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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

ALISHA BAILEY,
Plaintiff,
v.
COMMISSIONER OF SOCIAL SECURITY,
Defendant.

No. 2:15-CV-0153-DMC

ORDER

Plaintiff, who is proceeding with retained counsel, brought this action for judicial review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). Final judgement was entered on March 14, 2016. See ECF No. 18. Pending before the Court is Plaintiff’s counsel’s motion for an award of attorney’s fees in the amount of \$7,799.00 under 42 U.S.C. § 406(b). See ECF No. 21. Plaintiff was provided notice of counsel’s motion and has not filed any response thereto.

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1 **I. PROCEDURAL HISTORY**

2 Plaintiff's representation in this case was provided by way of a December 31,
3 2014, contingent fee agreement whereby Plaintiff agreed to pay counsel: (1) 25% of any benefits
4 awarded at or prior to a first administrative hearing, or \$6,000.00, whichever is smaller; (2) 25%
5 of any benefits awarded upon reversal of an unfavorable administrative decision for work before
6 the agency; and (3) a separate 25% of past-due benefits awarded upon reversal of an unfavorable
7 administrative decision for work before the court. See ECF No. 21-1, pg. 1. Plaintiff initiated
8 this action for judicial review of an unfavorable administrative decision on January 20, 2015. See
9 ECF No. 1. Following briefing on the merits, the matter was remanded on March 14, 2016, for
10 further administrative proceedings. See ECF No. 17. Pursuant to the stipulation of the parties,
11 Plaintiff was awarded \$2,900.00 in attorney's fees and costs under the Equal Access to Justice
12 Act (EAJA), less any offsets to be determined by the government. See ECF No. 20. On March
13 1, 2017, the Commissioner rendered a fully favorable decision. See ECF No. 21-2, pgs. 4-12. On
14 March 17, 2020, the Commissioner notified Plaintiff's counsel that \$7,799.75 had been withheld
15 from past-due benefits awarded Plaintiff, constituting 25% of the total \$31,199.00 in past-due
16 benefits awarded.¹ See ECF No. 21-3.

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18 **II. DISCUSSION**

19 Under the Social Security Act, "[w]henver a court renders a judgment favorable
20 to a claimant under this subchapter who was represented before the court by an attorney, the court
21 may determine and allow as part of its judgment a reasonable fee for such representation, not in
22 excess of 25 percent of the total past-due benefits to which the claimant is entitled by reason of
23 such judgment. . . ." 42 U.S.C. § 406(b)(1)(A). No other fee may be payable or certified for such
24 representation except as allowed in this provision. See id.

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28 ¹ The Court observes that Plaintiff's counsel is requesting \$0.75 less than the amount withheld by the Commissioner.

1 A remand constitutes a “favorable judgment” under § 406(b). See Shalala v.
2 Schaefer, 509 U.S. 292, 300-01 (1993). While the Ninth Circuit has not directly addressed the
3 issue, all other circuits to address the issue have concluded that the district court is authorized to
4 award fees under § 406(b) when it remands for further proceedings and, following remand, the
5 claimant is awarded past-due benefits. See Garcia v. Astrue, 500 F. Supp. 2d 1239, 1243 (C.D.
6 Cal. 2007). Limiting § 406(b) awards to cases in which the district court itself awards past-due
7 benefits would discourage counsel from requesting a remand where it is appropriate. See Bergen
8 v. Comm’r of Soc. Sec., 454 F.3d 1273, 1277 (11th Cir. 2006).

9 The 25 percent statutory maximum fee is not an automatic entitlement, and the
10 court must ensure that the fee actually requested is reasonable. See Gisbrecht v. Barnhart, 535
11 U.S. 789, 808-09 (2002). “Within the 25 percent boundary . . . the attorney for the successful
12 claimant must show that the fee sought is reasonable for the services rendered.” Id. at 807. “In
13 determining the reasonableness of fees sought, the district court must respect ‘the primacy of
14 lawful attorney-client fee arrangements,’ ‘looking first to the contingent-fee agreement, then
15 testing it for reasonableness.’” Crawford v. Astrue, 586 F.3d 1142, 1149 (9th Cir. 2009) (quoting
16 Gisbrecht, 535 U.S. at 793 and 808).

17 The Supreme Court has identified five factors that may be considered in
18 determining whether a fee award under a contingent-fee agreement is unreasonable and therefore
19 subject to reduction by the court. See Crawford, 586 F.3d at 1151-52 (citing Gisbrecht, 535 U.S.
20 at 808). Those factors are: (1) the character of the representation; (2) the results achieved by the
21 representative; (3) whether the attorney engaged in dilatory conduct in order to increase the
22 accrued amount of past-due benefits; (4) whether the benefits are large in comparison to the
23 amount of time counsel spent on the case; and (5) the attorney’s record of hours worked and
24 counsel’s regular hourly billing charge for non-contingent cases. See id.

25 Finally, an award of fees under § 406(b) is offset by any prior award of attorney’s
26 fees granted under the Equal Access to Justice Act. See Gisbrecht, 535 U.S. at 796.

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1 The Commissioner has filed a response to Plaintiff’s counsel’s motion. This
2 filing, however, amounts to nothing more than a recitation of applicable caselaw and contains
3 nothing in the way of analysis specific to this case. In particular, the Commissioner’s response
4 does not set forth any reasons why the Court should deny, in whole or in part, counsel’s motion.
5 The Court, therefore, considers Plaintiff’s counsel’s motion as unopposed. In this case, having
6 considered the factors above, the Court finds Plaintiff’s counsel’s request reasonable given the fee
7 agreement with Plaintiff, the results achieved, and the lack of any evidence of dilatory conduct
8 designed to increase past-due benefits. In making this finding, the Court notes that the
9 Commissioner stipulated to an award of \$2,900.00 under the EAJA, which Plaintiff’s counsel
10 appropriately asks be ordered to offset any award requested in the current motion.

11
12 **III. CONCLUSION**

13 Accordingly, IT IS HEREBY ORDERED that:

- 14 1. Plaintiff’s counsel’s motion, ECF No. 21, is granted and counsel is
15 awarded fees pursuant to 42 U.S.C. § 406(b) in the amount of \$7,999.00, paid to counsel by the
16 Commissioner of Social Security out of past-due benefits awarded to Plaintiff and withheld on
17 March 17, 2020, to the extent such benefits have not already been paid to Plaintiff; and
18 2. Counsel shall reimburse to Plaintiff \$2,900.00 previously paid to counsel
19 under the EAJA.

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21 Dated: August 31, 2021



22 DENNIS M. COTA
23 UNITED STATES MAGISTRATE JUDGE
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