or court level, the Commissioner may withhold up to 25% of
20 the past-due benefits awarded to pay directly to the attorney. *See*
21 42 U.S.C. § 406(a)(4), (b)(1)(A). If the amount withheld by the
22 Commissioner is insufficient to satisfy the amount of fees
23 determined reasonable by the court, the attorney must look to the
24 claimant, not the past-due benefits, to recover the difference. At
25 that point the attorney stands on the same level as other judgment
26 creditors in attempting to collect. *See generally Tom v. First. Am.*
27 *Credit Union*, 151 F.3d 1289, 1291-93 (10th Cir. 1998) (Congress
28 chose to protect Social Security beneficiaries from creditors who

25 ⁴ HALLEX is the Commissioner's Hearings, Appeals, and Litigation Law Manual, which the
26 Ninth Circuit has described as "strictly an internal Agency manual, with no binding legal effect
27 on the Administration or this court...Nevertheless, as an Agency manual, HALLEX is 'entitled to
28 respect' under *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944), to the
extent that it has the 'power to persuade.' *See Christensen v. Harris County*, 529 U.S. 576, 587,
120 S.Ct. 1655, 146 L.Ed.2d 621 (2000)." Clark v. Astrue, 529 F.3d 1211, 1216 (9th Cir. 2008).
Similarly, the POMS is the Commissioner's Program Operations Manual System.

1 utilized the judicial system and creditors who devised their own
2 extra-judicial methods of collecting debts); 42 U.S.C. § 407(a)
3 (disability insurance benefits are not transferable or assignable nor
4 are they subject to execution, levy, attachment, garnishment or
5 other legal process).

6 Wrenn ex rel. Wrenn v. Astrue, 525 F.3d 931, 933-34 (10th Cir. 2008). The Ninth Circuit, which
7 specifically cited Wrenn with approval in Clark, likewise noted the distinction between a fee
8 award and the Commissioner’s withholding/direct payment obligations:

9 Under 406(a), the Secretary first makes a determination of a
10 “reasonable” fee to compensate the attorney. In addition to this, the
11 Secretary is required to withhold up to 25% of the total amount of
12 past-due benefits and pay that amount directly to the attorney. The
13 two calculations are independent of one another. The attorney is
14 free to then attempt to collect the difference between the 25% paid
15 directly to him and the “reasonable” amount authorized by the
16 Secretary.

17 Clark, 529 F.3d at 1218. Although the Ninth Circuit in Clark was specifically addressing section
18 406(a) in that section of the opinion, there is no reason to believe that the same principles would
19 not apply to section 406(b). Indeed, although the Commissioner’s policies allow the
20 Commissioner, consistent with the statutory framework, to withhold and directly pay up to 25%
21 of past-due benefits for section 406(a) and 406(b) fees, the express statutory language for section
22 406(b) is permissive and seemingly does not even require the Commissioner to withhold and
23 directly pay 406(b) fees to the claimant’s attorney. 42 U.S.C. § 406(b)(1)(A). Moreover, the
24 Commissioner is not permitted to pay the claimant’s counsel any fees in addition to the past-due
25 benefits. Id.

26 In conclusion, it was not the court’s intention to order the Commissioner to directly pay
27 plaintiff’s counsel any section 406(b) fees awarded in excess of the withheld past-due benefits,
28 nor does the court have the statutory authority to do so. Plaintiff’s counsel must look to plaintiff
for the recovery of such excess fees.⁵ To the extent that the court’s prior order awarding section

⁵ The Commissioner also apprised the court that plaintiff died on or about October 26, 2013.
(ECF No. 44-6.) Thus, any recovery by plaintiff’s counsel may potentially be in some other
separate proceeding(s) against plaintiff’s estate. Nevertheless, the court finds that substitution for
plaintiff in this action under Federal Rule of Civil Procedure 25 is not required, because no live
controversy remains in this action between plaintiff/plaintiff’s estate and the Commissioner.

1 406(b) fees requires clarification to that effect, the court modifies that order pursuant to Federal
2 Rule of Civil Procedure 60(b)⁶ to more accurately reflect the Commissioner's obligations.
3 Furthermore, in light of the above discussion, plaintiff's counsel's request for sanctions against
4 the Commissioner is moot.


5 CONCLUSION

6 For the foregoing reasons, IT IS HEREBY ORDERED that:

- 7 1. The December 5, 2013 hearing is VACATED.
- 8 2. Plaintiff's motion for aid in execution of the court's prior order awarding
9 attorneys' fees under 42 U.S.C. § 406(b) and for sanctions against the
10 Commissioner (ECF No. 43) is DENIED.
- 11 3. The Commissioner's motion for clarification of the court's prior order awarding
12 fees, or in the alternative, for partial relief under Federal Rule of Civil Procedure
13 60(b) (ECF No. 44) is GRANTED.
- 14 4. The court's prior March 18, 2013 order awarding attorneys' fees under 42 U.S.C. §
15 406(b) (ECF No. 42) is clarified and amended pursuant to Federal Rule of Civil
16 Procedure 60(b) by substituting the following provision for the language that
17 presently appears on the second bullet point in the Conclusion section (ECF No.
18 42 at 6), so as to read: "Plaintiff's counsel is awarded the sum of \$8,631.87 in
19 attorneys' fees under 42 U.S.C. § 406(b), which shall be paid by the Commissioner
20 directly to plaintiff's counsel only to the extent that the withheld 25% of plaintiff's
21 past-due benefits are available and unexhausted."

22 IT IS SO ORDERED.

23 Dated: November 27, 2013

24 
25 _____
26 KENDALL J. NEWMAN
27 UNITED STATES MAGISTRATE JUDGE

26 ⁶ Federal Rule of Civil Procedure 60(b) provides that, "[o]n motion and just terms, the court may
27 relieve a party or its legal representative from a final judgment, order, or proceeding for the
28 following reasons: (1) mistake, inadvertence, surprise, or excusable neglect;...or (6) any other
reason that justifies relief." In this case, the Commissioner has moved for relief under Rule 60(b)
within a reasonable time and within one year of the entry of the court's March 18, 2013 order.