

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**WALTER D. FILIPKOWSKI, JR.,**

**Plaintiff,**

**v.**

**05-CV-01449  
(GLS/RFT)**

**JO ANNE B. BARNHART,  
Commissioner of Social Security,**

**Defendant.**

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**APPEARANCES:**

**OF COUNSEL:**

**FOR THE PLAINTIFF:**

Binder, Binder Law Firm  
215 Park Avenue South,  
6<sup>th</sup> Floor  
New York, NY 10003

CHARLES E. BINDER, ESQ.

**FOR THE DEFENDANT:**

ANDREW T. BAXTER  
United States Attorney  
PO Box 7198  
100 South Clinton Street  
Syracuse, NY 13261-7198

WILLIAM H. PEASE, ESQ.  
Assistant U.S. Attorney

26 Federal Plaza  
Room 3904  
New York, NY 10278

MARIA P. FRAGASSI SANTANGELO, ESQ.  
Assistant U.S. Attorney

**Gary L. Sharpe  
U.S. District Judge**

## ORDER

Currently before the court is plaintiff's counsel's motion for attorney's fees (Dkt. No. 13) pursuant to 42 U.S.C. § 406(b). Having reviewed counsel's brief, defendant's response and the record on the matter, the court now grants the motion.

### **Background**

The undisputed relevant facts indicate that claimant Walter D. Filipkowski, Jr. filed an application for Social Security disability benefits. (See Dkt. No. 13-4, Affirmation of Charles E. Binder at ¶ 1.) Filipkowski's claim was initially denied so he sought judicial review of the Administrative Law Judge's ("ALJ") decision. (*Id.* at ¶¶ 1-3.) After this court remanded the case, Filipkowski ultimately received a favorable decision by the ALJ. (*Id.* at ¶¶ 4-6.) Counsel for Filipkowski now has filed a motion for attorney's fees in the amount of \$24,714.57 pursuant to 42 U.S.C. § 406(b). The government opposes the motion arguing the amount requested represents a windfall to plaintiff's counsel.

### **Discussion**

Section 406(b) provides:

Whenever a court renders a judgment favorable to a claimant .

. . . 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.

42 U.S.C. § 406(b)(1)(A). “Because benefits amounts figuring in the fee calculation are limited to those past due, attorneys may not gain additional fees based on a claimant’s continuing entitlement to benefits.” *Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002).<sup>1</sup> The United States Supreme Court has rejected the “lodestar” method, i.e., the number of hours expended times an hourly rate, for calculating attorney’s fees in cases where the parties have entered into a contingent fee arrangement. *Id.* at 799-808.

The Court indicates:

§ 406(b) does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases. Congress has provided one boundary line: Agreements are unenforceable to the extent that they provide for fees exceeding 25 percent of the past-due benefits. . . . Within the 25 percent boundary, as petitioners in this case acknowledge, the attorney for the successful claimant must show that the fee sought is reasonable for the services

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<sup>1</sup>Fee awards may be made under both the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d)(1)(A) and § 406(b), “but the claimant’s attorney must refund to the claimant the amount of the smaller fee” award. *Gisbrecht*, 535 U.S. at 796. (citations, internal quotations and modifications omitted).

rendered.

*Id.* at 807. (footnotes omitted). In making a determination of attorneys' fees in social security cases, courts consider the following factors derived from *Gisbrecht*: (1) "whether the fee requested is out of line with the character of the representation and the results the representation achieved;" (2) "whether the attorney unreasonably delayed [] proceedings;" and (3) "whether the benefits awarded are large in comparison to the amount of time counsel spent on the case," i.e, whether the amount constitutes a "windfall." See *Joslyn v. Barnhart*, 389 F.Supp.2d 454, 456 (W.D.N.Y. 2005); *Blizzard v. Astrue*, 496 F.Supp.2d 320, 322 (S.D.N.Y. 2007) (quotation marks omitted). On the "windfall" question, courts consider: (1) whether the attorney's efforts were successful, (2) whether there is evidence of the effort expended, and (3) whether the case was handled efficiently by the attorney due to his experience in the area. See *Joslyn*, 389 F.Supp.2d at 456-57; *Blizzard*, 496 F.Supp.2d at 323.

With these precepts in mind, the court determines the fee requested is not out of line with respect to the representation and the results obtained. Here, it is undisputed that the attorney's firm has worked on this case since December 1998, handling three administrative hearings, two appeals, and

a request for judicial review. (See Dkt. No. 13-4, Affirmation of Charles E. Binder at ¶ 8.) Nothing in the record suggests that the briefing was ineffective, and it certainly was successful. In addition, nothing suggests that counsel unreasonably delayed proceedings. Keeping in mind that counsel for plaintiff was successful, that there is evidence of the effort expended, and that counsel has extensive experience in social security cases, *Id.* at ¶¶ 9-10, the court also determines the fee requested is reasonable.

The government opposes counsel's fee request arguing that the amount requested appears to be a windfall. The government points out that the record reflects counsel expended 33.25 hours and that, considering the requested amount of \$24,714.57, the hourly rate would be \$743.30 per hour. Without supporting authority, the government contends this amount constitutes a "windfall." However, the problem with the government's argument is that it is based on the use of the traditional "lodestar" analysis and the United States Supreme Court rejected that analysis for social security cases. This court shares the views of our sister New York district courts in *Joslyn* (approving a rate of \$891.61 per hour) and *Blizzard* (approving a rate of \$705 per hour), and agrees that, *in social*

*security cases*, “[d]eference should be given . . . to the ‘freely negotiated expression both of a claimant’s willingness to pay more than a particular hourly rate . . . and of an attorney’s willingness to take the case despite the risk of nonpayment.’” *Josylin*, 389 F.Supp.2d at 456 (quoting *Wells v. Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990)); *Blizzard*, 496 F.Supp.2d at 324-25. In fact, as the *Blizzard* court noted: “[i]n the absence of a fixed-fee agreement, payment for an attorney in a social security case is inevitably uncertain, and any reasonable fee award must take account of that risk.” *Blizzard*, 496 F.Supp.2d at 325. (quoting *Wells*, 907 F.2d at 371). “Thus, a reduction in the agreed-upon contingency amount should not be made lightly.” *Id.* Furthermore, the request in this case is less than 25 percent of the plaintiff’s past due benefits and there is no evidence of fraud in making the agreement.

**WHEREFORE**, for the foregoing reasons, it is hereby

**ORDERED**, that the motion for attorney’s fees pursuant to 42 U.S.C. § 406(b) (Dkt. No. 13) is **GRANTED**; and it is further

**ORDERED**, that the Clerk of the Court provide a copy of this Order to the parties.

**IT IS SO ORDERED.**

Dated: August 6, 2009

Albany, New York

  
United States District Court Judge