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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CARLOS G CRUZ,  
Plaintiff,

v.

NANCY A. BERRYHILL,  
Defendant.

Case No. 16-cv-05910-PJH

**ORDER GRANTING MOTION FOR  
ATTORNEY'S FEES PURSUANT TO  
TITLE 42 U.S.C. § 406(B)**

Re: Dkt. No. 35

Before the court is plaintiff Carlos G. Cruz's ("plaintiff") motion for attorney's fees pursuant to the Social Security Act, Title 42 U.S.C. § 406(b) (the "SSA"). The matter is fully briefed and suitable for decision without oral argument. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby **GRANTS** plaintiff's motion.

**BACKGROUND**

On October 12, 2016, plaintiff petitioned this court for review of defendant Commissioner of Social Security's ("defendant") final decision denying his application for disability insurance and supplemental security income. Dkt. 1. On December 19, 2017, the court granted in part and denied in part plaintiff's motion for summary judgment and denied defendant's cross-motion for summary judgment. Dkt. 23. The court remanded this action to an administrative law judge ("ALJ") for further proceedings. *Id.* at 34.

On March 18, 2018, plaintiff filed a motion for attorney's fees under the Equal Access to Justice Act, Title 28 U.S.C. § 2412 ("EAJA"). Dkt. 26. On May 8, 2018, the court granted that motion, awarding \$9,124.61 in fees directly payable to plaintiff's counsel, Robert Weems ("counsel"). Dkt. 34 at 4. Defendant did so. Dkt. 35 at 5.

1 On December 17, 2019, the ALJ issued plaintiff a fully favorable decision. Dkt. 39-  
2 2 at 1. In it, she determined that plaintiff was disabled within the meaning of the SSA  
3 from July 1, 2011 through the date of his death, September 21, 2017. Id. at 11. On  
4 February 4, 2020, the Social Security Administration sent plaintiff's survivor, Brandon  
5 Cruz, a notice indicating that defendant owed plaintiff a pre-deduction total of over  
6 \$48,360.90 for monthly benefits owed to plaintiff for the December 2011 through August  
7 2017 period. Dkt. 39-3 at 2 (listing benefit amount owed per month during that period).

8 On June 23, 2020, plaintiff filed the instant motion. Dkt. 35. In it, he asks the court  
9 to award \$2,957.89 in attorney's fees pursuant to Title 42 U.S.C. § 406(b). That amount  
10 reflects the difference between 25 percent of the past-due benefits awarded to plaintiff in  
11 the notice and the fees previously paid to counsel under EAJA.<sup>1</sup> For whatever reason,  
12 neither counsel nor plaintiff contest that any past-due benefits owed to plaintiff for the  
13 August 2011 through November 2011 period should be accounted for when determining  
14 the attorney's fees requested in this motion. Additionally, in his initial June 23, 2020  
15 declaration in support of this motion (Dkt. 36), counsel failed to attach its referenced  
16 exhibits. So long as plaintiff filed those exhibits, defendant indicated non-opposition to  
17 the requested fees. Dkt. 38 at 2. On September 4, 2020, counsel refiled his declaration  
18 with its referenced exhibits. Dkt. 39. Defendant has not since indicated any opposition.

## 19 DISCUSSION

20 In relevant part, Title 42 U.S.C. § 406 provides the following:

21 "Whenever a court renders a judgment favorable to a claimant  
22 under this subchapter who was represented before the court by  
23 an attorney, the court may determine and allow as part of its  
24 judgment a reasonable fee for such representation, not in  
25 excess of 25 percent of the total of the past-due benefits to  
26 which the claimant is entitled by reason of such judgment, and  
the Commissioner of Social Security 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

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27 <sup>1</sup> Plaintiff mistakenly calculated \$48,330 as the sum of the past-due benefits owed. The  
28 \$30 difference between the court's calculation and plaintiff's is negligible. For simplicity,  
the court will rely on plaintiff's calculation when analyzing the subject fees request.

1 past-due benefits. . . .” 42 U.S.C. § 406(b)(1)(A).

2 When construing this section, the Supreme Court in Gisbecht v. Barnhart, 535  
3 U.S. 789 (2002) explained that it “does not displace contingent-fee agreements as the  
4 primary means by which fees are set for successfully representing Social Security  
5 benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements  
6 as an independent check, to assure that they yield reasonable results in particular  
7 cases.” 535 U.S. at 807. The only per se limitation for awards authorized under this  
8 section is that “[a]greements are unenforceable to the extent that they provide for fees  
9 exceeding 25 percent of the past-due benefits.” Id. That limitation aside, “the district  
10 court must first look to the fee agreement and then adjust downward if the attorney  
11 provided substandard representation or delayed the case, or if the requested fee would  
12 result in a windfall.” Crawford v. Astrue, 586 F.3d 1142, 1151 (9th Cir. 2009). For  
13 purpose of § 406(b), “past due benefits” must be calculated prior to any applicable  
14 reduction. 42 U.S.C. § 406(b)(1)(B)(ii).

15 The Ninth Circuit has also clarified that “any award [under §406(b)] is paid directly  
16 out of the claimant’s benefits.” Parrish v. Comm’r of Soc. Sec. Admin., 698 F.3d 1215,  
17 1217 (9th Cir. 2012). Lastly, when construing the relationship between attorney’s fees  
18 awarded under §406(b) and EAJA, the Ninth Circuit has explained that “[b]ecause  
19 attorneys who accepted an award under [EAJA] in excess of the § 406(b)(1) cap could be  
20 subject to criminal sanctions under § 406(b)(2), Congress amended the EAJA in 1985 to  
21 add a savings provision that allows attorneys to receive fees under both § 406(b) and  
22 [EAJA]. However, in order to maximize the award of past-due benefits to claimants and  
23 to avoid giving double compensation to attorneys, the savings provision requires a lawyer  
24 to offset any fees received under § 406(b) with any award that the attorney receives  
25 under [EAJA] if the two were for the ‘same work.’” Id. at 1218.

26 Here, the court concludes that the \$2,957.89 sought by plaintiff is warranted under  
27 § 406(b). As threshold matter, counsel and plaintiff entered a contingent fee agreement  
28 on October 12, 2016. Dkt. 39-1. Under it, counsel agreed to represent plaintiff for his

1 appeal of defendant’s social security disability determination. Id. at 1. In turn, plaintiff  
2 agreed “to pay . . . a fee of 25% of [plaintiff’s] total past due benefits under 42 U.S.C. §  
3 406(b), including past due benefits to any auxiliary beneficiaries” as well “any amounts  
4 [plaintiff] may be awarded under the Equal Access to Justice Act (‘EAJA’).” Id. As part of  
5 this arrangement, counsel expressly agreed “to credit amounts actually received by  
6 [counsel] from any EAJA fee award to [plaintiff] against the amount to be paid from  
7 [plaintiff’s] past due benefits.” Id. Given these conditions, the agreement is enforceable  
8 under Gisbrecht.

9 The court does not see anything in the record that would justify a downward  
10 deviation of the measure of fees presumptively owed to counsel under the agreement.  
11 Nothing about this case suggests that he performed subpar or was dilatory in his  
12 representation. To the contrary, counsel successfully litigated a motion for summary  
13 judgment that required further agency consideration of his client’s disability status. Dkt.  
14 23. On remand, counsel also convinced the ALJ to find in favor of his client. Dkt. 39-2.  
15 Additionally, the total fees owed to counsel under this agreement (\$12,082.50) can hardly  
16 serve as a “windfall” for his representation in this matter. To the contrary, that amounts  
17 appears quite reasonable, particularly when adjusted for the approximately 55 hours  
18 expended by counsel’s firm on its representation in this matter. Dkt. 39-4 at 5; Dkt. 39-5.  
19 Accordingly, the court finds that the requested fees are warranted under § 406.  
20 Separately, because the amount requested (\$2,957.89) constitutes the difference  
21 between the amount owed to counsel under the agreement (\$12,082.50) and the amount  
22 previously awarded as EAJA fees (\$9,124.61), the requested amount satisfies EAJA’s  
23 offset requirement.

24 **CONCLUSION**

25 For the above reasons, the court **GRANTS** plaintiff’s motion for \$2,957.89 in  
26 attorney’s fees under Title 42 U.S.C. § 406(b). Pursuant to the subject agreement, Dkt.  
27 39-1 at 1, and as permitted by § 406(b), defendant should certify this amount for direct  
28 payment to counsel, Robert Weems, within 65 days of this order.

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**IT IS SO ORDERED.**

Dated: September 15, 2020

/s/ Phyllis J. Hamilton  
PHYLLIS J. HAMILTON  
United States District Judge