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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 BEATRIZ B.,

12 Plaintiff,

13 v.

14 ANDREW M. SAUL, Commissioner of
15 Social Security,¹

16 Defendant.

Case No.: 3:19-cv-785-AHG

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

[ECF No. 23]

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18 Before the Court is Plaintiff's counsel's motion for attorney fees pursuant to 42
19 U.S.C. § 406(b). ECF No. 23. For the reasons set forth below, the Court **GRANTS** the
20 motion.

21 **I. BACKGROUND**

22 Plaintiff Beatriz B. ("Plaintiff") filed this action on April 29, 2019, seeking review
23 of the Commissioner of Social Security's ("Commissioner") denial of her application for
24 social security disability and supplemental security income benefits. ECF No. 1. The

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¹ Andrew Saul became the Commissioner of Social Security on June 17, 2019. Although
27 Plaintiff originally brought this action against Former Acting Commissioner
28 Nancy Berryhill, this case may properly proceed against Andrew Saul pursuant to 42
U.S.C. § 405(g).

1 parties consented to proceed before a Magistrate Judge on May 7, 2019. ECF No. 5.
2 Pursuant to the Court’s Order, the parties filed a Joint Motion for Judicial Review on
3 December 9, 2019, stating their positions on the disputed issues in the case. ECF No. 17.
4 On July 16, 2020, the Court reversed the Commissioner’s denial of disability insurance
5 benefits and remanded to the Administrative Law Judge (“ALJ”) for the calculation and
6 award of benefits. ECF No. 18. On remand, the Commissioner awarded Plaintiff
7 \$63,701.60 in total past due benefits. ECF No. 23-1 at 1; ECF No. 23-3. On
8 September 1, 2020, pursuant to a joint motion, this Court awarded Plaintiff \$4,450.00 in
9 attorney fees under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d). ECF
10 No. 22; ECF No. 19 (jointly requesting that Plaintiff’s counsel receive \$205.25 per hour
11 for 19.5 hours of work performed and \$143 per hour for 3.4 hours of paralegal work, with
12 the total request discounted to \$4,450.00).

13 In the instant motion, Plaintiff’s counsel seeks an order awarding Brian C. Shapiro,
14 Esq. (Plaintiff’s counsel) attorney fees in the amount of \$15,925.40 for representing
15 Plaintiff in this action, and further ordering Mr. Shapiro to reimburse Plaintiff the amount
16 of \$4,450.00 for the EAJA fees awarded by the Court. ECF No. 23-1 at 2–7, 11. The
17 Commissioner has taken no position on the reasonableness of counsel’s request. Though
18 she was notified twice regarding her ability to oppose the motion (*see* ECF No. 23 at 2;
19 ECF No. 23-1 at 14; ECF No. 25), Plaintiff has also taken no position on the reasonableness
20 of counsel’s request.

21 **II. LEGAL STANDARD**

22 “Under 42 U.S.C. § 406(b), a court entering judgment in favor of [a social security]
23 claimant who was represented by an attorney ‘may determine and allow as part of its
24 judgment a reasonable fee for such representation, not in excess of 25 percent of the total
25 of the past-due benefits to which the claimant is entitled by reason of such judgment.’”
26 *Crawford v. Astrue*, 586 F.3d 1142, 1147 (9th Cir. 2009) (en banc) (quoting 42 U.S.C.
27 § 406(b)(1)(A)). “Within the 25 percent boundary, . . . the attorney for the successful
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1 claimant must show that the fee sought is reasonable² for the services rendered.” *Gisbrecht*
2 *v. Barnhart*, 535 U.S. 789, 807 (2002).

3 “[A] district court charged with determining a reasonable fee award under
4 § 406(b)(1)(A) must respect ‘the primacy of lawful attorney-client fee agreements,’ . . .
5 ‘looking first to the contingent-fee agreement, then testing it for reasonableness[.]’”
6 *Crawford*, 586 F.3d at 1148 (quoting *Gisbrecht*, 535 U.S. at 793, 808). When determining
7 reasonableness of the fee award, courts must consider “whether the amount need be
8 reduced, not whether the lodestar amount should be enhanced.” *Crawford*, 586 F.3d at
9 1149. While there is not a definitive list of factors, courts should consider “the character of
10 the representation and the results the representative achieved.” *Gisbrecht*, 535 U.S. at 808.
11 “The court may properly reduce the fee for substandard performance, delay, or benefits
12 that are not in proportion to the time spent on the case.” *Crawford*, 586 F.3d at 1151.

13 Finally, “an EAJA award offsets an award under Section 406(b), so that the [amount
14 of the total past-due benefits the claimant actually receives] will be increased by the . . .
15 EAJA award up to the point the claimant receives 100 percent of the past-due benefits.”
16 *Gisbrecht*, 535 U.S. at 796.

17 **III. DISCUSSION**

18 On August 26, 2019, Plaintiff and the Law Offices of Lawrence D. Rohlifing entered
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21 ² The Court notes that the lodestar calculation does not apply to the instant motion. *See*
22 *Gisbrecht*, 535 U.S. at 802 (explaining that the lodestar method is applicable to “disputes
23 over the amount of fees properly shifted to the loser in the litigation” whereas “Section
24 406(b) is of another genre: [i]t authorizes fees payable from the successful party’s
25 recovery”); *see also Crawford*, 586 F.3d at 1148 (“SSDI attorney[] fees, in contrast, are
26 not shifted. They are paid from the award of past-due benefits and the amount of the fee,
27 up to 25% of past-due benefits, is based on the agreement between the attorney and the
28 client.”); *see, e.g., Shultz v. Comm’r of Soc. Sec.*, No. 17cv1823-CAB-MDD, 2020 U.S.
Dist. LEXIS 147006, at *3–*4 (S.D. Cal. Aug. 14, 2020) (not applying the lodestar
calculation, when the motion was not opposed by the Commissioner or plaintiff); *Berry v.*
Saul, No. 16cv1700-MMA-AGS, 2019 WL 6467807 at *2 n.2 (S.D. Cal. Dec. 2, 2019)
(same).

1 into a Social Security Representation Agreement (“Agreement”). ECF No. 23-2. Pursuant
2 to the Agreement, Plaintiff agreed to pay counsel a contingency-fee of up to 25% of past-
3 due benefits awarded by the Commissioner. *Id.*³ The administrative proceedings became
4 final on September 8, 2020, when the Social Security Administration issued its Notice of
5 Award. *See* ECF No. 23-3 at 1. Plaintiff’s counsel seeks a total award of \$15,925.40 in
6 attorney fees and “bases this fee on 25% of the net payable past due benefits.” ECF No.
7 23-1 at 2; *see* ECF No. 23-3 (awarding Plaintiff \$63,701.60 in total past due benefits).
8 Counsel argues that the amount sought in the instant motion “falls within the range of
9 reasonable,” considering counsel’s firm “expended 22.9 hours of attorney time and
10 paralegal time in the representation of [Plaintiff] in this matter through the entry of the
11 order of remand.” *Id.* at 2, 12. Additionally, if granted by the Court, this award would then
12 be further reduced by the \$4,450.00 that has already been received in attorney fees under
13 the EAJA. *Id.* at 2 (requesting that that the Court order counsel to reimburse Plaintiff in the
14 amount of \$4,450.00 for the EAJA fees).

15 Upon careful review of the documents submitted, and the applicable law, the Court
16 finds that counsel’s fee request is reasonable. Plaintiff’s counsel and his paralegal expended
17 22.9 hours on this case.⁴ *Id.* at 12. The *de facto* hourly rate is \$695.43,⁵ which falls on the
18 low end of the range that has been approved by courts in similar cases, including in this
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21 ³ As an initial matter, the Court notes that the contingency fee agreement between Plaintiff
22 and her counsel is within the statutory ceiling. *Compare* 42 U.S.C. § 406(b)(1)(A)) *with*
23 ECF No. 23-3 at ¶ 4.

24 ⁴ While every case is different, the amount of time spent on this case (19.5 hours by counsel
25 and 3.4 hours by counsel’s paralegal) are similar to the underlying cases approved in
26 *Crawford*. 586 F.3d at 1145 (The time spent in the three underlying cases was: 19.5 hours
27 by counsel and 4.5 hours by paralegal in *Crawford*; 17.45 hours by counsel and 4.7 hours
28 by paralegal in *Washington*; and 26.9 hours by counsel and 2.6 hours by paralegal in *Trejo*).

⁵ The *de facto* hourly rate is calculated by dividing the \$15,925.40 fee requested by 22.9
hours.

1 district. *See Crawford*, 586 F.3d at 1153 (approving *de facto* hourly rates of \$519, \$875,
2 and \$902 in 2009); *Kikkert v. Berryhill*, No. 14cv1725-MMA-JMA, 2018 WL 3617268, at
3 *2 (S.D. Cal. July 30, 2018) (approving *de facto* hourly rate of \$943.55); *Martinez v.*
4 *Berryhill*, No. 13-cv-272-JLS-JLB, 2017 WL 4700078, at *3 (S.D. Cal. Oct. 19, 2017)
5 (approving *de facto* hourly rate of \$886.52 and noting that “[w]hile such an hourly rate is
6 on the higher end charged for social security appeals, the Court nonetheless concludes that
7 the fee is reasonable in the present case”); *Richardson v. Colvin*, No. 15-cv-1456-MMA-
8 BLM, 2017 WL 1683062, at *2 (S.D. Cal. May 2, 2017) (approving *de facto* hourly rate
9 of \$770); *Likens v. Colvin*, No. 11-CV-0407-LAB-BGS, 2014 WL 6810657, at *2 (S.D.
10 Cal. Dec. 2, 2014) (approving *de facto* hourly rate of \$666.68); *Nash v. Colvin*, No. 12-cv-
11 2781-GPC-RBB, 2014 WL 5801353, at *2 (S.D. Cal. Nov. 7, 2014) (approving *de facto*
12 hourly rate of \$656); *Sproul v. Astrue*, No. 11-cv-1000-IEG-DHB, 2013 WL 394056, at *2
13 (S.D. Cal. Jan. 30, 2013) (approving *de facto* hourly rate of \$800).

14 Moreover, “the Court finds that Plaintiff’s counsel assumed a substantial risk of not
15 recovering attorney[] fees. At the time that Plaintiff and his counsel signed the contingency
16 fee agreement, Plaintiff had an unfavorable ruling from the ALJ and had just filed this
17 action for judicial review.” *Shultz*, 2020 U.S. Dist. LEXIS 147006, at *5–6; *see also*
18 *Moreno v. Berryhill*, No. 13-cv-8492-PLA, 2018 WL 3490777, at *3 (C.D. Cal. July 19,
19 2018) (“[c]ounsel assumed the risk of nonpayment inherent in a contingency agreement,
20 [and] and the fee does not exceed ... the 25 percent statutory cap[.]”).

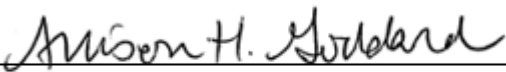
21 Plaintiff’s counsel has also submitted a billing statement detailing the work
22 performed to litigate this case in federal court. ECF No. 23-4. There is nothing in the record
23 to suggest substandard performance by counsel, or that counsel delayed this litigation in
24 order to amass more in potential fees. As a result of counsel’s work, Plaintiff received a
25 favorable decision and a significant award of past-due benefits. Thus, none of the factors
26 outlined in *Gisbrecht* favor reducing the fee award, and the Court concludes that counsel’s
27 request for attorney fees is reasonable and that it does not constitute a “windfall” to
28 Plaintiff’s counsel. *See Gisbrecht*, 535 U.S. at 808.

1 **IV. CONCLUSION**

2 For the reasons set forth above, the Court **GRANTS** Plaintiff’s counsel’s motion for
3 attorney fees pursuant to 42 U.S.C. §406(b). The Court **AWARDS** Brian C. Shapiro, Esq.
4 attorney fees in the amount of \$15,925.40.⁶ The Court **HEREBY ORDERS**
5 Brian C. Shapiro, Esq to reimburse Plaintiff Beatriz B. the amount of \$4,450.00 for EAJA
6 fees awarded by this Court.

7 **IT IS SO ORDERED.**

8 Dated: December 23, 2020

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11 Honorable Allison H. Goddard
12 United States Magistrate Judge
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28 ⁶ As such, the Court **DIRECTS** the Commissioner to certify the fee of \$15,925.40 payable
to Law Offices of Lawrence D. Rohlfing.