

1 **BACKGROUND**

2 The facts, briefly stated, are that on July 16, 2018, the court granted in part plaintiff’s
3 motion for summary judgment and remanded the matter. (See ECF No. 25.) On September 25,
4 2018, plaintiff’s counsel filed a motion for attorney’s fees under the Equal Access to Justice Act
5 (“EAJA”). (ECF No. 27.) On September 26, the court granted the request for fees and costs
6 under the EAJA for \$4,900. (ECF No. 28.) Following remand, the agency ultimately issued a
7 fully favorable decision in plaintiff’s favor. (See ECF No. 29-2.)

8 On November 2, 2020, plaintiff’s counsel filed the instant motion for attorney’s fees under
9 42 U.S.C. § 406(b). (ECF No. 29.) Counsel served this motion on plaintiff. (Id.) The
10 Commissioner filed an advisory response. (ECF No. 30.)

11 **DISCUSSION**

12 Title 42 U.S.C. § 406(b) provides, in part, that:

13 Whenever a court renders a judgment favorable to a claimant under
14 this subchapter who was represented before the court by an attorney,
15 the court may determine and allow as part of its judgment a
16 reasonable fee for such representation, not in excess of 25 percent of
17 the total of the past-due benefits to which the claimant is entitled by
18 reason of such judgment, and the Commissioner of Social Security
19 may, notwithstanding the provisions of section 405(i) of this title, but
subject to subsection (d) of this section, 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. In case of any such judgment, no
other fee may be payable or certified for payment for such
representation except as provided in this paragraph.

20 42 U.S.C. § 406(b)(1)(A). Unlike fee-shifting provisions where the losing party is responsible for
21 attorneys’ fees, the attorneys’ fees provision in 42 U.S.C. § 406(b) is paid by the claimant out of
22 the past-due benefits awarded. Gisbrecht v. Barnhart, 535 U.S. 789, 802 (2002).

23 The Commissioner typically does not act as an adversary, but instead as an advisor to the
24 court with respect to Section 406(b) fee requests. Crawford v. Astrue, 586 F.3d 1142, 1144 n.2
25 (9th Cir. 2009) (en banc) (“The Commissioner plays a part in the fee determination resembling
26 that of a trustee for the claimants.”). “Because the [Commissioner] has no direct interest in how
27 much of the award goes to counsel and how much to the disabled person, the district court has an
28 affirmative duty to assure that the reasonableness of the fee is established.” Id. at 1149.

1 In Crawford, the Ninth Circuit Court of Appeals extensively discussed how the
2 reasonableness of the fee within the 25% cap is to be determined. The court noted that although
3 the Ninth Circuit previously used the lodestar method to determine the reasonableness of fees
4 under 42 U.S.C. § 406(b), i.e., “by multiplying the reasonable hourly rate by the number of hours
5 reasonably expended on the case” with consideration of possible enhancements, the approach
6 changed after the United States Supreme Court’s decision in Gisbrecht. Crawford, 586 F.3d at
7 1148. The Ninth Circuit observed that:

8 In Gisbrecht, the Supreme Court flatly rejected our lodestar
9 approach. The court explained that we had “erroneously read
10 [Section] 406(b) to override customary attorney-client contingent-
11 fee agreements” when we approved the use of the lodestar to
12 determine a reasonable fee. 535 U.S. at 808-09. The Court held
13 that a district court charged with determining a reasonable fee
14 award under Section 406(b)(1)(A) must respect “the primacy of
15 lawful attorney-client fee agreements,” id. at 793, “looking first to
16 the contingent-fee agreement, then testing it for reasonableness,” id.
17 at 808. The Court noted that courts that had followed this model
18 had “appropriately reduced the attorney’s recovery based on the
19 character of the representation and the results the representative
20 achieved.” Id. A fee resulting from a contingent-fee agreement is
unreasonable, and thus subject to reduction by the court, if the
attorney provided substandard representation or engaged in dilatory
conduct in order to increase the accrued amount of past-due
benefits, or if the “benefits are large in comparison to the amount of
time counsel spent on the case.” Id. “[A]s an aid to the court’s
assessment of the reasonableness of the fee yielded by the fee
agreement,” but “not as a basis for satellite litigation,” the court
may require counsel to provide a record of the hours worked and
counsel’s regular hourly billing charge for noncontingent cases. Id.
The attorney bears the burden of establishing that the fee sought is
reasonable. Id. at 807.

21 Id. Thus, performance of the district court’s duty to assure reasonableness of the fee “must begin,
22 under Gisbrecht, with the fee agreement, and the question is whether the amount need be reduced,
23 not whether the lodestar amount should be enhanced.” Id. at 1149, 1151 (“the district court must
24 first look to the fee agreement and then adjust downward if the attorney provided substandard
25 representation or delayed the case, or if the requested fee would result in a windfall”). Should a
26 406(b) fee be awarded, counsel must refund the smaller of this award or any EAJA award.
27 Gisbrecht, 535 U.S. at 796.

28 ///

1 In support of the motion for attorneys' fees under 42 U.S.C. § 406(b), plaintiff's counsel
2 attached an attorney-client agreement, which provided for a contingency fee of 25% of any past-
3 due benefits awarded in plaintiff's case. (ECF No. 29-3.) This calculation would total 22,499.50,
4 but counsel attests only to be seeking a net amount of \$12,989.63. (ECF No. 29-1.)


5 In light of the guidance provided in Crawford, the court finds plaintiff's counsel's fee
6 request to be reasonable. As an initial matter, agreements providing for fees of 25% of past due
7 benefits are the "most common fee arrangement between attorneys and Social Security
8 claimants." Crawford, 586 F.3d at 1147. Additionally, the undersigned does not find any
9 indication that plaintiff's counsel performed substandard work or unduly delayed the case; to the
10 contrary, plaintiff's counsel's work over several years ultimately resulted in a fully favorable
11 decision for plaintiff and an award of back benefits. Furthermore, the amount sought does not
12 appear to be disproportionate to the amount of time plaintiff's counsel spent on the case. In the
13 briefing, counsel suggests that she spent approximately 26.30 hours on the case, which equates to
14 a rate of approximately \$680 per hour. It is important to note that plaintiff's counsel also
15 assumed the risk of receiving no compensation, as plaintiff's application was initially denied in
16 full at the administrative level. (ECF No. 13-1 at 1.) The court finds that the fee amount
17 requested is reasonable in light of the several years of litigation and the result achieved, and
18 cannot be said to amount to a windfall to plaintiff's counsel.

19 **ORDER**

20 Accordingly, IT IS HEREBY ORDERED that:

- 21 1. The motion for attorneys' fees under 42 U.S.C. § 406(b) (ECF No. 26) is GRANTED;
- 22 2. The Commissioner shall pay plaintiff's counsel in this case the sum of \$17,889.63 in
23 attorneys' fees under 42 U.S.C. § 406(b); and
- 24 3. Plaintiff's counsel shall reimburse plaintiff \$4,900 in previously-awarded EAJA fees.

25 Dated: November 4, 2020

26 
27 _____
28 KENDALL J. NEWMAN
UNITED STATES MAGISTRATE JUDGE

de la.651