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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KEVIN G. CALKINS,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

No. 2:14-cv-1877 AC

ORDER

Plaintiff sought judicial review of a final decision of the Commissioner of Social Security (“Commissioner”), denying his application for a period of disability and disability insurance benefits (“DIB”) benefits under Title II of the Social Security Act (“the Act”). On September 18, 2015, the court granted plaintiff’s motion for summary judgment, denied the Commissioner’s cross-motion for summary judgment, and remanded the action to the Commissioner with instructions to award benefits. ECF No. 28.

Now pending before the court is plaintiff’s August 10, 2017 amended motion for an award of attorney’s fees pursuant to 42 U.S.C. § 406(b). ECF No. 34. On August 11, 2017, defendant filed a statement of non-opposition asserting that defendant “is not in a position to either assent or

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1 object” to the fee request. ECF No. 35.¹ For the reasons set forth below, the motion will be
2 granted.

3 I. REASONABLENESS OF FEE REQUEST

4 At the outset of the representation, plaintiff and his counsel entered into a contingent-fee
5 agreement. ECF No. 34-1. Pursuant to that agreement plaintiff’s counsel now seeks attorney’s
6 fees in the amount of \$11,520.00, which represents 25% of the \$46,080.00 in retroactive
7 disability benefits received by plaintiff on remand, for 29 hours of attorney time expended on this
8 matter. ECF Nos. 34 at 2, 39 at 1-3.

9 Attorneys are entitled to fees for cases in which they have successfully represented social
10 security claimants:

11 Whenever a court renders a judgment favorable to a claimant under
12 this subchapter who was represented before the court by an
13 attorney, the court may determine and allow as part of its judgment
14 a reasonable fee for such representation, not in excess of 25 percent
15 of the total of the past-due benefits to which the claimant is entitled
by 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.

16 42 U.S.C. § 406(b)(1)(A). “In contrast to fees awarded under fee-shifting provisions such as 42
17 U.S.C. § 1988, the fee is paid by the claimant out of the past-due benefits awarded; the losing
18 party is not responsible for payment.” Crawford v. Astrue, 586 F.3d 1142, 1147 (9th Cir. 2009)
19 (en banc) (citing Gisbrecht v. Barnhart, 535 U.S. 789, 802 (2002)). The goal of fee awards under
20 § 406(b) is “to protect claimants against “inordinately large fees” and also to ensure that
21 attorneys representing successful claimants would not risk “nonpayment of [appropriate] fees.””
22 Parrish v. Comm'r of Soc. Sec. Admin., 698 F.3d 1215, 1217 (9th Cir. 2012) (quoting Gisbrecht,
23 535 U.S. at 805).

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26 ¹ On October 18, 2017, the court ordered the plaintiff to file within 7 days a supplemental
27 memorandum providing information and relevant documentation that was missing from
28 plaintiff’s amended motion for attorney fees. ECF No. 38. Although the supplemental document
was filed one day late, the court will excuse the delay. However, counsel is cautioned that failure
to meet deadlines in the future may result in sanctions. E. D. Cal. R. 110.

1 The 25% statutory maximum fee is not an automatic entitlement, and the court must
2 ensure that the fee requested is reasonable. Gisbrecht, 535 U.S. at 808-09 (“406(b) does not
3 displace contingent-fee agreements within the statutory ceiling; instead, § 406(b) instructs courts
4 to review for reasonableness fees yielded by those agreements”). “Within the 25 percent
5 boundary . . . the attorney for the successful claimant must show that the fee sought is reasonable
6 for the services rendered.” Id. at 807. “[A] district court charged with determining a reasonable
7 fee award under § 406(b)(1)(A) must respect ‘the primacy of lawful attorney-client fee
8 arrangements,’ ‘looking first to the contingent-fee agreement, then testing it for reasonableness.’”
9 Crawford, 586 F.3d at 1149 (quoting Gisbrecht, 535 U.S. at 793, 808).

10 In determining whether the requested fee is reasonable, the court considers “‘the character
11 of the representation and the results achieved by the representative.’” Crawford, 586 F.3d at 1151
12 (quoting Gisbrecht, 535 U.S. at 808). In determining whether a reduction in the fee is warranted,
13 the court considers whether the attorney provided “substandard representation or delayed the
14 case,” or obtained “benefits that are not in proportion to the time spent on the case.” Id. Finally,
15 the court considers the attorney’s record of hours worked and counsel’s regular hourly billing
16 charge for non-contingent cases. Crawford, 586 F.3d at 1151-52 (citing Gisbrecht, 535 U.S. at
17 808); see also, E.D. Cal. R. 293(c)(1) (in fixing attorney’s fees the court considers “the time and
18 labor required”). Below, the court will consider these factors in assessing whether the fee
19 requested by counsel in this case pursuant to 42 U.S.C. § 406(b) is reasonable.

20 Here, plaintiff’s counsel is an experienced attorney who secured a successful result for
21 plaintiff. See Declaration of Jesse S. Kaplan (“Kaplan Decl.”) (ECF No. 34) at 6 ¶4. There is no
22 indication that a reduction of fees is warranted due to any substandard performance by counsel.
23 There is also no evidence that plaintiff’s counsel engaged in any dilatory conduct resulting in
24 excessive delay. The court finds that the \$11,520.00 fee, which represents 25% of the \$46,080.00
25 in past-due benefits paid to plaintiff, is not excessive in relation to the benefits awarded. In
26 making this determination, the court recognizes the contingent fee nature of this case and
27 counsel’s assumption of the risk of going uncompensated in agreeing to represent plaintiff on
28 such terms. See Crawford, 586 F.3d at 1152 (“[t]he attorneys assumed significant risk in

1 accepting these cases, including the risk that no benefits would be awarded or that there would be
2 a long court or administrative delay in resolving the cases”). Finally, counsel has submitted a
3 detailed billing statement in support of the requested fee. ECF No. 39 at 1-3.

4 Accordingly, for the reasons stated above, the court concludes that the fees sought by
5 counsel pursuant to § 406(b) are reasonable.

6 II. OFFSET FOR EAJA FEES

7 An award of § 406(b) fees must be offset by any prior award of attorney’s fees granted
8 under the Equal Access to Justice Act (“EAJA”). 28 U.S.C. § 2412; Gisbrecht, 535 U.S. at 796.
9 Here, plaintiff’s attorney was previously awarded \$5,501.57 in EAJA fees. See ECF No. 31.
10 Counsel therefore must remit that amount to plaintiff.

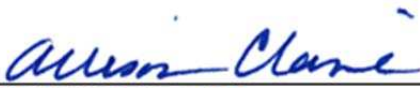
11 Accordingly, IT IS HEREBY ORDERED that:

12 1. Plaintiff’s Motion for attorney Fees under 42 U.S.C. § 406(b) (ECF No. 30), is
13 GRANTED;

14 2. Counsel for plaintiff is awarded \$11,520.00 in attorney’s fees under § 406(b); the
15 Commissioner shall certify that amount to be paid to counsel from the funds previously withheld
16 for the payment of such fees; and

17 3. Counsel for plaintiff is directed to remit to plaintiff the amount of \$5,501.57 for EAJA
18 fees previously paid to counsel by the Commissioner.

19 DATED: October 30, 2017

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21 ALLISON CLAIRE
22 UNITED STATES MAGISTRATE JUDGE
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