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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 ERIK W. H.,

8 Plaintiff,

9 v.

10 KILOLO KIJAKAZI, Acting Commissioner
of Social Security,

11 Defendant.

Case No. [16-cv-07383-DMR](#)

**ORDER RE PLAINTIFF'S COUNSEL'S
MOTION FOR ATTORNEYS' FEES**

Re: Dkt. No. 38

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13 The court has received the motion for attorneys' fees pursuant to 42 U.S.C. § 406(b)
14 submitted by Plaintiff Erik W. H.'s counsel, Josephine Gerrard. [Docket No. 38.] Defendant
15 Kilolo Kijakazi, Acting Commissioner of Social Security, filed a response. [Docket No. 39.]

16 In Gerrard's motion, she represents that Plaintiff was awarded \$179,011 in retroactive Title
17 II benefits. She asks the court for a net award of \$25,753.00 in attorneys' fees that would be
18 payable out of Plaintiff's past due benefits. This sum represents a total attorneys' fee award of
19 \$44,753.00 minus \$19,000.00 in fees payable by the government pursuant to the Equal Access to
20 Justice Act ("EAJA"), 28 U.S.C. § 2412(b), which the court previously awarded.¹ [See Docket
21 No. 37.]

22 In this motion, Gerrard's interests are adverse to those of her client, because any fees that
23 the court awards Gerrard pursuant to 42 U.S.C. § 406(b) will come from Plaintiff's past-due
24 benefits. In other words, if the court grants Gerrard's motion and awards her fees, it will reduce

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26 ¹ A claimant's attorney who is successful in obtaining both EAJA fees from the United States and
27 an award under 42 U.S.C. § 406(b) (which comes out of past-due benefits) must "refun[d] to the
28 claimant the amount of the smaller fee." *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002)
(quotation omitted). Here, Gerrard asks the court to order the payment of attorneys' fees in the
amount of \$44,753.00 with a credit to Plaintiff for the \$19,000.00 in EAJA fees previously paid to
counsel.


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the amount of past-due benefits that Plaintiff will receive from Defendant by \$25,753.

By no later than August 8, 2023, counsel shall serve Plaintiff with a copy of her motion and this order and shall file a proof of service. **The court grants Plaintiff until August 29, 2023 to submit any objections to Gerrard’s motion for attorneys’ fees.** If the court does not receive any objection from Plaintiff by August 29, 2023 the court will decide Gerrard’s motion based on the papers already submitted.

IT IS SO ORDERED.

Dated: August 4, 2023



Donna M. Ryu
Chief Magistrate Judge