

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

DEBORAH DULATRE	)	CIVIL NO. 03-00653 DAE-KSC
	)	
Plaintiff,	)	REPORT OF SPECIAL MASTER
	)	RECOMMENDING THAT THE
vs.	)	PETITION FOR AWARD OF
	)	ATTORNEY FEE PURSUANT TO §
MICHAEL V. ASTRUE, Commissioner, Social Security Administration	)	206(b)(1) BE GRANTED
	)	
Defendant.	)	
	)	

REPORT OF SPECIAL MASTER RECOMMENDING THAT  
THE PETITION FOR AWARD OF ATTORNEY FEE  
PURSUANT TO § 206(b)(1) BE GRANTED

On November 12, 2009, Petitioner Carl Varady filed a Petition for Award of Attorney Fee Pursuant to § 206(b)(1) ("Petition").<sup>1</sup> On November 20, 2009, Defendant filed a Response. Mr. Varady filed a Supplemental Declaration on December 7, 2009, as

---

<sup>1</sup> Ordinarily, the Court would require that a statement of consultation be filed before it would consider the merits of the motion. Local Rule 54.3(b). However, this type of case is unique in that the award of attorneys' fees derives from a plaintiff's past-due social security benefits, not from the opposing party. As such, a consultation would be pointless. Even Defendant submits that it should not enter into stipulations/agreements regarding the payment of 406(b) fee requests. Rather than taking a position on the Petition, Defendant has provided guidance as to how the Court might assess the request.

directed by the Court.<sup>2</sup> Pursuant to Local Rule 7.2(d) of the Local Rules of Practice of the United States District Court for the District of Hawaii ("Local Rules"), the Court finds this matter suitable for disposition without a hearing.

After careful consideration of the Petition and the supporting memorandum, the Court HEREBY FINDS and RECOMMENDS that the district court GRANT the Petition for the reasons set forth below.

#### BACKGROUND

On December 1, 2003, Plaintiff Deborah Dulatre ("Plaintiff") commenced this action for review of the Commissioner's unfavorable decision. On September 1, 2004, the parties stipulated to remand the case and the Court ordered that the case be remanded to the agency for further proceedings. On September 8, 2004, the Court entered judgment.

On November 29, 2004, Plaintiff filed an

---

<sup>2</sup> Although the Declaration was filed shortly after the noon deadline imposed by the Court, the Court considers it timely filed based on the explanation offered by Mr. Varady.

application for attorneys' fees under the Equal Access to Justice Act ("EAJA"). On February 10, 2005, this Court held a settlement conference regarding the request for fees, and the parties settled in the amount of \$5,000.00.

On remand, the Administrative Law Judge issued a favorable decision, awarding benefits from May 2000, with past-due benefits totaling \$56,479.00. Pet., Ex. A.

#### DISCUSSION

Mr. Varady petitions the Court for an award of attorneys' fees in the amount of \$14,119.75, which represents 25% of the award of past-due benefits, pursuant to 42 U.S.C. § 406(b), for services rendered before this Court, offset by the previous \$5,000.00 award of attorneys' fees under the EAJA.

Section 406(b)(1)(A) of Title 42 of the U.S. Code provides:

Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such

representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the 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.

42 U.S.C. § 406(b)(1)(A). Section "406(b) calls for court review of [contingent-fee] arrangements as an independent check, to assure that they yield reasonable results in particular cases." Gisbrecht v. Barnhart, 535 U.S. 789, 807 (2002). An agreement that exceeds the "25 percent of the total of the past-due benefits" limitation is unenforceable. Id. The attorney for the successful party is required to show that the requested fee is reasonable for the services rendered. Id. Factors to be considered in determining reasonableness include the attorney's risk of loss, the character and result of representation, whether delays are attributable to the attorney, and the attorney's hours

spent representing the client coupled with the attorney's normal hourly billing rate in the context of non-contingent cases. Id. at 805, 808.

In the present case, the Court may authorize an award of fees under § 406(b) because the district court remanded the case for further proceedings and Plaintiff received past-due benefits as a result. See, e.g., McGraw v. Barnhart, 450 F.3d 493, 503 (10th Cir. 2006); Smith v. Bowen, 815 F.2d 1152, 1155 (7th Cir. 1987) (en banc); Conner v. Gardner, 381 F.2d 497, 500 (4th Cir. 1967). As such, the Court's analysis will focus on the reasonableness of the contingent-fee agreement with necessary adjustments made to the "attorney's recovery based on the character of the representation and the results the representative achieved." Gisbrecht, 535 U.S. at 808.

A. Contingent-Fee Agreement

On November 18, 2003, Plaintiff entered into a contingent-fee agreement with Mr. Varady, which provides in pertinent part that representation would not cost Plaintiff more than 25% of the past due

benefits. Pet., Ex. B. The plain language of this agreement conforms to the requirement articulated in § 406(b)(1)(A) that the fees collected by Mr. Varady not exceed 25% of the past-due benefits awarded to Plaintiff. Accordingly, on its face, the agreement is reasonable. The Court must nevertheless conduct an inquiry into whether the requested fees are reasonable.

B. Reasonableness of the Fee Award

The administrative decision on remand resulted in an award of \$56,479.00 in past-due benefits. Mr. Varady requests \$14,119.75 for his services in this action, to be offset by the \$5,000.00 in EAJA fees previously awarded.

As an initial matter, the Court notes that fees awarded under both the EAJA and 42 U.S.C. § 406(b) do not constitute double recovery. Russell v. Sullivan, 930 F.2d 1443, 1446 (9th Cir. 1991), abrogated on other grounds by Sorenson v. Mink, 239 F.3d 1140 (9th Cir. 2001). This is because "[t]he award under § 406(b) of the Social Security Act merely allows the claimant's attorney to collect his or her fee out of the

claimant's past-due disability benefits, while the EAJA award is paid by the government to the claimant to defray the cost of legal services." Id. (citation omitted). Consequently, dual fee awards are proper as long as Mr. Varady gives the smaller of the two awards to Plaintiff to compensate her for her litigation costs. Id.; Gisbrecht, 535 U.S. at 796 ("[A]n EAJA award offsets an award under Section 406(b), so that the [amount of the total past-due benefits the claimant actually receives] will be increased by the ... EAJA award up to the point the claimant receives 100 percent of the past-due benefits." (alteration in original)). In the present case, Mr. Varady properly seeks to offset the § 406(b) fee request with the EAJA award.

The Court shall now assess the reasonableness factors to determine whether an award of \$14,119.75 is proper.

1. Attorney's Risk of Loss

Mr. Varady assumed the risk of non-payment by taking on this contingency case. As a general principle, social security claimants "prevail only

about thirty-five percent of the time." Davis v. Astrue, 533 F. Supp. 2d 1212, 1219 (M.D. Fla. 2007) (citing Social Security Advisory Board, Disability Decision Making: Data and Materials (January 2001), at 86, available at <<http://www.ssab.gov/Publications/Disability/chartbook B-pdf>>); Faircloth v. Barnhart, 398 F. Supp. 2d 1169, 1173 (D.N.M. 2005) ("A report from the Social Security Advisory Board reveals that a mere 35% of claimants who file at the United States District Court level will obtain benefits."). Although it does not appear, and Mr. Varady does not argue, that this case was particularly complicated or unwinnable, Mr. Varady nevertheless assumed some risk of loss by accepting the case on a contingency basis.

## 2. Character and Result of the Representation

It appears, based on the remand and the award of past-due benefits, that Mr. Varady more than adequately represented Plaintiff and procured a favorable outcome. But for Mr. Varady's representation, Plaintiff might not have ultimately secured the \$56,479.00 in past-due benefits awarded on



remand. In light of Plaintiff's successful outcome, there is no basis for reducing the fee requested herein for inadequate representation. But see Gisbrecht, 535 U.S. at 808 (citing Lewis v. Sec'y of Health and Human Servs., 707 F.2d 246, 249-50 (6th Cir. 1983) (instructing reduced fee when representation is substandard)).

3. Delays Attributable to the Attorney

Delays caused by counsel warrant a reduction in fees "so that the attorney will not profit from the accumulation of benefits during the pendency of the case in court." Id. There is an absence of evidence to suggest that Mr. Varady has contributed to or caused any delays that might have occurred in this case. Therefore, the Court declines to recommend any reductions to the fee requested based on delay.

4. Hours Expended and Attorney's Normal Billing Rate

While the Court acknowledges that Gisbrecht rejected the lodestar method of calculating attorneys' fees in the context of § 406(b), the Gisbrecht Court specifically instructed that in order to aid courts in

assessing the reasonableness of the fee yielded by the fee agreement, "the court may require the claimant's attorney to submit . . . a record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases." Id. Mr. Varady has provided such information for the Court's consideration.

Mr. Varady represents that the \$5,000.00 EAJA fee award covered 65.40 hours of legal service. When divided by the hours reasonably expended, the amount requested by way of this Petition (\$14,119.75) results in an effective hourly rate of \$215.90. This falls within the range of effective hourly rates awarded by other courts and the Court cannot say that such an award would result in a windfall to Mr. Varady. See, e.g., Hearn v. Barnhart, 262 F. Supp. 2d 1033 (N.D. Cal. 2003) (approving a de facto hourly rate of \$450); Yarnevic v. Apfel, 359 F. Supp. 2d 1363, 1365-66 (N.D. Ga. 2005) (approving effective hourly rate of \$643); Claypool v. Barnhart, 294 F. Supp. 2d 829, 833-34 (S.D. W. Va. 2003) (approving effective hourly rate of

\$1,433); Brown v. Barnhart, 270 F. Supp. 2d 769, 772-73 (W.D. Va. 2003) (approving effective hourly rate of \$977); Martin v. Barnhart, 225 F. Supp. 2d 704 (W.D. Va. 2002) (approving effective rate of \$605); Coppett v. Barnhart, 242 F. Supp. 2d 1380, 1385 (S.D. Ga. 2002) (approving effective hourly rate of \$350.49).

Mr. Varady is regularly awarded an hourly rate of \$275.00 in this district court. If the fees were calculated using a lodestar approach, this would result in an award of approximately \$17,985.00.<sup>3</sup> However, this would not take into account the risk of loss inherent in a contingent-fee agreement. "Congress has indicated the permissibility, within limits, of rewarding attorneys for assuming the risk of going uncompensated for representing Social Security claimants." Hearn, 262 F. Supp. 2d at 1037 (quoting Dodson v. Comm'r of

---

<sup>3</sup> This amount would be lower if the Court calculated fees according to a Hensley lodestar analysis because it would take into account the lower hourly rates to be applied to the hours expended by other attorneys and/or paralegals who also worked on this case. However, for the purposes of this Report, it is unnecessary to go through this full analysis to come up with an actual total.

Soc. Sec., 2002 WL 31927589, \*2 (W.D. Va. 2002)). In fact, as demonstrated by the cases cited above, courts regularly approve high effective rates resulting from contingency agreements that exceed non-contingent rates, and in some instances significantly so. To compensate for the attorney's "risk of loss, Social Security attorneys need to charge a winning client 2.7 times the fee the attorney would have charged on a non-contingent basis (which the attorney is prohibited from doing under Title 42, U.S.C. § 406(b)(2))."

Davis, 533 F. Supp. 2d at 1219. Here, that would result in an hourly rate of \$742.50. An effective hourly rate of \$215.90 is well below both the multiplied non-contingent rate and Mr. Varady's currently awarded hourly rate, and justified in light of the risk of loss assumed by Mr. Varady as well as his effective representation.

##### 5. Total Benefits

Finally, the Court notes that an additional factor militates in favor of the requested award of fees. Plaintiff will apparently receive an additional

\$129,168.00 in benefits from November 2008 until she reaches age 67, which means that Mr. Varady's representation will result in a lifetime benefit to Plaintiff of \$185,647.00 plus Medicare and full retirement benefits. Hearn, 262 F. Supp. 2d at 1037 (taking into consideration the fact that the value of the case to the plaintiff was substantially more than the past-due benefits upon which the fee request was based because he would receive, in addition to the past-due benefits, ongoing Title II benefits until he died, reached retirement age, or became no longer disabled).

Based on these and the foregoing factors, the Court finds that the award requested is manifestly reasonable.

C. Total Award

The Court finds and recommends that Mr. Varady be awarded \$14,119.75. From this award, he shall pay Plaintiff \$5,000.00 for the EAJA fees previously awarded, and end up with a net fee award of \$9,119.75.

CONCLUSION

In accordance with the foregoing, the Court HEREBY FINDS and RECOMMENDS that the district court GRANT Mr. Varady's Petition for Attorney Fee Pursuant to § 206(b)(1), filed November 12, 2009, and 1) award Mr. Varady \$14,119.75 and 2) order Mr. Vardy to reimburse Plaintiff \$5,000.00 for the EAJA fees previously awarded.

IT IS SO FOUND AND RECOMMENDED.

Dated: Honolulu, Hawaii, December 8, 2009.



  
\_\_\_\_\_  
Kevin S.C. Chang  
United States Magistrate Judge

CV NO. 03-00653 DAE-KSC; DULATRE V. ASTRUE; REPORT OF SPECIAL MASTER RECOMMENDING THAT THE PETITION FOR AWARD OF ATTORNEY FEE PURSUANT TO § 206(b)(1) BE GRANTED