

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GILBERTO PAREDES MARTINEZ,
Plaintiff,
v.
NANCY A. BERRYHILL, Acting
Commissioner of Social Security,
Defendant.

Case No.: 13-CV-272 JLS (JLB)

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

(ECF No. 28)

Presently before the Court is Plaintiff Gilberto Paredes Martinez’s Counsel Brian C. Shapiro’s (“Counsel”) Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b). (“Pl.’s Mot. for Att’y Fees,” ECF No. 28.) Also before the Court is Defendant’s Statement of Non-Opposition to Plaintiff’s Motion for Attorney’s Fees. (ECF No. 29.) Plaintiff has not filed a response. Having considered the parties’ arguments and the law, the Court **GRANTS** Counsel’s Motion for Fees.

BACKGROUND

On February 4, 2013, Plaintiff filed a complaint pursuant to Section 405(g) of the Social Security Act. (Report & Recommendation (“R. & R.”) at 2, ECF No. 21.) Plaintiff asked the Court to review the final decision of the Commissioner of the Social Security Administration denying Plaintiff’s claim for social security disability insurance (“SSDI”) benefits. *Id.* at 3. Counsel filed the complaint on Plaintiff’s behalf pursuant to a signed

1 contingency-fee agreement providing that Counsel, if successful, would receive 25% of the
2 final back pay award. (Pl.’s Mot. for Att’y Fees, Shapiro Decl. ¶ 2; *id.*, Ex. 1, at 1.) On
3 September 10, 2013, Plaintiff filed a Motion for Summary Judgment regarding his Section
4 405(g) claim and on October 1, 2013, Defendant filed a Cross Motion for Summary
5 Judgment and Opposition to Plaintiff’s Motion for Summary Judgment. (R. & R. at 3.)
6 On November 2, 2013, Plaintiff filed a Reply and an Opposition to Defendant’s Cross
7 Motion. (*Id.*)

8 On August 7, 2014, Magistrate Judge Jill L. Burkhardt issued a Report &
9 Recommendation finding that the Administrative Law Judge (“ALJ”) committed legal
10 error by failing to provide clear and convincing reasons for discrediting Plaintiff’s
11 testimony about his pain and limitation symptoms. (*Id.* at 11.) Magistrate Judge Burkhardt
12 recommended that Defendant’s Motion for Summary Judgment be denied, Plaintiff’s
13 Motion for Summary Judgment be granted in part and denied in part, and the case to be
14 remanded for further proceedings. (*Id.* at 13.) Defendant objected to the R. & R., but on
15 September 4, 2014, the Court adopted Magistrate Judge Burkhardt’s R. & R. in its entirety.
16 (ECF No. 24.)

17 Prior to remand, the parties jointly moved for attorney’s fees pursuant to the Equal
18 Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d), in the amount of \$4,900, “subject to
19 any offset allowed under the United States Department of Treasury’s Offset Program.”
20 (ECF No. 25.) The Court granted the Motion. (ECF No. 27.)

21 On remand, ALJ Robert Iafe issued a decision fully favorable to Plaintiff. (Pl.’s
22 Mot. for Att’y Fees, Ex. 2, at 1) On August 27, 2017, the Social Security Administration
23 (“SSA”) issued a Notice of Award letter to Mr. Paredes Martinez, noting that \$42,818 of
24 the award had been set aside for potential payment to Mr. Paredes Martinez’s
25 representative as attorney’s fees, which constituted 25% of Plaintiff’s past-due benefits.
26 (*Id.* at 4.) Counsel now moves, under 42 U.S.C. § 406(b), for attorney’s fees in the amount
27 of \$25,000 with a credit to Plaintiff for EAJA fees previously paid in the amount of \$4,900.
28 (Pl.’s Mot. for Att’y Fees 1.)

1 **LEGAL STANDARD**

2 Section 406(b) governs an attorney’s right to recover fees in a successful Social
3 Security case.¹ 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 citations omitted). Thus,
13 a 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.”
20

21 _____
22 ¹ 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) (en banc) (citing *Gisbrecht*, 535
2 U.S. at 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. A district court may
9 consider the lodestar calculation, but only as an aid in assessing the reasonableness of the
10 fee. *Crawford*, 586 F.3d at 1151. It is important that the Court assess the reasonableness
11 of the requested fees because, “while the attorney’s compensation must be sufficient to
12 encourage members of the bar to undertake representation of disability claimants, the
13 disability award, from which the attorney’s fee is paid, is normally an already-inadequate
14 stipend for the support and maintenance of the claimant and his dependents.” *Starr v.*
15 *Bowen*, 831 F.2d 872, 873 (9th Cir. 1987) (quoting *MacDonald v. Weinberger*, 512 F.2d
16 144, 146–47 (9th Cir. 1975)).

17 The EAJA also permits an attorney to receive fees for successful Social Security
18 representations.² *See Parrish v. Comm’r of Soc. Sec. Admin.*, 698 F.3d 1215, 1216–17 (9th
19 Cir. 2012). Fees awarded pursuant to the EAJA are paid by the government rather than the
20 claimant. *Id.* at 1218. Accordingly, while “[f]ee awards may be made under both
21 prescriptions, . . . the claimant’s attorney must ‘refun[d] to the claimant the amount of the
22

23 ² 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 action, brought by or against the United States in any court having
28 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 U.S.C. § 2412(d)(1)(A).

1 smaller fee.”” *Gisbrecht*, 535 U.S. at 796 (second alteration in original) (quoting Act of
2 Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186).

3 ANALYSIS

4 The Court begins its analysis of the § 406(b) award at issue by examining the
5 contingency-fee agreement. Counsel’s requested § 406(b) award is less than the original
6 25% contingency-fee agreement between the parties. Plaintiff was awarded \$171,272 in
7 past-due benefits by SSA. (Pl.’s Mot. for Att’y Fees 2.) The SSA withheld 25% of
8 Plaintiff’s past-due benefits—\$42,818—and Counsel requests only \$25,000 of the
9 withholding. At a minimum, the requested award is well within the 25% statutory
10 boundary. 42 U.S.C. § 406(b)(1)(A); *Gisbrecht*, 535 U.S. at 807. Further, the Court
11 concludes that none of the reasons for reducing a fee award identified by the *Crawford*
12 court are applicable in the present case. Counsel obtained a favorable judgment for
13 Plaintiff and the record presents no indication of delay. The only remaining consideration
14 is whether the benefits secured by Counsel are in proportion to the time spent on the case.

15 “Since *Gisbrecht* was handed down by the Supreme Court, the district courts
16 generally have been deferential to the terms of contingency fee contracts in § 406(b) cases,
17 accepting that the resulting *de facto* hourly rates may exceed those for non contingency-
18 fee arrangements.” *Hearn v. Barnhart*, 262 F. Supp. 2d 1033, 1037 (N.D. Cal. 2003)
19 (collecting cases). Further, contingency-fee arrangements expose an attorney to the
20 inherent “risk of receiving nothing for his time and effort” if the plaintiff is unsuccessful.
21 *Id.*

22 In the present case, Counsel spent 28.2 hours³ litigating the district court appeal,
23 (Pl.’s Mot. for Att’y Fees, Shapiro Decl. ¶ 5); assessed against the proposed fee award, this
24 amounts to a *de facto* hourly rate of \$886.52 per hour (\$25,000 / 28.2 hours) for both
25 attorney and paralegal work. While such an hourly rate is on the higher end charged for
26

27
28 ³ 3.7 hours were billed by Counsel’s paralegal and 24.5 hours were billed by Counsel. (Pl.’s Mot. for Att’y Fees, Ex. 4, at 1–2.)

1 social security appeals, the Court nonetheless concludes that the fee is reasonable in the
2 present case. Counsel had sixteen years of experience in the field of social security law at
3 the time Plaintiff filed his Complaint. (*Id.* ¶ 7.) Counsel secured a favorable outcome in
4 Plaintiff's district court appeal, ultimately resulting in a fully favorable judgment by the
5 SSA ALJ.

6 Further, fees within this general range have been previously awarded and upheld by
7 the Ninth Circuit. *See, e.g., Crawford*, 586 F.3d at 1153 (Clifton, J., concurring in part and
8 dissenting in part) (noting that majority ordered payments in underlying cases that equated
9 to \$519, \$875, and \$902 hourly rates). Indeed, Counsel was a party-in-interest to the
10 *Crawford* decision and his requested award was one of those upheld by the Ninth Circuit.
11 *Id.* at 1145 (majority opinion). Next, the benefits are in proportion to the time spent on the
12 case. While every case is different, the amount of time spent on this case (24.5 hours by
13 Counsel and 3.7 hours by Counsel's Paralegal) are similar to the underlying cases approved
14 in *Crawford*.⁴ *See id.* Counsel's requested attorney's fee is 14.5% of benefits awarded
15 (\$25,000 requested attorney's fee / \$171,272 back pay awarded). This fee percentage is
16 within the range approved in *Crawford*, *see id.*, as well as less than fee percentages
17 previously approved by this Court, *see Macewen v. Colvin*, No. 10-CV-1263-JLS (MDD),
18 2016 WL 6082308, at *1 (S.D. Cal. Oct. 18, 2016) (approving 25% fee award), and other
19 courts in this District. *See, e.g., Richardson v. Colvin*, No. 15-CV-1456-MMA-BLM, 2017
20 WL 1683062, at *2 (S.D. Cal. May 2, 2017) (approving 25% attorney's fee).

21 Finally, Counsel took a non-negligible risk in accepting the present case. Plaintiff
22 had previously been denied benefits. (R. & R. 1.) There were cross-motions for summary
23 judgment during the district court appeal, resulting in a fourteen-page Report and
24 Recommendation by Magistrate Judge Burkhardt, (ECF No. 21), and, upon remand, further
25 argument before ALJ Iafe. (*See Pl.'s Mot. for Att'y Fees*, Ex. 3). In sum, this was not a
26

27 ⁴ The time spent in the three underlying cases was: 19.5 hours by counsel and 4.5 hours by paralegal in
28 *Crawford*; 17.45 hours by counsel and 4.7 hours by paralegal in *Washington*; and 26.9 hours by counsel
and 2.6 hours by paralegal in *Trejo*. *Crawford*, 586 F.3d at 1145.

1 formulaic case and Counsel's representation was adequate under the circumstances.

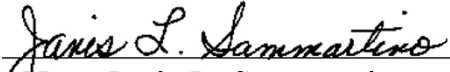
2 Finally, Counsel requests the Court to order Counsel to reimburse Plaintiff the
3 amount of \$4,900 previously paid by the SSA under EAJA. This satisfies the requirement
4 that counsel refunds its plaintiff an EAJA award that is smaller than the related § 406(b)
5 award. *See Gisbrecht*, 535 U.S. at 796. Counsel's request meets this requirement.
6 Accordingly, the Court concludes that the EAJA award will be deducted from the § 406(b)
7 award.

8 CONCLUSION

9 In light of the foregoing, the Court concludes that Counsel's fee request is reasonable
10 and therefore **GRANTS** Counsel's Motion for Attorney Fees. The Court awards fees in
11 the amount of \$25,000. Counsel **SHALL** reimburse Mr. Gilberto Paredes Martinez the
12 amount of \$4,900 in EAJA fees previously paid by the Government.

13 IT IS SO ORDERED.

14 Dated: October 19, 2017


15 Hon. Janis L. Sammartino
16 United States District Judge