

1
2 UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 ERMITA ATKINS,

6 Plaintiff,

No. C 10-0180 PJH

7 v.

**ORDER DENYING REQUEST
FOR ATTORNEYS' FEES**

8 MICHAEL J. ASTRUE, Commissioner
9 of Social Security,

10 Defendants.
11 _____/

12 Before the court is plaintiff and claimant, Ermita Atkins' motion for attorneys' fees
13 filed by attorney Robert Weems. Having carefully reviewed the parties' papers and
14 considered the relevant legal authority, the court hereby DENIES plaintiff's motion for the
15 reasons below.

16 **BACKGROUND**

17 **A. Summary of Proceedings**

18 This social security case was not a typical social security appeal. Atkins applied for
19 disability insurance benefits under Title II of the Social Security Act ("SSA"), and the Social
20 Security Commissioner ("Commissioner") denied her application both initially and upon
21 reconsideration. Subsequently, an Administrative Law Judge ("ALJ") dismissed her request
22 for a hearing as untimely, and as result, Atkins never received a hearing on her application.

23 Atkins appealed the ALJ's dismissal to the district court, and on April 7, 2011, this
24 court denied the Commissioner's motion to dismiss her appeal for lack of jurisdiction. The
25 court further concluded that Atkins' due process rights were violated by the ALJ's dismissal
26 of her request for hearing based on her mental incapacity and the Commissioner's failure to
27 provide her with notice of his denial of her motion for reconsideration, and remanded the
28 case to the Commissioner with instructions to allow Atkins to reopen her application and file

1 a request for hearing before the ALJ, so that the ALJ could hear her application for benefits
2 on the merits. On remand, the Commissioner issued a favorable decision and awarded
3 Atkins past due benefits.

4 **B. Procedural Background**

5 On March 26, 2009, Atkins filed this appeal initially in the District Court for the
6 Northern District of Oklahoma, and the Commissioner filed his answer on June 23, 2009.
7 The case was subsequently transferred to this court on January 14, 2010, after the
8 Oklahoma district court granted Atkins' motion to change venue to the Northern District of
9 California following her relocation to San Rafael, California, and was initially assigned to
10 Magistrate Judge Joseph Spero. On February 2, 2010 local counsel, Ian Sammis, entered
11 an appearance in the case for Atkins. Atkins declined to consent to a magistrate judge,
12 and the case was subsequently reassigned to the undersigned judge on February 9, 2010.
13 At that time, in addition to Sammis, Atkins was represented by two Oklahoma attorneys,
14 Timothy M. White and Richmond J. Brownson. On March 17, 2010, White and Brownson
15 moved to withdraw as attorneys of record. Unfortunately, courtesy copies of the motion
16 were not provided to the court; nor did White and Brownson file a proposed order in support
17 of their request. Although the court did not enter an order granting the request at the time,
18 it hereby GRANTS the request and orders White and Brownson relieved from their duties
19 as counsel *nunc pro tunc* to March 17, 2010.

20 On April 1, 2010, Atkins filed a notice of substitution of counsel, substituting local
21 counsel, Sammis for White and Brownson. Sammis alone represented her in conjunction
22 with a motion to amend her complaint and in opposing the Commissioner's motion to
23 dismiss the case. At the time the court issued the order remanding the case on April 7,
24 2011, Sammis remained counsel of record for Atkins.

25 Following remand of the case to the Commissioner, Sammis passed away on May
26 29, 2011, and attorney Robert Weems took over his Sammis' practice. Weems Decl. Exh.
27 3. At the time that Sammis passed away, he had a fee agreement with Atkins dated
28 September 16, 2005, by which Atkins agreed to pay Sammis a certain percentage of any

1 recovery of past due benefits. Weems Decl., Exh. 2. On June 21, 2011, Atkins entered
2 into a fee agreement with Weems. Weems Decl., Exh. 1.

3 Following remand and Sammis' death, in 2012, the Commissioner issued a
4 favorable decision and awarded Atkins past due benefits. Weems represented Atkins on
5 remand before the Commissioner.

6 On June 6, 2012, Weems filed a motion for attorneys' fees under 42 U.S.C. §
7 406(b). In that motion, signed only by Weems, Weems asserted that Atkins was seeking
8 an award of \$12,053.75 for work performed by Weems, Sammis, and Oklahoma attorney,
9 Timothy White. Weems did not provide a declaration with the motion, but simply attached
10 three exhibits: (1) a May 23, 2012 "Notice of Change in Benefits" issued to Atkins; (2) a
11 September 16, 2005 document that appears to be a page from a fee agreement between
12 Atkins and Sammis; and (3) an August 8, 2011 declaration from Andrew Ragnes, a law
13 clerk to Sammis, in support of what appears to be a request for fees under the Equal
14 Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), (*not* under § 406).¹

15 On June 20, 2012, the Commissioner responded to the § 406(b) motion for
16 attorneys' fees and noted several deficiencies with the motion, including:

- 17 (1) Weems' failure to serve a copy of the motion on Atkins herself and
18 Atkins' presumed lack of notice of the motion;
- 19 (2) Weems' failure to provide the court with a notice of award that set forth
20 the cumulative total of past due benefits awarded, a disability onset
21 date, or a period for which past benefits were due;
- 22 (3) the fact that Atkins was represented by four different counsel in the
23 case, and that only Weems signed the motion;

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25
26 ¹However, there have been no motions - from Weems, Sammis' representative, or
27 otherwise - for an award of fees under the EAJA. Ragnes' declaration sets forth time records
28 for Sammis, and in the concluding paragraph to his declaration, states that \$5,695.43 is
requested "for work and costs of Mr. Ian Sammis, Mr. White, Mr. Weems, attorneys and
Andrew Ragnes of \$5,695.43." However, as noted, no such motion was ever filed.

- 1 (4) the fact that there is no evidence that Oklahoma attorneys Brownson
2 or White waived or assigned any interest in fees they may be due;
- 3 (5) Weems' failure to provide documentation that he is requesting
4 payment on behalf of the estate of deceased counsel, Sammis;
- 5 (6) Weems' numerous conflicting statements regarding who is to be
6 paid the § 406(b) fees and on behalf of whom.

7 Weems failed to file a reply to the Commissioner's response, and on July 25, 2012,
8 the court issued an order advising Weems that absent a reply addressing the above
9 deficiencies, it would deny his motion for attorneys' fees. The court further advised Weems
10 that he needed to provide the necessary documentation to support his motion, and that any
11 exhibits needed to be attached to a declaration and to comply with the Federal Rules of
12 Evidence.

13 On August 8, 2012, Weems filed a reply, along with a declaration to which he
14 attached: (1) Atkins' June 22, 2011 fee agreement with Weems; (2) a page from Atkins'
15 September 16, 2005 fee agreement with Sammis; (3) the November 23, 2011 purchase
16 agreement for Weems' purchase of the social security portion of Sammis' law practice; (4)
17 various documents related to proceedings on remand, including what appears to be a
18 February 24, 2012 "Notice of Amended Decision," a February 24, 2012 ALJ order ruling
19 that the ALJ did not approve the fee agreement between Atkins and her representative, and
20 a February 24, 2012 amended decision from the ALJ; and (5) the same May 23, 2012
21 "Notice of Change in Benefits" attached to Weems' June 2012 opening motion.

22 **DISCUSSION**

23 **A. Legal Standards**

24 Attorneys handling social security proceedings may seek fees for their work under
25 both the EAJA and the SSA. While the government pays an award pursuant to the EAJA,
26 an award pursuant to § 406 of the SSA is paid out of a successful claimant's past-due
27 benefits. See *Russell v. Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991), *abrogated on other*
28 *grounds by Sorensen v. Mink*, 239 F.3d 1140, 1149 (9th Cir. 2001). In passing § 406,

1 Congress sought to protect attorneys from the nonpayment of fees, while also shielding
2 clients from unfairly large fees. See *Gisbrecht v. Barnhart*, 535 U.S. 789, 805 (2002). If the
3 court awards fees under both the EAJA and SSA, the attorney must reimburse the client
4 the amount of the smaller fee. See *id.* at 796.

5 Section 406 provides different means for reimbursing attorneys based on whether
6 the proceedings were at the administrative level or in court. For administrative work, §
7 406(a) allows an attorney to recover fees of either 25 percent of the past-due benefits or
8 \$4,000, whichever is smaller, and such a motion is brought before the Commissioner. See
9 42 U.S.C. § 406(a)(2)(A). For successful representation before a court, a judge “*may*
10 *determine and allow* as part of its judgment a reasonable fee for such representation, not in
11 excess of 25 percent of the total past-due benefits to which claimant is entitled.” 42 U.S.C.
12 § 406(b)(1)(A) (emphasis added).

13 In *Gisbrecht*, the Supreme Court explained that where the plaintiff has entered into a
14 contingent fee agreement with counsel, § 406(b) is meant “to control, not to displace, fee
15 agreements between Social Security benefits claimants and their counsel.” 535 U.S. at
16 793. Aside from capping the contingency rate at 25 percent, § 406(b) itself does not
17 explain how courts should determine if requested attorneys’ fees are reasonable. See
18 *Crawford v. Astrue*, 586 F.3d 1142, 1148 (9th Cir. 2009). However, the *Gisbrecht* Court
19 established basic guidelines for determining the reasonableness of attorneys’ fees in §
20 406(b) actions. 535 U.S. at 789. Even if a § 406(b) claim is within the statutory limit of
21 twenty-five percent of past-due benefits, the attorney must show that the fee sought is
22 reasonable, and the court is required to review fee agreements for reasonableness as an
23 independent check. See *id.* at 807.

24 In *Gisbrecht*, the Supreme Court held that where the claimant and counsel had
25 entered into a lawful contingent fee agreement, courts that used the “lodestar” method as
26 the starting point to determine the reasonableness of fees requested under section 406(b)
27 improperly “reject[ed] the primacy of lawful attorney-client fee agreements.” 535 U.S. at
28

1 793.² Interpreting *Gisbrecht*, the Ninth Circuit subsequently explained in *Crawford* that
2 lodestar rules should not be applied by courts in cases where the plaintiff and attorney
3 reached a contingent fee agreement because “[t]he lodestar method under-compensates
4 attorneys for the risk they assume in representing [social security] claimants and ordinarily
5 produces remarkably smaller fees than would be produced by starting with the
6 contingent-fee agreement.” 586 F.3d at 1149. The *Crawford* court held “that a district
7 court's use of the lodestar to determine a reasonable fee thus ultimately works to the
8 disadvantage of [social security] claimants who need counsel to recover any past-due
9 benefits at all.” *Id.*

10 Nevertheless, even in contingency fee cases, the court has “an affirmative duty to
11 assure that the reasonableness of the fee [asserted by counsel] is established.” *Id.* (holding
12 that to satisfy this duty, the court must examine “whether the amount need be reduced, not
13 whether the lo[de]star amount should be enhanced”). A court can adjust an attorneys’ fee
14 award downward if “the benefits are large in comparison to the amount of time counsel
15 spent on the case.” *Gisbrecht*, 535 U.S. at 808. Section 406(b) fees should be reduced
16 where they would constitute a “windfall,” and would not be proportional to the time spent on
17 the case. *See id*; *see also Crawford*, 586 F.3d at 1148. The court may require a record of
18 hours spent representing the claimant and a statement of the lawyer’s normal hourly billing

20 ²Under the “lodestar” method, attorneys’ fees are calculated by multiplying the number
21 of hours reasonably expended in representing a client by a reasonable hourly fee. *See*
22 *Gisbrecht*, 535 U.S. at 797–98 (discussing application of the “lodestar” method in the Ninth
23 Circuit). The “lodestar” may be adjusted upward or downward to account for a variety of
factors. *Id.* at 798–99. In the Ninth Circuit, courts look to the following factors to determine
whether the lodestar should be adjusted:

- 24 1) the time and labor required; 2) the novelty and difficulty of the questions
25 involved; 3) the skill requisite to perform the legal service properly; 4) the
preclusion of other employment by the attorney due to acceptance of the case;
- 26 5) the customary fee; 6) whether the fee is fixed or contingent; 7) time limitations
imposed by the client or the circumstances; 8) the amount involved and the
27 results obtained; 9) the experience, reputation, and ability of the attorneys; 10)
the undesirability of the case; 11) the nature and length of the professional
relationship with the client; and 12) awards in similar cases.

28 *Id.*

1 charge. See *id.* The attorney bears the burden of establishing that the fee sought is
2 reasonable. *Id.*

3 **B. Atkins' Motion**

4 In spite of the court's order requiring a reply and response to the numerous
5 deficiencies in the opening motion papers, there remain significant problems following the
6 reply with the instant fee request, counsel's declaration, and additional exhibits.

7 The most glaring problem with the motion is the fact that Weems is seeking fees
8 under § 406(b) for successful representation before the *court* presumably based on the
9 representation provided by three other attorneys, White, Brownson, and Sammis, because
10 (other than to file the instant motion for fees) Weems himself has never represented Atkins
11 before this court. Weems states in his August 8, 2012 declaration that he represented
12 Atkins in the proceedings on remand and successfully obtained benefits for her after a
13 hearing. However, Weems' instant fee request is brought pursuant to § 406(b), which
14 governs proceedings before the *court*. Accordingly, the fee request should pertain to work
15 performed in Atkins' case *before this court*.³ Weems never filed a notice of appearance
16 before this court, and prior to the instant fee request, had never filed anything with the
17 court. The work completed on Atkins' case prior to remand was accomplished entirely by
18 attorneys White, Brownson, and Sammis. The absence of any billing records from Weems
19 is further evidence of this fact.

21 ³By contrast, 42 U.S.C. § 406(a)(2)(A) governs proceedings before the Commissioner,
22 including those on remand. It appears from documents submitted in conjunction with Weems'
23 declaration that Weems in fact requested fees before the Commissioner, but that the
24 Commissioner denied the request. In a February 24, 2012 order, the ALJ ruled that he did "not
25 approve the fee agreement between [Atkins] and her representative [presumably Weems]
26 because: [Atkins] appointed more than one representative from a law firm, or other business;
27 all representatives did not sign a single fee agreement; and the representative(s) who did not
28 sign the fee agreement, did not waive charging and collecting a fee." It is unclear if there was
a subsequent appeal of this decision before the Commissioner. Weems appears to
acknowledge the unfavorable decision by the Commissioner, and in a footnote to his reply
"requests issuance of an OSC against the Commissioner for a full and complete accounting."
See Reply at 2 n.1. There is, however, no authority, for such a request or for granting such
relief. If Weems seeks relief from the ALJ's ruling regarding his fees for work performed at the
administrative level, he should pursue the relief available to him via the appropriate channels
before the Commissioner.

1 As the Commissioner noted in his response, there is no evidence that Oklahoma
2 attorneys Brownson or White waived or assigned any interest in fees they may be due.
3 Weems' only response to this fact in his reply is that White and Brownson are "registered e-
4 filers" in the case, and that to the extent they had conflicting claims or objected to his
5 request for fees, they should have had notice and filed an objection. Weems, however,
6 continues to fail to explain his authority for seeking fees for work performed by the
7 Oklahoma attorneys.

8 As for Sammis, Weems does state in his reply that "as successor to Mr. Sammis'
9 law practice, [he] is authorized and obligated to seek recovery of such fees as [Sammis]
10 may have earned prior to death in addition to those independently earned. In short, fees
11 due Mr. Sammis are due and payable to Mr. Weems." Reply at 2. This statement,
12 contained only in argument in his reply brief, is conspicuously absent from Weems'
13 accompanying declaration. In support of the fact that he is entitled to collect fees for
14 Sammis, Weems cites to a November 23, 2011 purchase agreement executed by Weems
15 and Robert Sammis, the practice executor and the personal representative of the Estate of
16 Ian Sammis. Weems Decl., Exh. 3. Weems, however, does not cite to a specific provision
17 in the nine-page agreement which assigns to him the right to collect fees for work
18 performed by Sammis prior to his death; nor is the court able to locate such a provision.
19 Moreover, Weems has not provided a declaration from Robert Sammis, who appears to be
20 the personal representative of Ian Sammis' estate, or otherwise, which would confirm an
21 assignment of fees.⁴

22 Given these deficiencies and the fact that Weems provides absolutely no accounting
23 of the time he personally spent on the case before this court or otherwise, Weems has not
24 met his burden to establish that the fees he seeks are reasonable. Moreover, given the
25 fact that it appears that the bulk, if not all, of the work on Atkins' case before this court was
26 performed by other attorneys, an award of fees to Weems would be excessively large in

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28 ⁴As noted above, although there have been no motions for an award of fees under the
EAJA, Weems filed a declaration from Sammis' law clerk, Ragnes, in which Ragnes sets forth
billing records for Sammis pertaining to Atkins' case.

1 comparison to the amount of time that he spent on the case, and would constitute a
2 “windfall.” See *Gisbrecht*, 535 U.S. at 808. Accordingly, the motion for attorneys’ fees
3 under § 406(b) is DENIED for these reasons.

4 In addition to the above, the court notes that there are at least two other deficiencies
5 that Weems failed to resolve with his reply and supporting documentation, including: (1)
6 his failure show that Atkins received notice of the instant motion; and (2) his failure to
7 provide the court with a post-remand notice of award that sets forth the cumulative total of
8 past due benefits awarded, a disability onset date, or a period for which past due benefits
9 were due. The court assumes (and assumed prior to issuing its order requiring a reply) that
10 Weems could have cured these two deficiencies. He was given the opportunity to do so
11 with his court-ordered reply, and has failed to rectify them. Therefore, in addition to the
12 above issues, the court DENIES Weems’ motion for these reasons at well.

13 **CONCLUSION**

14 Atkins’ motion for attorneys’ fees pursuant to § 406(b) is DENIED based on Weems’
15 failure to establish that he performed any work entitling him to such fees, his failure to
16 establish that he is entitled to compensation for work performed before this court by other
17 attorneys prior to his representation of Atkins, for his failure to establish that the fees he
18 requests are reasonable, and because an award of the fees he requests would constitute a
19 windfall under *Gisbrecht*. See 535 U.S. at 808.

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21 **IT IS SO ORDERED.**

22 Dated: October 29, 2012



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25 _____
26 PHYLLIS J. HAMILTON
27 United States District Judge
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