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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

KAELONI DALE MARKS,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

No. 2:16-cv-1701-EFB

ORDER

Plaintiff’s counsel moves for an award of attorney’s fees under 42 U.S.C. § 406(b). ECF No. 22. Plaintiff entered into a retainer agreement with his attorney which provides that he would pay counsel the lesser of 25 percent of any award of past-due benefits resulting from the appeal in this case, or \$6,000. ECF No. 20-1. Counsel now seeks an award of \$6,000, but has not shown whether that amount exceeds exceed 25 percent of past due benefits.

42 U.S.C. § 406 contains two subsections authorizing an award of attorney’s fees for counsel who successfully represents a Social Security claimant. “Section 406(a) grants the Social Security Administration exclusive jurisdiction to award fees for representation of a Social Security Claimant in proceedings before the Administration. Similarly, § 406(b) grants federal courts exclusive jurisdiction to award attorney’s fees for representation of the claimant in court.” *Clark v. Astrue*, 529 F.3d 1211, 1215 (9th Cir. 2008).

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1 Here, the relevant portion of Section 406(b) provides:

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

6 42 U.S.C. § 406(b)(1)(A).¹

7 Thus, this court may only award counsel's request for \$6,000 in fees if that amount does
8 not exceed 25 percent of the past-due benefits awarded to plaintiff. Counsel, however, has not
9 submitted any evidence establishing the amount of past-due benefits plaintiff was awarded. In
10 fact, counsel has not even demonstrated that on remand the Commissioner found that plaintiff
11 was entitled to disability benefits. Consequently, he has failed to demonstrate his entitlement to
12 fees under § 406(b). Accordingly, the motion for attorney's fees is denied without prejudice to
13 renewal upon submission of a properly-supported motion for attorney's fees.

14 Accordingly, it is hereby ORDERED that:

15 1. Plaintiff's counsel's motion for attorney's fees (ECF No. 22) is denied without
16 prejudice to renewal; and

17 2. Should plaintiff's counsel choose to re-file his motion for attorney fees, that motion
18 shall be filed within 30 days of this order.

19 DATED: March 21, 2019.

20 
21 EDMUND F. BRENNAN
22 UNITED STATES MAGISTRATE JUDGE

23 _____
24 ¹ 42 U.S.C. § 406(a) provides two ways in which counsel may obtain a fee award for
25 work performed at the administrative level. First, counsel may request that the Commissioner
26 award a "reasonable fee" for the rendered services. 42 U.S.C. § 406(a)(1). Second, in cases
27 where past due benefits are awarded, the Commissioner will award attorney's fees where: (1) the
28 fee agreement is submitted prior to the Commissioner's determination, (2) the fee specified in the
agreement does not exceed the lesser of 25 percent of past-due benefits or \$6,000, and (3) the
Commissioner's determination is favorable to the claimant. 42 U.S.C. § 406(a)(2)(A); 74
Fed.Reg. 6080-02 (Feb. 4, 2009) (increasing maximum award under § 406(a)(2) from \$4,000 to
\$6,000).