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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ZAK FRANKLIN HAY,

Plaintiff,

v.

KILOLO KIJAKAZI, Commissioner of
Social Security,

Defendant.

No. 2:18-cv-01706-EFB (SS)

ORDER

Pursuant to 42 U.S.C. § 406(b), counsel for plaintiff in the above-entitled action seeks an award of attorney fees in the amount of \$83,496.37. ECF No. 33. Plaintiff previously entered into a retainer agreement with his attorney providing that he would pay counsel 25 percent of any past-due benefits won as a result of the appeal in this case. ECF No. 33-4. Here, the amount requested is more than 25 percent of the past due benefits plaintiff was documented as receiving, and also more than the amount remaining in plaintiff's Social Security Administration (SSA) withholding account. For the reasons set forth below, the motion of fees is granted in part and denied in part.

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1 42 U.S.C. § 406(b)(1)(A) provides, in relevant part:

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
6 the total of the past-due benefits to which the claimant is entitled by
7 reason of such judgment.

8 Rather than being paid by the government, fees under the Social Security Act are awarded
9 out of the claimant’s disability benefits. *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991),
10 *receded from on other grounds*, *Sorenson v. Mink*, 239 F.3d 1140, 1149 (9th Cir. 1991).

11 However, the 25 percent statutory maximum fee is not an automatic entitlement; the court also
12 must ensure that the requested fee is reasonable. *Gisbrecht v. Barnhart*, 535 U.S. 789, 808-09
13 (2002) (“We hold that § 406(b) does not displace contingent-fee agreements within the statutory
14 ceiling; instead, § 406(b) instructs courts to review for reasonableness fees yielded by those
15 agreements.”). “Within the 25 percent boundary . . . the attorney for the successful claimant must
16 show that the fee sought is reasonable for the services rendered.” *Id.* at 807. A “court may
17 properly reduce the fee for substandard performance, delay, or benefits that are not in proportion
18 to the time spent on the case.” *Crawford v. Astrue*, 586 F.3d 1142, 1151 (9th Cir. 2009) (en
19 banc).

20 Plaintiff’s attorney represented him in two federal cases. In 2012, plaintiff applied for
21 Title II benefits, alleging disability as of November 2007. The ALJ issued an unfavorable
22 decision in 2013. ECF No. 9 (Administrative Record (“AR”)) 148-165. Plaintiff’s attorney
23 represented him in the subsequent action for district court review, *Hay v. Colvin*, Case No. 2:15-
24 cv-02049 EFB, which resulted in a remand for further proceedings. *Id.*, ECF No. 20. In 2015,
25 the ALJ issued a second unfavorable decision. AR 10-22. Plaintiff’s counsel then represented
26 him in the instant federal action. ECF No. 1. In 2020, this court granted summary judgment for
27 plaintiff and again remanded for further proceedings. ECF No. 23. In the second round of
28 remand proceedings, plaintiff was found disabled, resulting in an award of past-due benefits. AR
151-160.

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1 Plaintiff's counsel asserts that, between the two federal cases, he spent over 150 hours of
2 attorney time. ECF No. 33-1 (Weems Decl., ¶ 6); *see* ECF Nos. 33-5 & 33-6 (invoices). In
3 defendant's response to the fee motion, defendant calculates that plaintiff's attorney spent 18.1
4 hours on the first case and 101.9 hours on the instant case, for a total of approximately 120 hours.
5 ECF No. 35, citing ECF Nos. 33-5 & 33-6.

6 Plaintiff's November 6, 2021 "Notice of Award" letter stated that his total past-due
7 benefit amount was \$222,657.00. ECF No. 33-2 at 5. It further stated that the SSA had withheld
8 \$55,664.24 (25 percent) of that amount in order to pay any attorney fees on plaintiff's behalf. *Id.*
9 On May 23, 2022, SSA sent plaintiff an "Important Information" letter indicating that only
10 \$45,997.12 remained in plaintiff's withholding account, as a portion of the withheld funds were
11 used to satisfy an attorney fee award under § 406(a). ECF No. 33-3; *see* ECF No. 33 at 6.

12 Plaintiff's attorney asserts that, because plaintiff has minor children, an additional
13 auxiliary disability insurance benefit of \$111,328.50 is due to plaintiff under agency regulations,
14 bringing the total past-due benefits award to plaintiff and his family to \$333,985.50. ECF No. 33
15 at 6. Plaintiff's attorney contends that a fee award of \$83,496.37, or 25 percent of this amount, is
16 due to him under the fee agreement. ECF No. 33 at 7. In response, defendant notes that
17 plaintiff's counsel "did not include any letters indicating any such award. Counsel for Defendant
18 was unable to independently obtain any such documents, nor did he find any indication that
19 plaintiff's benefits included child's benefits as well." ECF No. 35 at 4. Defendant contends
20 that plaintiff's past-due benefits are accurately reflected as \$222,657.00, as set forth in the Notice
21 of Award letter, and the court finds this persuasive. As indicated in the letter, 25 percent of this
22 amount is \$55,664.24. Assuming plaintiff's counsel spent 120 hours litigating the two cases, the
23 effective hourly rate for attorney time sought by counsel is \$463.87 (*see* ECF No. 35 at 5) which
24 the court finds reasonable under the circumstances presented here.

25 Counsel did not delay these proceedings, and his representation of plaintiff was not
26 substandard. Indeed, he successfully represented his client's interests before this court. Based on
27 the risk of loss taken in representing plaintiff, counsel's experience in the field of Social Security
28 law, and the results achieved in this case, the court finds that fee request is reasonable. *See De*

1 *Vivo v. Berryhill*, No. 1:15-cv-1332-EPG, 2018 WL 4262007 (E.D. Cal. Sept. 6, 2018) (awarding
2 fees at effective hourly range of \$1,116.26); *Jamieson v. Astrue*, No. 1:09cv0490 LJO DLB,
3 2011 WL 587096 (E.D. Cal. Feb. 9, 2011) (finding fee at effective hourly rate of \$1,169.49
4 reasonable); *Naddour v. Colvin*, No.: 13-CV-1407-BAS, 2016 WL 4248557 (S.D. Cal. Aug. 11,
5 2016) (awarding fee at effective hourly rate of \$1,063); *Kazanjian v. Astrue*, No. 09 civ. 3678
6 (BMC), 2011 WL 2847439, at *1-2 (E.D.N.Y. July 15, 2011) (finding that counsel “performed
7 well, diligently, and with unusual efficiency,” and awarding fee at hourly rate of \$2,100).

8 Based on the foregoing, plaintiff’s attorney is entitled to \$55,664.24 under the fee
9 agreement with plaintiff. However, as noted above, only \$45,997.12 remains in plaintiff’s SSA
10 withholding account. The Commissioner typically withholds a total of 25 percent of past-due
11 benefits from which to pay attorney fees under § 406(a) and § 406(b). *See* 42 U.S.C. §§
12 406(a)(4), (b)(1)(A); *Culbertson v. Berryhill*, 139 S. Ct. 517, 523 (2019) (noting that the agency
13 has a discretionary policy of withholding “only one pool of 25% of past-due benefits” to pay
14 attorney fees under both § 406(a) and § 406(b), and thus the Commissioner’s direct payment of
15 fees to the attorney out of the past-due benefits “could be less than the fees to which the attorney
16 is entitled”). “[I]f the amount of past-due benefits withheld is insufficient to cover all fees
17 awarded at the administrative and court levels, the claimant’s counsel must recover the difference
18 from the claimant.” *Dobson v. Commissioner*, No. 2:09-cv-1460-KJN, 2013 WL 6198185, *3
19 (E.D. Cal. Nov. 27, 2013). Thus, the court will order the Commissioner to pay plaintiff’s counsel
20 the \$45,997.12 in plaintiff’s withholding account, with plaintiff to pay the remaining \$9,667.12
21 owing to counsel under the contingency fee contract.

22 Finally, plaintiff’s counsel acknowledges that the award must be offset by the fees
23 previously awarded under the Equal Access to Justice Act (“EAJA”). Plaintiff’s counsel notes
24 that, between the two actions on plaintiff’s behalf, he has received \$22,951.26 in EAJA fees.¹
25 ECF No. 33 at 6; *see* ECF No. 32 (awarding \$18,801.75 in EAJA fees in instant action); *Hay v.*


27 ¹ Defendant’s brief refers to \$7,600.00 in EAJA fees, but this appears to be an error. ECF
28 No. 35 at 3, 6.

1 Commissioner, No. 2:15-cv-02049 EFB, ECF No. 28 (awarding \$4,149.41 in EAJA fees in
2 previous action). Accordingly, the court will include in its ruling an order directing counsel to
3 refund the EAJA fees previously awarded to plaintiff. *See Gisbrecht v. Barnhart*, 535 U.S. 789,
4 796 (2002) (holding that where attorney’s fees are awarded under both EAJA and § 406(b), the
5 attorney must refund the smaller of the two awards to the plaintiff).²

6 Accordingly, it is hereby ORDERED that plaintiff’s counsel’s motion for attorney’s fees
7 (ECF No. 33) is granted in part, as follows:

- 8 1. The court approves a total fee award to plaintiff’s counsel in the amount of
9 \$55,664.24;
- 10 2. The Commissioner shall pay plaintiff’s counsel the \$45,997.12 available in plaintiff’s
11 withholding account;
- 12 3. The remainder of \$9,667.12 is due to plaintiff’s counsel under the fee contract with
13 plaintiff; and
- 14 4. Plaintiff’s counsel shall refund plaintiff the \$22,951.26 previously awarded under the
15 EAJA.

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17 Dated: December 9, 2022.


EDMUND F. BRENNAN
UNITED STATES MAGISTRATE JUDGE

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26 ² The court declines counsel’s request for a net fee award. *See Crawford v. Astrue*, 586
27 F.3d 1142 at 1144 n.3 (9th Cir. 2009) (“A district court may award fees under both the EAJA and
28 42 U.S.C. § 406(b), but the claimant’s attorney must refund to the claimant the amount of the
smaller fee.”) (internal quotations omitted) (emphasis added); *Martinez v. Saul*, 2021 WL
535404, *4 (E.D. Cal. Feb. 12, 2012) (declining to award net fee and discussing issue).