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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 DALE A. MACEWEN,

12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN, Acting
15 Commissioner of Social Security,

16 Defendant.

Case No.: 10-CV-1263 JLS (MDD)

**ORDER GRANTING PLAINTIFF'S
COUNSEL'S MOTION FOR
ATTORNEY FEES PURSUANT TO
42 U.S.C. § 406(b)**

(ECF No. 29)

17 Presently before the Court is Plaintiff Dale A. MacEwen's Counsel Shanny J. Lee
18 ("Counsel")'s Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b). (ECF No. 29.)
19 Also before the Court is Defendant's Response to the Motion for Attorney Fees. (ECF No.
20 32.) Having considered the parties' arguments and the law, the Court **GRANTS** Counsel's
21 Motion for Fees.

22 **BACKGROUND**

23 On June 11, 2010, Plaintiff filed a complaint pursuant to Section 405(g) of the Social
24 Security Act. (R. & R. at 1, ECF No. 24.) Plaintiff asked the Court to review the final
25 decision of the Commissioner of the Social Security Administration denying Plaintiff's
26 claim for supplemental security income benefits and social security disability insurance
27 benefits. *Id.* Counsel filed the complaint on Plaintiff's behalf pursuant to a signed
28 contingency-fee agreement providing that Counsel, if successful, would receive 25% of the

1 final award. (Pl.’s Mot. for Att’y Fees, Lee Decl. ¶ 8; *id.*, Ex. A, at 1.) On December 10,
2 2010, Plaintiff filed a Motion for Summary Judgment regarding his Section 405(g) claim,
3 and on March 2, 2011, Defendant filed a Cross Motion for Summary Judgment and
4 Opposition to Plaintiff’s Motion for Summary Judgment. (R. & R. at 1.) On March 11,
5 2011, Plaintiff filed a Reply to Defendant’s Response. (*Id.*)

6 On September 7, 2011, Magistrate Judge Mitchell D. Dembin issued an R. & R.
7 finding that the Administrative Law Judge (“ALJ”) committed legal error both by rejecting
8 the opinion of Plaintiff’s treating surgeon, Dr. Frey, and by finding that Plaintiff was not
9 credible. (*Id.* at 11.) Magistrate Judge Dembin recommended that both parties’ motions
10 for summary judgment be denied and the case remanded for further proceedings. (*Id.* at
11 12.) Defendant did not object to the R. & R. and on November 2, 2011, the Court adopted
12 Magistrate Judge Dembin’s R. & R. in its entirety. (ECF No. 25.)

13 Prior to remand, the parties jointly moved for attorney fees pursuant to the Equal
14 Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), in the amount of \$5,800, “subject to
15 any offset allowed under the United States Department of Treasury’s Offset Program.”
16 (ECF No. 26.) The Court granted the motion, (ECF No. 27), but no money was ultimately
17 paid to Plaintiff or Counsel because the government determined that Mr. MacEwen owed
18 a pre-existing, non-tax, federal debt that equaled or exceeded the amount of the EAJA
19 award. (Pl.’s Mot. for Att’y Fees, Lee Decl. ¶ 8.)

20 On remand, ALJ James S. Carletti issued a decision partially favorable to Mr.
21 MacEwen, and the Appeals Council issued a fully favorable decision several months later.
22 (*Id.* ¶¶ 9–10.) In March of 2016, the Social Security Administration (“SSA”) issued a
23 Notice of Award letter to Mr. MacEwen, noting that \$21,808.50 of the award had been set
24 aside for potential payment to Mr. MacEwen’s representative as attorney fees. (*Id.* ¶ 11.)
25 Counsel now moves under 42 U.S.C. § 406(b) for attorney fees in the amount of
26 \$21,808.50, as both specified in the contingency agreement and set aside by the SSA.

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1 **LEGAL STANDARD**

2 Section 406(b) governs an attorney’s right to recover fees in a successful Social
3 Security case.³ The U.S. Supreme Court has held that,

4 [m]ost plausibly read, . . . § 406(b) does not displace contingent-
5 fee agreements as the primary means by which fees are set for
6 successfully representing Social Security benefits claimants in
7 court. Rather, § 406(b) calls for court review of such
8 arrangements as an independent check, to assure that they yield
9 reasonable results in particular cases. Congress has provided one
10 boundary line: Agreements are unenforceable to the extent that
11 they provide for fees exceeding 25 percent of the past due
benefits. . . . Within the 25 percent boundary, . . . the attorney
for the successful claimant must show that the fee sought is
reasonable for the services rendered.

12 *Gisbrecht v. Barnhart*, 535 U.S. 789, 807 (2002) (footnotes and citation omitted). Thus, a
13 district court should first look to the contingency-fee agreement and then test it for
14 reasonableness. *Id.* at 808.

15 The Supreme Court has instructed that a reduction of the fee award may be
16 appropriate “based on the character of the representation and the results the representative
17 achieved.” *Id.* The Ninth Circuit subsequently explained that when analyzing the
18 reasonableness of a fee award a Court “may properly reduce the fee for substandard
19 performance, delay, or benefits that are not in proportion to the time spent on the case.”

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22 ³ Section 406(b)(1)(A) of title 42 of the United States Code provides:

23 Whenever a court renders a judgment favorable to a claimant under this
24 subchapter who was represented before the court by an attorney, the court
25 may determine and allow as part of its judgment a reasonable fee for such
26 representation, not in excess of 25 percent of the total past-due benefits to
27 which the claimant is entitled by reason of such judgment, and the
28 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 past-due benefits. In case of any such
judgment, no other fee may be payable or certified for payment for such
representation except as provided in this paragraph.

1 *Crawford v. Astrue*, 586 F.3d 1142, 1151 (9th Cir. 2009) (citing *Gisbrecht*, 535 U.S. at
2 808). Further, the Supreme Court has explicitly provided that,

3 [i]n this regard, the court may require the claimant’s attorney to
4 submit, not as a basis for satellite litigation, but as an aid to the
5 court’s assessment of the reasonableness of the fee yielded by the
6 fee agreement, a record of the hours spent representing the
7 claimant and a statement of the lawyer’s normal hourly billing
charge for noncontingent-fee cases.

8 *Gisbrecht*, 535 U.S. at 808; *see also Crawford*, 586 F.3d at 1151. It is important that the
9 Court assess the reasonableness of the requested fees because, “while the attorney’s
10 compensation must be sufficient to encourage members of the bar to undertake
11 representation of disability claimants, the disability award, from which the attorney’s fee
12 is paid, is normally an already-inadequate stipend for the support and maintenance of the
13 claimant and his dependents.” *Starr v. Bowen*, 831 F.2d 872, 873 (9th Cir. 1987) (quoting
14 *MacDonald v. Weinberger*, 512 F.2d 144, 146–47 (9th Cir. 1975)).

15 The EAJA also permits an attorney to receive fees for successful Social Security
16 representations.⁴ *See Parrish v. Comm’r of Soc. Sec. Admin.*, 698 F.3d 1215, 1216–17 (9th
17 Cir. 2012). Fees awarded pursuant to the EAJA are paid by the government rather than the
18 claimant. *Id.* at 1218. Accordingly, while “[f]ee awards may be made under both
19 prescriptions, . . . the claimant’s attorney must ‘refun[d] to the claimant the amount of the
20 smaller fee.’” *Gisbrecht*, 535 U.S. at 796 (quoting Act of Aug. 5, 1985, Pub. L. No. 99-
21 80, § 3, 99 Stat. 186) (second alteration in original).

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23 ⁴ Pursuant to the EAJA:

24 [A] court shall award to a prevailing party other than the United States fees
25 and other expenses . . . incurred by that party in any civil action (other than
26 cases sounding in tort), including proceedings for judicial review of agency
27 jurisdiction of that action, unless the court finds that the position of the
United States was substantially justified or that special circumstances make
an award unjust.

28 28 U.S.C. § 2412(d)(1)(A).

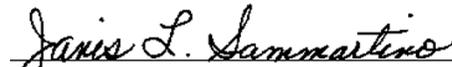
1 present case. Counsel has fourteen years of experience in the field of social security law
2 and here secured a favorable outcome in Plaintiff's district court appeal, ultimately
3 resulting in a fully favorable judgment by the SSA Appeals Council. (*Id.* ¶¶ 2, 9, 10.)
4 Further, fees within this general range have been previously awarded and upheld within
5 the Ninth Circuit. *See, e.g., Crawford*, 586 F.3d at 1153 (Clifton, J., concurring in part and
6 dissenting in part) (noting that majority ordered payments in underlying cases that equated
7 to \$519, \$875, and \$902 hourly rates). Finally, Counsel took a non-negligible risk in
8 accepting the present case. There were cross-motions for summary judgment during the
9 district court appeal, resulting in a twelve-page Report and Recommendation by Magistrate
10 Judge Dembin, (R. & R., ECF No. 24), and upon remand to the SSA Plaintiff still was not
11 awarded a fully favorable decision until the Appeals Council further reviewed the ALJ's
12 fourteen-page decision addressing nine pages worth of exhibits, (*compare* Notice of
13 Decision—Partially Favorable, ECF No. 29-5, *with* Notice of Appeals Council Decision
14 Fully Favorable, ECF No. 29-6). In sum, this was not a formulaic case, and Counsel's
15 representation was adequate under the circumstances.

16 CONCLUSION

17 In light of the foregoing, the Court concludes that Counsel's fee request is reasonable
18 and therefore **GRANTS** Counsel's Motion for Attorney Fees. The Court awards fees in
19 the amount of \$21,808.50.

20 IT IS SO ORDERED.

21 Dated: October 18, 2016

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23 Hon. Janis L. Sammartino
24 United States District Judge
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