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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JONATHAN MATTHEW
AYERSMAN,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

Case No.: 17-cv-1121-WQH-JMA

ORDER

HAYES, Judge:

The matter before the Court is the Motion for Attorney Fees Pursuant to 42 U.S.C. § 406(b) filed by Plaintiff’s counsel, Cyrus Safa. (ECF No. 24).

I. BACKGROUND

On October 29, 2015, Plaintiff Jonathan Matthew Ayersman filed an application for disability insurance benefits, alleging disability beginning September 30, 2014. (Administrative Record (“AR”) 166). Plaintiff’s application was denied at the initial level and on reconsideration. (AR 104-08, 110-15). On October 13, 2016, a hearing was held before an administrative law judge (“ALJ”). (AR 42). On November 17, 2016, the ALJ issued a written decision finding Plaintiff not disabled. (AR 23-41). On April 5, 2017, the Appeals Council denied Plaintiff’s request for review, and the ALJ’s decision became the

1 final decision of the Commissioner of the Social Security Administration
2 (“Commissioner”). (AR 1-4).

3 On June 2, 2017, Plaintiff filed a Complaint against the Commissioner, seeking
4 review of the Commissioner’s final decision. (ECF No. 1). On February 2, 2018, the parties
5 filed a Joint Motion for Voluntary Remand and Entry of Judgment. (ECF No. 18). On
6 February 7, 2018, the Court issued an Order remanding the case to the Commissioner for
7 further proceedings. (ECF No. 19).

8 On April 16, 2020, the Commissioner issued a fully favorable decision to Plaintiff.
9 (ECF No. 24-2 at 1). On October 9, 2020, the Commissioner sent Plaintiff a Notice of
10 Award, notifying Plaintiff that Plaintiff is owed past-due disability benefits in the amount
11 of \$65,191.85¹ for August 2015 through August 2020, monthly benefits in the amount of
12 \$1,162.40 for the month of September 2020, and monthly benefits in the amount of
13 \$1,307.00 beginning October 2020. (ECF No. 24-3 at 1-2).

14 On November 18, 2020, Plaintiff’s counsel, Cyrus Safa (“Counsel”), filed a Motion
15 for Attorney Fees Pursuant to 42 U.S.C. § 406(b). (ECF No. 24). Counsel moves for
16 approval of attorneys’ fees pursuant to 42 U.S.C. § 406(b) in the amount of \$10,000.00 for
17 work in the district court. Counsel asserts that the requested fee is 12% of Plaintiff’s past-
18 due benefits—less than the 25% of Plaintiff’s past-due benefits agreed upon in the retainer
19 agreement between Plaintiff and the Law Offices of Lawrence D. Rohlring. Attached to
20 the Motion is a Declaration by Counsel, a copy of the retainer agreement between Plaintiff
21 and the Law Offices of Lawrence D. Rohlring, a chart listing the hours worked by Counsel
22 in this case, Counsel’s resume, copies of the Commissioner’s Notice of Decision and
23 Notice of Award, portions of the United States Consumer Law Attorney Fee Survey Report
24 2017-18, and a Proof of Service indicating that Plaintiff was served with a copy of the
25 Motion.

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28 ¹ \$65,191.85 constitutes total past-due benefits of \$84,987.60 – \$19,795.75 withheld from the past-due
benefits for attorney fees. (See ECF No. 24-3 at 3).

1 On November 19, 2020, the Commissioner filed a Response to the Motion for
2 Attorney Fees, providing “an analysis of the fee request and tak[ing] no position on the
3 reasonableness of the request.” (ECF No. 25 at 4).

4 The record reflects that Plaintiff did not file a response to the Motion for Attorney
5 Fees.

6 **II. DISCUSSION**

7 Attorneys are entitled to fees for cases in which they successfully represent social
8 security claimants. 42 U.S.C. § 406(b)(1)(A) provides:

9 Whenever a court renders a judgment favorable to a claimant under this title
10 who was represented before the court by an attorney, the court may determine
11 and allow as part of its judgment a reasonable fee for such representation, not
12 in excess of 25 percent of the total of the past-due benefits to which the
13 claimant is entitled by reason of such judgment, and the Commissioner of
Social Security may . . . 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.

14 An award under § 406(b) “allows the claimant’s attorney to collect his or her fee out of the
15 claimant’s past-due disability benefits, while [an Equal Access to Justice Act] award is
16 paid by the government to the claimant to defray the cost of legal services.” *Russell v.*
17 *Sullivan*, 930 F.2d 1443, 1446 (9th Cir. 1991).

18 The 25% statutory maximum fee is not an automatic entitlement, and the court must
19 ensure that the requested fee is reasonable. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 808-
20 09 (2002) (“We hold that § 406(b) does not displace contingent-fee agreements within the
21 statutory ceiling; instead, § 406(b) instructs courts to review for reasonableness fees
22 yielded by those agreements.”). “Within the 25 percent boundary . . . the attorney for the
23 successful claimant must show that the fee sought is reasonable for the services rendered.”
24 *Id.* at 807. The Supreme Court has established five factors that may be relevant in
25 considering whether a fee award under a contingency fee arrangement is reasonable: 1)
26 “the character of the representation;” 2) the “results the [attorney] achieved;” 3) “[i]f the
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1 attorney was responsible for delay;” and 4) “[i]f the benefits are large in comparison to the
2 amount of time counsel spent on the case.” *See id.* at 808.

3 On January 17, 2017, Plaintiff and the Law Offices of Lawrence D. Rohlfing entered
4 into a contingency fee agreement that provided, “If this matter requires judicial review of
5 any adverse decision of the Social Security Administration, the fee for successful
6 prosecution of this matter is **a separate 25% of the backpay awarded upon reversal of**
7 **any unfavorable ALJ decision for work before the court.**” (ECF No. 24-1 at 1). On
8 remand after judicial review by this Court, Counsel procured a favorable decision for
9 Plaintiff. (*See* ECF No. 24-3 at 1, 3 (total past-due benefit award of \$84,987.60 (\$65,191.85
10 owed + \$19,795.75 withheld for attorneys’ fees))). A billing summary submitted by
11 Counsel shows that the Law Offices of Lawrence D. Rohlfing expended 9.9 hours of
12 attorney time and 2.8 hours of paralegal time on the district court case. (ECF No. 24-4 at
13 1). Counsel’s requested award of \$10,000.00 represents approximately 12% of the total
14 past-due benefit award award and an effective hourly rate of \$787.40.

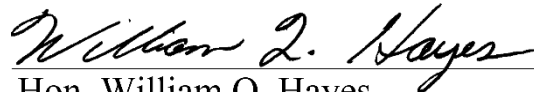
15 The Court has considered the *Gisbrecht* factors as they relate to this case. There is
16 no evidence in the record suggesting that Counsel overreached or unreasonably delayed
17 this litigation. Counsel has been practicing social security law since 2012. Counsel’s efforts
18 on Plaintiff’s behalf were ultimately successful. Although the average hourly rate of
19 \$787.40 is greater than the average rates for similar attorneys at other California-region
20 firms (*see* ECF No. 24-6), the requested award is only 12% of the total backpay award—
21 less than half of the 25% agreed to in the contingency fee agreement. Further, “[t]he courts
22 recognize that basing a reasonableness determination on a simple hourly rate basis is
23 inappropriate when an attorney is working pursuant to a reasonable contingency contract
24 for which there runs a substantial risk of loss’ Courts are loathe to penalize experienced
25 counsel for efficient representation under contingency agreements, particularly in the social
26 security context.” *Sproul v. Astrue*, No. 11-cv-1000-IEG, 2013 WL 394056, at *2 (S.D.
27 Cal. Jan. 30, 2013) (quoting *Hearn v. Barnhart*, 262 F. Supp. 2d 1033, 1037 (N.D. Cal.
28 2003)) (approving a 25% fee award, representing an effective hourly rate of \$794.63); *see*

1 *Martinez v. Berryhill*, No. 13-cv-272-JLS (JLB), 2017 WL 4700078, at *3 (S.D. Cal. Oct.
2 19, 2017) (approving effective hourly rate of \$886.52 for counsel with sixteen years’
3 experience and noting that “[w]hile such an hourly rate is on the higher end charged for
4 social security appeals, the Court nonetheless concludes that the fee is reasonable in the
5 present case”); *Richardson v. Colvin*, No. 15-cv-1456-MMA (BLM), 2017 WL 1683062,
6 at *2 (S.D. Cal. May 2, 2017) (approving effective hourly rate of \$770); *Nash v. Colvin*,
7 No. 12-cv-2781-GPC (RBB), 2014 WL 5801353, at *2 (S.D. Cal. Nov. 7, 2014) (approving
8 effective hourly rate of \$656). After consideration of the *Gisbrecht* factors, and based on
9 the quality of Counsel’s representation and the results achieved in this case, the Court
10 concludes that the fees sought pursuant to § 406(b) are reasonable.

11 **III. CONCLUSION**

12 IT IS HEREBY ORDERED that the Motion for Attorney Fees Pursuant to 42 U.S.C.
13 § 406(b) (ECF No. 24) is granted. The Commissioner is directed to certify the fee of
14 \$10,000.00 payable to the Law Offices of Lawrence D. Rohlfing.

15 Dated: January 4, 2021

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17 Hon. William Q. Hayes
18 United States District Court
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