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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DESIREE D.,

Plaintiff,

v.

ANDREW SAUL, Commissioner of
Social Security,

Defendant.

Case No.: 3:19-cv-01522-RBM

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

[Doc. 24]

I. INTRODUCTION

On January 26, 2021, counsel for Desiree D. (“Plaintiff”) filed a motion for attorney fees pursuant to 42 U.S.C. § 406(b). (Doc. 24.) The Commissioner of Social Security (“Defendant”) filed a response on February 9, 2021. (Doc. 25.) For the reasons set forth below, Plaintiff’s motion is **GRANTED IN PART** and **DENIED IN PART**.

II. BACKGROUND

Plaintiff applied for disability insurance benefits pursuant to Title II to the Social Security Act. (Doc. 1 at ¶ 3.) After the administrative law judge (“ALJ”) denied Plaintiff’s claim for benefits and the Appeals Council denied Plaintiff’s request for review, Plaintiff appealed the ALJ decision to this Court. (*Id.* at ¶ 8.) After the Commissioner filed the administrative record, the undersigned issued a merits briefing schedule. (Docs. 13, 14,

1 16.) On February 25, 2020, Plaintiff filed a motion for summary judgment. (Doc. 18.)
2 Before Defendant's time to file an opposition brief expired, the parties filed a joint motion
3 to voluntarily remand the action for further administrative action pursuant to sentence four
4 of 42 U.S.C. § 405(g). (Doc. 19 at 2.) The Court granted the motion for remand and
5 entered judgment in favor of Plaintiff. (Doc. 20.) On remand, Plaintiff prevailed and the
6 Commissioner awarded Plaintiff past-due benefits. (Doc. 25-1 at 2.)

7 On September 28, 2020, pursuant to a joint motion, the Court awarded Plaintiff
8 \$2,600.00 in attorney fees and expenses under the Equal Access to Justice Act ("EAJA"),
9 28 U.S.C. § 2412(d). (Docs. 21, 23.) In the instant motion, Plaintiff's counsel seeks an
10 attorney fee award of \$16,600.00, which allegedly represents 25 percent of the \$66,482.00
11 in past-due benefits payable to Plaintiff. (Doc. 24 at 4, 10.) According to the motion, the
12 Commissioner has yet to pay the \$2,600.00 in EAJA fees, and Plaintiff's counsel requests
13 that the Court account for the unpaid EAJA fee of \$0.00 by ordering the Commissioner to
14 certify a net fee of \$16,600.00 to counsel. (Doc. 24 at 7, 9.)

15 Defendant's response disputes the amount of past-due benefits owed, contending the
16 amount owed as confirmed by the Social Security Administration ("SSA") is \$65,452.00.¹
17 (Doc. 25 at 2; Doc. 25-1 at 2, ¶¶ 2-3.) Given this figure, Defendant contends that any
18 contingency fee award would be capped at \$16,363.00. (Doc. 25 at 2.) Other than the
19 dispute as to the past-due benefits amount and the applicable 25 percent cap, Defendant
20 takes no position as to the reasonableness of the fee request. (*Id.* at 3.)

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23 ¹ To support Plaintiff's entitlement to \$66,482.00 in past-due benefits, Plaintiff's motion includes a
24 Declaration of Lawrence D. Rohlring which attaches a January 10, 2021 Notice of Award ("Notice").
25 (Doc. 24 at 10, ¶ 4; Doc 24-3 at 1.) However, the Notice did not state a total amount of past-due benefits
26 owed to Plaintiff, but instead indicated the monthly amounts owed from 2015 to 2021. (Doc 24-3 at 1.)
27 Rohlring's citation to \$66,482.00 appears to be an extrapolation of past-due benefits owed based upon the
28 monthly amounts indicated in the Notice. (*Id.*) Exhibit 1 to Defendant's response, the Declaration of
Ellinor R. Coder, states her office "contacted the SSA payment center responsible for calculating
[Plaintiff's] past-due benefits" and the SSA informed Defendant that the past-due benefit amount for the
period of May 2015 through November 2020 was \$65,452.00. (Doc. 25-1 at 2, ¶¶ 2-3.) The discrepancy
between the parties' cited amounts of past-due benefits appears to be the difference in one month of
payments in December 2020 amounting to \$1,030.50. (*See* Doc. 24-3 at 1.)

1 As to the lack of EAJA payment to date and Plaintiff's counsel's request for
2 certification of a "net fee," the Commissioner contends such request should be denied.
3 (Doc. 25 at 5-10.) At this time, "[t]he Commissioner has no information regarding whether
4 the EAJA payment was offset by the U.S. Treasury, or whether payment has simply been
5 delayed." (*Id.*) Defendant contends that counsel's request for a "net fee" is inconsistent
6 with applicable statutes as well as caselaw because it inappropriately shifts the burden of
7 refunding any excess EAJA fee award from Plaintiff's counsel to the Commissioner. (*Id.*)

8 **III. LEGAL STANDARD**

9 Under 42 U.S.C. § 406(b), "[w]henver a court renders a judgment favorable to a
10 [social security] claimant . . . the court may determine and allow as part of its judgment a
11 reasonable fee" for representation by claimant's counsel, which cannot exceed 25 percent
12 of the total of past-due benefits awarded to the claimant. 42 U.S.C. § 406(b)(1)(A). In
13 determining the reasonableness of the fee, the lodestar method (i.e., multiplying the
14 reasonable hourly rate by the number of hours reasonably expended on a case) does not
15 apply. *Gisbrecht v. Barnhart*, 535 U.S. 789, 802 (2002) (reasoning that lodestar applies to
16 "disputes over the amount of fees properly shifted to the loser in litigation" and not Section
17 406(b) which "authorizes fees payable from the successful party's recovery"); *see also*
18 *Crawford v. Astrue*, 586 F.3d 1142, 1148 (9th Cir. 2009) (en banc). Rather, the court must
19 "approach § 406(b) fee determinations by looking first to the contingent-fee agreement,
20 then testing it for reasonableness." *Crawford*, 586 F.3d at 1149 (citing *Gisbrecht*, 535 U.S.
21 at 808). In determining the fee's reasonableness, courts look to "the character of the
22 representation and the results the representative achieved." *Gisbrecht*, 535 U.S. at 808
23 (citation omitted). Fees may be subject to reduction "if the attorney provided substandard
24 representation or engaged in dilatory conduct in order to increase the accrued amount of
25 past-due benefits, or if the 'benefits are large in comparison to the amount of time counsel
26 spent on the case.'" *Crawford*, 586 F.3d at 1148 (citing *Gisbrecht*, 535 U.S. at 808).

27 Fee awards are available under both Section 406(b) and the EAJA. *See* 42 U.S.C. §
28 406(b); 28 U.S.C. § 2412(d). However, the attorney in receipt of both types of fees must

1 refund the smaller award to the Social Security claimant. *Gisbrecht*, 535 U.S. at 796. The
2 Savings Provision of the EAJA clarifies the issue, stating in relevant part:

3 Section 206(b) of the Social Security Act (42 U.S.C. 406(b)(1)) shall not prevent an
4 award of fees and other expenses under section 2412(d) of title 28, United States
5 Code. Section 206(b)(2) of the Social Security Act shall not apply with respect to
6 any such award but only if, where the claimant's attorney receives fees for the same
7 work under both section 206(b) of that Act and section 2412(d) of title 28, United
8 States Code, the claimant's attorney refunds to the claimant the amount of the
9 smaller fee.

10 Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 183 (1985). Pursuant to the Savings
11 Provision, the attorney cannot receive duplicate compensation for the "same work," and
12 must refund the smaller fee to the claimant. *Parrish v. Comm'r of Soc. Sec. Admin.*, 698
13 F.3d 1215, 1218 (9th Cir. 2012) (citations omitted).

14 **IV. DISCUSSION**

15 *i. Amount of Requested Fees under Section 406(b)*

16 As outlined above, the parties dispute the amount of past-due benefits that are subject
17 to a fee award under Section 406(b). *See supra* p. 2 n.1. Notably, Plaintiff's counsel did
18 not file a reply brief to rebut the evidence presented in Defendant's response, and the time
19 for doing so has expired. *See* CivLR 7.1(e)(3). Thus, Defendant's cited amount of past-
20 due benefits totaling \$65,452.00 is deemed undisputed. *See generally Terrell v. Contra*
21 *Costa Cnty.*, 232 F. App'x 626, n.2 (9th Cir. 2007) (unpublished) (a reply brief may address
22 the same set of facts supplied the opposing party's opposition but provides the full context
23 to the opposing party's selected recitation of the facts). Considering the foregoing and the
24 25 percent cap of past-due benefits, the requested fees at issue amounts to \$16,363.00. *See*
25 42 U.S.C. § 406(b)(1)(A).

26 *ii. Reasonableness of Fee Request*

27 As an initial matter, the representation agreement between Plaintiff and her counsel
28 contemplates a 25 percent contingency fee. (Doc. 24 at ¶ 2.) The agreement provides that
if judicial review of an adverse decision by the SSA is required, "the fee for successful

1 prosecution . . . is a separate 25% of the past due benefits awarded upon reversal of any
2 unfavorable ALJ decision for work before the court.” (Doc. 24-1 at ¶ 4.) This is consistent
3 with the statutory fee ceiling. *See* 42 U.S.C. § 406(b)(1)(A).

4 In reviewing the record, the Court finds the fee request reasonable. Although the
5 parties stipulated to voluntarily remand this action for further administrative proceedings,
6 this stipulation occurred *after* Plaintiff’s counsel worked up the case and filed a lengthy
7 merits brief citing various grounds to reverse the ALJ’s decision. (Docs. 18, 20.) There is
8 nothing in the record to suggest Plaintiff’s counsel provided substandard representation or
9 engaged in dilatory conduct. Indeed, the opposite is true. Plaintiff’s counsel secured a
10 sentence four remand for his client, which is a determination that the agency erred in some
11 request in reaching its decision to deny benefits. *Akopyan v. Barnhart*, 296 F.3d 852, 855
12 (9th Cir. 200). In sum, counsel’s efforts resulted in a prompt disposition of Plaintiff’s case
13 and a substantial award of past-due benefits. (Docs. 13, 19.)

14 Additionally, the Court concludes a \$16,363.00 fee award does not constitute a
15 windfall. *See Gisbrecht*, 535 U.S. at 808. Plaintiff’s counsel expended 10.95 hours in
16 attorney time and 3.4 hours in paralegal time to litigate this case through entry of the order
17 for remand. (Doc. 24 at ¶ 5; *see also* Doc. 24-4.) Defendant takes no position as to the
18 reasonableness of the fee request but alleges that this amounts to a *de facto* hourly rate of
19 \$1,494.34 (i.e., $\$16,363.00 \div 10.95 = \$1,494.34$ per hour). (Doc. 25 at 5.) However,
20 courts have approved similar fee awards. *See Crawford*, 586 F.3d at 1145, 1153 (awarding
21 \$21,000 in fees representing 19.5 hours of attorney time and 4.5 hours of paralegal time);
22 *see also Lonnie T. v. Saul*, 18-cv-456-AJB-JMA, Doc. 23 (S.D. Cal. Nov. 12, 2020) and
23 Doc. 19-1, ¶ 5 (S.D. Cal. Mar. 2, 2020) (approving \$27,658.40 fee award representing 17.7
24 hours of attorney and paralegal work); *Richardson v. Colvin*, 2017 WL 1683062, *2 (S.D.
25 Cal. May 2, 2017) (approving award representing \$770 hourly rate and citing cases
26 approving rates ranging from \$519 to \$902 per hour). Moreover, the fee request takes into
27 account counsel’s assumption of a “risk that no benefits would be awarded or that there
28 would be a long court or administrative delay in resolving the case.” *Crawford*, 586 F.3d

1 at 1152. In considering all of the foregoing factors, the Court finds a fee request of
2 \$16,363.00 is reasonable.

3 In sum, the Court grants the motion for fees under Section 406(b), but only to the
4 extent it seeks \$16,363.00 in fees.

5 *iii. Request for Certification of Net Fee*

6 Based on the papers, Plaintiff's counsel has yet to receive the \$2,600.00 EAJA fee
7 award to date. (Doc. 24 at 1.) Counsel seeks to account for the unpaid EAJA fee by
8 requesting that the Court order the Commissioner to certify a "net fee" to counsel in the
9 amount of the Section 406(b) award, which is now \$16,363.00. *See supra* p. 4. Defendant
10 opposes such request as inconsistent with applicable law in that it inappropriately shifts the
11 burden of refunding any excess EAJA fee from Plaintiff's counsel to the Commissioner.
12 (Doc. 25 at 5-10.)

13 Plaintiff's counsel cites to a Seventh Circuit opinion, *O'Donnell v. Saul*, for the
14 proposition that the netting approach is permissible. *See* 983 F.3d 950, 957 (7th Cir. 2020).
15 There, the court found the fee statutes "as written in no way preclude a court from awarding
16 an attorney 25% of a claimant's past-due benefits under § 406(b)(1) and requiring the
17 attorney to refund a prior EAJA award to his client. To the contrary, they vest the court
18 with discretion to order just that." *Id.* at 958. The Seventh Circuit specifically found "no
19 statutory requirement that the court order netting in any or all circumstances." *Id.* at 957.
20 The court affirmed the magistrate judge's order awarding Section 406(b) fees and requiring
21 plaintiff's counsel to refund the EAJA fees recovered by counsel to plaintiff. *Id.* at 958.
22 Although not binding on this Court, *O'Donnell* makes clear that the netting approach is not
23 mandatory and that the court has discretion to impose the refund obligation on the
24 claimant's attorney. This is consistent with Ninth Circuit precedent. *See Crawford*, 586
25 F.3d 1142, 1144 n.3 (stating "[a] district court may award fees under both the EAJA and
26 42 U.S.C. § 406(b), 'but the claimant's attorney must refund to the claimant the amount of
27 the smaller fee.'" (citing *Gisbrecht*, 535 U.S. at 796).

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1 Plaintiff's counsel also cites various district court opinions from within the Ninth
2 Circuit where the court awarded fees under Section 406(b) and the EAJA, directed the
3 Commissioner to subtract amounts previously awarded for the EAJA fee, and thereby
4 awarded a "net fee." (Doc. 24 at 8.) However, these cited cases do not address the unique
5 scenario presented here, that is, where the payment status of the EAJA fee award is unclear.
6 To be sure, the Commissioner alleges that he has no information whether the Treasury
7 offset the EAJA award or whether payment has simply been delayed. (Doc. 25 at 5-10.)
8 Considering the circumstances of this case, the netting approach is not appropriate.

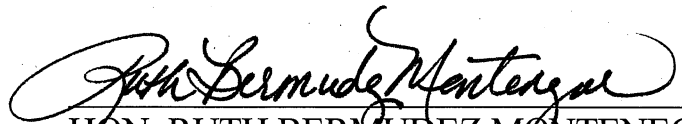
9 Therefore, the Court denies the motion's request for an order requiring the
10 Commissioner to certify a net fee of \$16,600.00 to Plaintiff's counsel.

11 **V. CONCLUSION**

12 For the reasons set forth above, the Court **GRANTS IN PART** and **DENIES IN**
13 **PART** Plaintiff's counsel's motion for attorney fees pursuant to 42 U.S.C. § 406(b). The
14 Court **AWARDS** the Law Offices of Lawrence D. Rohlring ("Rohlring") attorney fees in
15 the amount of \$16,363.00. To the extent Rohlring receives any EAJA fees, the Court
16 **ORDERS** Rohlring to reimburse Plaintiff with any such funds received.

17 **IT IS SO ORDERED.**

18 DATE: April 20, 2021

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20 HON. RUTH BERMUDEZ MONTENEGRO
21 UNITED STATES MAGISTRATE JUDGE
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