

1 **Background**

2 To briefly summarize the background of this case, on December 20, 2018, the court
3 granted in part plaintiff's motion for summary judgment and remanded the matter for further
4 agency proceedings. (See ECF No. 25.) On March 18, 2019, plaintiff's counsel filed a motion
5 for attorneys' fees under the Equal Access to Justice Act ("EAJA"). (ECF No. 27.) On April 17,
6 2019, the court awarded \$6,750 in attorneys' fees under the EAJA, pursuant to the parties'
7 stipulation. (ECF Nos. 29, 30.) After further proceedings following the remand, on February 28,
8 2020, an administrative law judge ultimately issued a fully favorable decision for plaintiff. (See
9 ECF No. 31.1 at 1.)

10 On March 18, 2020, the Commissioner issued a Notice of Award, informing plaintiff that
11 she was entitled to past-due disability benefits from November 2014 through the date of the
12 decision. (ECF No. 31.2.) The letter does not state the total amount of benefits being awarded,
13 but does state that the agency is withholding \$137,228, some portion of which would be used to
14 pay attorneys' fees. (*Id.* at 1-2.) The sum of the monthly past-due benefits listed on the Notice of
15 Award is roughly equivalent to that total; therefore, the court understands \$137,228 to be
16 plaintiff's total award of past-due benefits. Twenty-five percent of that amount comes to
17 \$34,307, although counsel is requesting a reduced amount of \$31,360 in attorney's fees. (ECF
18 No. 31.1.)

19 On August 3, 2020, plaintiff's counsel filed the instant unopposed motion for attorneys'
20 fees under 42 U.S.C. § 406(b). (ECF No. 31.) In a separate request to the agency, plaintiff's
21 counsel is seeking \$6,750 in attorneys' fees under 42 U.S.C. § 406(a) (fees for representation at
22 agency level).² (ECF No. 31 at 1 n.1.) Counsel represents that if she receives the § 406(b) fees
23 before the § 406(a) fees, she will give plaintiff the option of an immediate refund of the identical
24 EAJA fee previously awarded, or to hold the EAJA fee in her trust account pending approval of

25 ² Following the Supreme Court's recent decision in Culbertson v. Berryhill, 139 S. Ct. 517
26 (2019), it does not matter that counsel's potential recovery of both \$6,750 in § 406(a) fees for her
27 agency work plus \$31,360 in § 406(b) fees for her work before this court (for a total of \$38,110)
28 would exceed 25% of plaintiff's past-due benefits (\$34,307). *Id.* at 519 (holding that 25% cap in
§ 406(b) applies only to fees for representation before the court, not to aggregate fees for both
court and agency representation).

1 the § 406(a) fee. (Id.)

2 **Discussion**

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

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

16 42 U.S.C. § 406(b)(1)(A). Unlike fee-shifting provisions where the losing party is responsible for
17 attorneys' fees, the attorneys' fees authorized under 42 U.S.C. § 406(b) are paid by the claimant
18 out of the past-due benefits awarded. Gisbrecht v. Barnhart, 535 U.S. 789, 802 (2002).

19 The Commissioner typically does not act as an adversary, but instead as an adviser to the
20 court with respect to fee requests under 42 U.S.C. § 406(b). Crawford v. Astrue, 586 F.3d 1142,
21 1144 n.2 (9th Cir. 2009) (en banc) (“The Commissioner plays a part in the fee determination
22 resembling that of a trustee for the claimants.”). “Because the [Commissioner] has no direct
23 interest in how much of the award goes to counsel and how much to the disabled person, the
24 district court has an affirmative duty to assure that the reasonableness of the fee is established.”
25 Id. at 1149.

26 In Crawford, the Ninth Circuit Court of Appeals extensively discussed how the
27 reasonableness of the fee within the 25% cap is to be determined. The court noted that although
28 the Ninth Circuit had previously used the lodestar method to determine the reasonableness of fees
under 42 U.S.C. § 406(b), i.e., “by multiplying the reasonable hourly rate by the number of hours
reasonably expended on the case” with consideration of possible enhancements, the approach
changed after the United States Supreme Court’s decision in Gisbrecht v. Barnhart, 535 U.S. 789
(2002). Crawford, 586 F.3d at 1148. The Ninth Circuit observed that:

1 In Gisbrecht, the Supreme Court flatly rejected our lodestar
2 approach. The court explained that we had “erroneously read
3 § 406(b) to override customary attorney-client contingent-fee
4 agreements” when we approved the use of the lodestar to determine
5 a reasonable fee, Gisbrecht, 535 U.S. at 808-09, 122 S. Ct. 1817. The
6 Court held that a district court charged with determining a reasonable
7 fee award under § 406(b)(1)(A) must respect “the primacy of lawful
8 attorney-client fee agreements,” id. at 793, 122 S. Ct. 1817, “looking
9 first to the contingent-fee agreement, then testing it for
10 reasonableness,” id. at 808, 122 S. Ct. 1817. The Court noted that
11 courts that had followed this model had “appropriately reduced the
12 attorney’s recovery based on the character of the representation and
13 the results the representative 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, 122 S. Ct.
1817.

14 Id. Thus, performance of the district court’s duty to assure reasonableness of the fee “must begin,
15 under Gisbrecht, with the fee agreement, and the question is whether the amount need be reduced,
16 not whether the lodestar amount should be enhanced.” Id. at 1149, 1151 (“the district court must
17 first look to the fee agreement and then adjust downward if the attorney provided substandard
18 representation or delayed the case, or if the requested fee would result in a windfall”).

19 In support of the motion for attorneys’ fees under 42 U.S.C. § 406(b), plaintiff’s counsel
20 attaches plaintiff’s attorney-client agreement, which provides for a contingent fee of 25% of any
21 past-due benefits awarded in plaintiff’s case following an appeal. (ECF No. 31.3.) The
22 agreement is signed. (ECF No. 31.3.) The court also notes that (after prompting by the court)
23 plaintiff’s counsel served a copy of the motion on plaintiff and that plaintiff did not file any
24 objections to this fee request. (ECF No. 35.) Accordingly, the court has no reason to doubt
25 plaintiff’s counsel’s representations regarding the fee agreements. As noted above, plaintiff’s
26 counsel now seeks slightly less than 25% of plaintiff’s total past-due benefits, i.e., an award of
27 \$31,360.

28 ////

1 In light of the guidance provided in Crawford, the court finds plaintiff's counsel's fee
2 request to be reasonable. As an initial matter, agreements providing for fees of 25% of past-due
3 benefits are the "most common fee arrangement between attorneys and Social Security
4 claimants." Crawford, 586 F.3d at 1147. Additionally, the undersigned finds no indication that
5 plaintiff's counsel performed substandard work or unduly delayed the case; to the contrary,
6 plaintiff's counsel's work over several years ultimately resulted in a fully favorable decision for
7 plaintiff and an award of back benefits and continuing benefits. Furthermore, the total amount
8 sought (\$31,360) does not appear to be disproportionate to the amount of time plaintiff's counsel
9 spent on the case. The exhibits attached to the motion reflect that plaintiff's counsel and a
10 contracting attorney brief writer spent 37.7 hours on the case, which equates to a rate of
11 approximately \$832 per hour. While the hourly rate is quite high, it cannot be said to amount to a
12 windfall to plaintiff's counsel. See Crawford, 586 F.3d at 1153 (J. Clifton, concurring in part and
13 dissenting in part) (explaining that the majority opinion found reasonable effective hourly rates
14 equaling \$519, \$875, and \$902); Thomas v. Colvin, No. 1:11-cv-01291-SKO, 2015 WL 1529331,
15 at *2-3 (E.D. Cal. Apr. 3, 2015) (upholding an effective hourly rate of \$1,093.22 for 40.8 hours of
16 work); Villa v. Astrue, No. CIV-S-06-0846-GGH, 2010 WL 118454, at *1-2 (E.D. Cal. Jan. 7,
17 2010) (awarding an hourly rate exceeding \$1,000, when counsel requested \$4,569.25 for 5.2
18 hours of combined attorney and paralegal work, and noting that "[r]educing § 406(b) fees after
19 Crawford is a dicey business"). Moreover, the court finds the requested fee amount reasonable in
20 light of the several years of litigation and the result achieved. For these reasons, the court awards
21 plaintiff's counsel the requested amount of \$31,360 in attorneys' fees under 42 U.S.C. § 406(b).

22 Once the court determines that the fee sought under § 406(b) is reasonable, it must
23 account for the attorneys' fees paid by the Commissioner on his own behalf pursuant to the
24 EAJA. Gisbrecht, 535 U.S. at 796. "Congress harmonized fees payable by the Government
25 under EAJA with fees payable under § 406(b) out of the claimant's past-due Social Security
26 benefits" by requiring the claimant's attorney to refund to the claimant the amount of the smaller
27 fee up to the point where the claimant receives 100% of the past-due benefits. Gisbrecht, 535
28 U.S. at 796. Here, the court finds counsel's § 406(b) request reasonable, and therefore orders


1 counsel to pay plaintiff the \$6,750 in EAJA fees previously awarded (ECF No. 30), although
2 plaintiff may—at her own discretion—decide to allow counsel to hold the \$6,750 in trust pending
3 resolution of counsel’s § 406(a) motion requesting an identical amount be awarded by the agency.
4 Should the agency grant a § 406(a) award for less than the full amount of \$6,750, counsel shall
5 remit to plaintiff the balance forthwith.

6 **ORDER**

7 Accordingly, IT IS HEREBY ORDERED that:

- 8 1. Plaintiff’s counsel’s motion for attorneys’ fees under 42 U.S.C. § 406(b) (ECF No. 31) is
9 GRANTED;
- 10 2. The Commissioner shall pay plaintiff’s counsel in this case the sum of \$31,360.00 in
11 attorneys’ fees under 42 U.S.C. § 406(b). The remainder withheld from the back benefits
12 awarded to plaintiff shall be disbursed to plaintiff; and
- 13 3. Plaintiff’s counsel shall reimburse plaintiff for the \$6,750 in previously-awarded EAJA
14 fees.

15 Dated: November 23, 2020

16 
17 _____
18 KENDALL J. NEWMAN
19 UNITED STATES MAGISTRATE JUDGE

20 myer.2582