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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

ZAINAB HUSSEIN ABED,)
)
 Plaintiff,) 03:09-cv-00160-HU
)
 vs.) OPINION AND
) ORDER
)
 MICHAEL J. ASTRUE,)
 Commissioner of Social Security,)
)
 Defendant.)

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1 HUBEL, Magistrate Judge:

2 **Opinion and Order**

3 Currently before the court is plaintiff Zainab Hussein Abed's
4 ("Abed") motion (doc. #33) for fees pursuant to the Equal Access to
5 Justice Act ("EAJA"), 28 U.S.C. § 2412, and Abed's motion (doc.
6 #35) for approval of attorneys fees pursuant to 42 U.S.C. § 406(b)
7 ("§ 406(b)"). The parties stipulate and agree that Abed's counsel
8 (hereinafter "Counsel") should be awarded \$7,499.99 in EAJA fees.
9 As to § 406(b), Counsel moves the court for approval of fees in the
10 amount of \$10,131.50,¹ or twenty-five percent of Abed's past-due
11 benefits.² Based on the factors established in *Gisbrecht v.*
12 *Barnhart*, 535 U.S. 789, 122 S.Ct. 1817 (2002), and explained in
13 *Crawford v. Astrue*, 586 F.3d 1142 (9th Cir. 2009) (en banc), Abed's
14 motions are GRANTED. Counsel is awarded \$9,389.00 in § 406(b) fees
15 from which \$7,499.99 in EAJA fees must be refunded to Abed.

16 **Procedural Background**

17 Abed protectively filed applications for Supplementary
18 Security Income ("SSI") benefits under Title XVI of the Social
19 Security Act on July 29, 2004. (Compl. ¶ 4.) Abed's claims for
20 SSI benefits were denied initially and upon reconsideration.

21
22 ¹ As the Commissioner correctly noted, Counsel inadvertently
23 specified the amount of § 406(b) fees being sought as both
24 \$10,131.50 and \$10,837. (Def.'s Resp. (doc. #39) at 2 n.1; Doc.
25 #35.) However, Counsel's briefing makes clear that the figure she
26 is seeking is \$10,131.50. (See Mem. Supp. Pl.'s Mot. (doc. #36) at
1, 2.) The mistake was in the total, of back benefits and was high
by \$2,970 (\$40,526-37,556). One fourth of the back benefit error is
\$742.50 in fees which is the amount sought that is not awarded.

27 ² Under 42 U.S.C. § 406(b), the court may award a reasonable
28 fee no more than twenty-five percent of the claimant's retroactive
award.

1 (Compl. ¶ 5.) Abed was granted a hearing before an Administrative
2 Law Judge ("ALJ"), who denied Abed's claims on December 28, 2007.
3 (Compl. ¶ 5.) Abed requested a review of the ALJ's decision and,
4 on January 16, 2009, the Appeals Council denied review. As a
5 result, the ALJ's decision became the final decision of the
6 Commissioner and Abed's administrative remedies were fully
7 exhausted. (Compl. ¶ 5.)

8 On February 9, 2009, Abed sought review in this court,
9 claiming that the Commissioner's decision was not supported by
10 substantial evidence and was based upon errors of law. (Compl. ¶
11 6.) On December 2, 2009, Counsel filed her opening brief wherein
12 she claimed that the ALJ improperly rejected opinions of treating
13 doctors; the ALJ made legally inadequate severity findings; the ALJ
14 erred at step 3 in the 5-step sequential analysis; and the ALJ's
15 residual functional capacity("RFC") was incomplete. (Pl.'s Opening
16 Br. (doc. #22) at 12-17.) On February 3, 2010, the Commissioner
17 filed a brief opposing Counsel's position regarding the
18 aforementioned alleged errors by the ALJ. (Def.'s Br. (doc. #26)
19 at 4-20.) In response, Counsel filed a five page reply brief on
20 February 24, 2010. (Pl.'s Reply (doc. #30) at 1-5.)

21 This court filed an Opinion and Order, which reversed the
22 Commissioner's decision and remanded the case for an award of
23 benefits. (Doc. #31.) Judgment for Abed was entered on August 26,
24 2010. (Doc. #32.) Abed's motions, which are currently before the
25 court, for EAJA and § 406(b) fees were filed on November 9, 2010,
26 and February 28, 2011, respectively. (Doc. #33; Doc. #35.)

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28 ///

1 **Legal Standard**

2 **I. EAJA Fees**

3 The EAJA effectively increases the portion of past-due
4 benefits to a successful Social Security claimant. *Gisbrecht*, 535
5 U.S. at 796. EAJA fees are determined by the time expended and the
6 attorney's hourly rate, capped in most cases at \$125 per hour. *Id.*
7 EAJA fees are awarded against and paid by the government if Social
8 Security claimants prevail against the United States in court and
9 the government's position in the litigation was not substantially
10 justified. *Id.* Fee awards may be made under both EAJA and §
11 406(b), "but the claimant's attorney must refund to the claimant
12 the amount of the smaller fee." *Id.* (internal citation and
13 quotation marks omitted).

14 **II. Section 406(b) Fees**

15 **A. The Statute**

16 In Social Security cases, attorney fee awards are governed by
17 § 406(b), which provides in pertinent part:

18 (1)(A) Whenever a court renders a judgment favorable to
19 a claimant under this subchapter who was represented
20 before the court by an attorney, the court may determine
21 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[.]

22 42 U.S.C. § 406(b)(1)(A).

23 **B. Controlling Precedent**

24 *Gisbrecht v. Barnhart*, 535 U.S. 789, 792, 122 S.Ct. 1817
25 (2002) concerned fees awarded under § 406(b). Specifically, the
26 Supreme Court addressed the question, which sharply divided the
27 Federal Courts of Appeals: "What is the appropriate starting point
28

1 for judicial determinations of a reasonable fee [under § 406(b),]
2 for representation before the court?" *Id.*

3 For the purposes of the opinion, the Supreme Court
4 consolidated three separate actions where the District Court, based
5 on Circuit precedent, declined to give effect to the attorney-
6 client fee arrangement. *Id.* at 797. Instead, the District Court
7 employed a lodestar method whereby the number of hours reasonably
8 devoted to each case was multiplied by a reasonable hourly fee.
9 *Id.* at 797-98. The Court concluded that § 406(b) requires a court
10 to review the contingent-fee arrangement, to assure it yields
11 reasonable results. *Id.* at 807. Congress provided one boundary
12 line, *e.g.*, contingent-fee agreements are unenforceable if they
13 exceed 25 percent of past-due benefits. *Id.* But, within that 25
14 percent boundary, "*the attorney for the successful claimant must*
15 *show that the fee sought is reasonable for the services rendered.*"
16 *Id.* (emphasis added).

17 Courts are instructed to first test the contingent-fee
18 agreement for reasonableness. *Id.* at 808. An award of § 406(b)
19 fees can be appropriately reduced based on (1) the character of the
20 representation; (2) the results achieved; (3) when representation
21 is substandard; (4) if the attorney is responsible for delay; and
22 (5) if the benefits are large in comparison to the amount of time
23 counsel spent on the case. *Id.* The claimant's attorney may be
24 required to submit a record of hours spent representing the
25 claimant and a statement of the lawyer's normal hourly billing
26 charge for noncontingent-fee cases in order to aid the court's
27 assessment of reasonableness. *Id.* Finally, the *Gisbrecht* court
28 stated that, "[j]udges of our district courts are accustomed to

1 making reasonableness determinations in a wide variety of contexts,
2 and their assessments in such matters, in the event of an appeal,
3 ordinarily qualify for highly respectful review." *Id.*

4 In *Crawford v. Astrue*, 586 F.3d 1142 (9th Cir. 2009) (en
5 banc), the Ninth Circuit reviewed three consolidated appeals and
6 determined that, in each case, the district court failed to comply
7 with *Gisbrecht's* mandate. *Crawford*, 586 F.3d at 1144. In each of
8 the three cases, the claimant signed a written contingent fee
9 agreement whereby the attorney would be paid 25 percent of any
10 past-due benefits awarded. The *Crawford* court noted that
11 contingency-fee agreements, which provide for fees of 25 percent of
12 past-due benefits, are the norm for Social Security practitioners.
13 *Id.* at 1147. However, since the Social Security Administration
14 ("SSA") "has no direct interest in how much of the award goes to
15 counsel and how much to the disabled person, the district court has
16 an affirmative duty to assure the reasonableness of the fee is
17 established." *Id.* at 1149. Performance of that duty begins by
18 asking whether the amount of the fee agreement need be reduced.
19 *Id.*

20 The district courts' decisions, in each of the consolidated
21 cases, were overruled by the Ninth Circuit because they relied "on
22 lodestar calculations and reject[ed] the primacy of lawful
23 attorney-client fee agreements." *Id.* at 1150 (citing *Gisbrecht*,
24 535 U.S. at 793, 122 S.Ct. 1817). Specifically, the district
25 courts erroneously began with a lodestar calculation by comparing
26 the lodestar fee to the requested fee award. *Id.* The attorneys
27 requested fees representing 13.94%, 15.12%, and 16.95% of past-due
28 benefits. *Id.* at 1145-47. The *Crawford* opinion noted that in

1 these stipulated remand cases, the plaintiff's attorney's
2 voluntarily reduced their fee request from the contingency fee
3 agreement's 25%. See *id.* at 1150 n.8 ("The attorneys . . .
4 themselves suggested that the full 25% fee provided for by their
5 fee agreements would be unreasonable.") If the attorneys had
6 received the 25 percent fee provided for by their agreements, they
7 would have been awarded fees ranging from \$19,010.25 to \$43,055.75.
8 *Id.* at 1150. The district courts, however, reduced the contracted
9 fees by between 53.7% and 73.30% and ultimately awarded fees that
10 represented 6.68% to 11.61% of the past-due benefits. *Id.* The
11 Ninth Circuit went on to state that:

12 In *Crawford*, for example, the district court awarded
13 6.68% of the past-due benefits. From the lodestar point
14 of view, this was a premium of 40% over the lodestar. .
15 . . But from the contingent-fee point of view, 6.68% of
16 past-due benefits was over 73% less than the contracted
17 fee and over 60% less than the discounted fee the
18 attorney requested. Had the district court started with
19 the contingent-fee agreement, ending with a 6.68% fee
20 would be a striking reduction from the parties' fee
21 agreement. This difference underscores the practical
22 importance of starting with the contingent-fee agreement
23 and not just viewing it as an enhancement.

24 *Id.* at 1150-51. In *Washington* and *Trejo*, the district court
25 reduced the already discounted fees claimed by the attorneys by 23%
26 and 47%, respectively. *Id.* at 1151 n.9.

27 Importantly, the Ninth Circuit also noted that *Gisbrecht* "did
28 not provide a definitive list of factors that should be considered
in determining whether a fee is reasonable or how those factors
should be weighed[.]" *Id.* at 1151. They went on to cite *Mudd v.*
Barnhart, 418 F.3d 424(4th Cir. 2005), for the proposition that:
"The [Supreme] Court did not provide a definite list of factors to
be considered because it recognized that the judges of our district

1 are accustomed to making reasonableness determinations in a wide
2 variety of contexts." *Id.* (citing *Mudd*, 418 F.3d at 428).

3 **Discussion**

4 **I. EAJA Fees**

5 The parties, though their respective counsel, stipulate and
6 agree that EAJA fees in the amount of \$7,499.99 should be awarded
7 to Counsel under 28 U.S.C. § 2412. Counsel has represented to the
8 court that 46.1 hours have been spent on Abed's representation
9 before the district court. (Mem. Supp. Pl.'s Mot. (doc. #36) at 7;
10 Mem. Supp. Mot. EAJA Fees (doc. #34) at 2-3.) Counsel has
11 prevailed against the United States in court and the Government's
12 position in the litigation was not substantially justified.
13 Accordingly, Counsel should be awarded \$7,499.99 in EAJA fees to be
14 paid by the government in addition to back benefits. Pursuant to
15 *Astrue v. Ratliff*, 130 S.Ct. 2521 (2010), the award should be made
16 payable to Counsel if the Commissioner confirms that Abed owes no
17 debt to the government through the federal treasury offset program.

18 **II. The Fee Arrangement**

19 Abed and Counsel entered into a contingency-fee agreement
20 which reads:

21 I and my attorneys agree that if it is necessary to
22 appeal this case to federal court and if such action is
23 taken, the attorneys' fee for representation before the
24 court shall be the greater of the following:

- 25 1. 25% (twenty-five percent) of the past-due
26 benefits resulting from my claim or
27 claims (which I understand may exceed
28 \$400.00 per hour of attorney work), or
2. Such amount as my attorneys are able to
obtain pursuant to the Equal Access to
Justice Act (EAJA). Fees paid pursuant
to the EAJA are paid by the U.S.

1 government or agency thereof - not out of
2 the claimant's past-due benefits.

3 (Mem. Supp. Mot. EAJA Fees (doc. #34) at 9-10.)

4 By its terms, the contingency fee agreement is within the
5 statutory limits. The court will examine whether the fee sought
6 exceeds § 406(b)'s 25 percent ceiling, which requires evidence of
7 total past-due benefits. *Dunnigan v. Astrue*, No CV 07-1645-AC,
8 2009 WL 6067058, at *9 (D. Or. Dec. 23, 2009). Here, Counsel has
9 stated that Abed will receive approximately \$40,526 in retroactive
10 benefits. (Mem. Supp. Pl.'s Mot. (doc. #36) at 2.) As the
11 Commissioner points out, however, Counsel has miscalculated the
12 amount she is due under § 406(b). (Def.'s Resp. (doc. #39) at 2.)
13 The regulations define "past-due benefits" under the SSI program
14 as:

15 the total amount of payments under title XVI of the Act,
16 the [SSI] program, including any Federally administered
17 State payments, that has accumulated to you and your
spouse because of a favorable administrative or judicial
determination or decision, *up to but not including the*
month the determination or decision is made.

18 20 C.F.R. § 416.1503 (2010) (emphasis added).

19 Here, the court issued its Opinion and Order in August 2010.
20 Thus, for the purposes of § 406(b) fees, past-due benefits must be
21 calculated only through July 2010, which was the month prior to
22 this court's decision. Based on Abed's Notice of Award (doc. #36
23 Ex. 2), Abed accumulated back payments totaling \$28,052.00 from
24 August 2004 through March 2009. Over the ensuing 16-month period,
25 from April 2009, through July 2010, Abed accumulated an additional
26 \$9,504.00 in back payments, based on a monthly payment of \$594.00.
27 Thus, for the purposes of determining § 406(b) fees, the amount of
28 past-due benefits totals \$37,556.00 (\$28,052.00+\$9,504.00). Twenty-

1 five percent of that amount is \$9,389.00. Counsel's § 406(b)
2 request must therefore be reduced by \$742.50 to avoid exceeding 25%
3 of past due benefits.

4 **III. The Reasonableness of the § 406(b) Fee**

5 I turn now to my primary inquiry, the reasonableness of the
6 fee sought, e.g., \$9,389.00 in § 406(b), or 25 percent of \$37,556
7 in past-due benefits. After applying the *Gisbrecht* factors, as
8 interpreted by *Crawford*, I find that Counsel has demonstrated that
9 a 25 percent fee is reasonable for this case.

10 **A. Character of Representation**

11 Substandard performance by a legal representative warrants a
12 reduction in a § 406(b) fee award, as *Gisbrecht* and *Crawford* make
13 clear. See *Gisbrecht*, 535 U.S. at 808; *Crawford*, 586 F.3d at 1151.
14 Examples of substandard representation include poor preparation for
15 hearings, failing to meet briefing deadlines, submitting documents
16 to the court that are void of legal citations, and overbilling
17 one's clients. *Dunnigan*, 2009 WL 6067058, at *11 (citing *Lewis v.*
18 *Sec'y of Health and Human Servs.*, 707 F.2d 246, 250-51 (6th Cir.
19 1983)). The performance of Counsel in this case was not
20 substandard. Counsel's briefing on the merits was useful, was of
21 good quality, and it persuaded the court to award Abed benefits
22 despite denials by Disability Determination Services, an ALJ, and
23 the Appeals Council. Accordingly, no reduction is warranted under
24 this factor.

25 **B. The Results Achieved**

26 Counsel has won benefits for her client in this case. "The
27 circumstances of the case in which the result is achieved, however,
28 are important to the court's assessment of this factor. The

1 inquiry focuses on whether counsel's efforts made a 'meaningful and
2 material contribution towards the result achieved[.]'" *Dunnigan*,
3 2009 WL 6067058, at *11 (citing *Lind v. Astrue*, No. SACV 03-01499
4 AN, 2009 WL 499070, at *4 (C.D. Cal. 2009)).

5 As to this factor, Counsel points out that she "obtained from
6 this court an order for payment of benefits. This was obtained
7 because the Court agreed with [Abed]'s position that the ALJ's
8 decision was not substantially justified in several key areas, and
9 errors of law were made which deprived [Abed] of benefits to which
10 she was entitled." (Mem. Supp. Pl.'s Mot. (doc. #36) at 4.) The
11 court agrees with Counsel.

12 This was not a case where the Government eases an attorney's
13 task by conceding the ALJ's errors and agreeing to remand. See
14 *Dunnigan*, 2009 WL 6067058, at *12. Rather, the Government filed a
15 twenty-one page brief which devoted seventeen pages to arguments
16 opposing Abed's allegations. Counsel then filed an additional five
17 pages of arguments on the merits in her reply brief. To resolve
18 the parties' dispute the court issued a thirty-six page Opinion and
19 Order, which demonstrates that, unlike *Dunnigan*, the scope of the
20 case was not limited. *Cf. id.* (noting that the scope of the case
21 was limited to a single issue, whether or not the claimant's
22 condition met the requirements of a listing). Accordingly, this
23 factor does not warrant reduction from the 25 percent fee
24 agreement.

25 C. Dilatoriness

26 The court may reduce a § 406(b) fee for delays in the
27 proceedings attributable to the claimant's attorney. *Crawford*, 586
28 F.3d at 1151. The *Gisbrecht* court observed that a reduction on

1 this ground is appropriate if the requesting attorney
2 inappropriately caused delay in proceedings, so that the attorney
3 "will not profit from the accumulation of benefits" while the case
4 is pending. *Gisbrecht*, 535 U.S. at 808.

5 The court finds *Wojtecki v. Comm'r Soc. Sec.*, No. CV-09-584,
6 2011 WL 1694462 (D. Or. Apr. 6, 2011), instructive on this matter.
7 In *Wojtecki*, the plaintiff's counsel had requested two extensions
8 of time to file the opening brief, totaling seventy-five days. *Id.*
9 at *3. Plaintiff's counsel also had requested a 30-day extension
10 to file the reply brief. *Id.* Judge Stewart determined that,
11 "[t]hese extensions of time are not excessive and do not suggest
12 any intent to unnecessarily delay the proceedings in order to
13 maximize the attorney's fee award. Thus, no deduction for delay is
14 warranted." *Id.*

15 Here, on August 27, 2009, Counsel requested a 60-day extension
16 of time to file the Opening Brief in this matter. (Doc. #14, 15.)
17 Counsel requested this extension due to her workload during that
18 time period. (Doc. #15.) Counsel then requested an additional
19 thirty-four³ days to file the Opening Brief because "of Counsel's
20 holiday schedule and time off for family visits (Counsel's 90-year
21 old mother is currently visiting for 2 weeks, and Counsel plans to
22 spend a week in Los Angeles for Thanksgiving)." (Doc. #18.) On
23 February 18, 2010, Counsel requested a 2-day extension of time to
24 file Abed's Reply Brief. (Doc. #27, 28.) The extensions given to

25
26 ³ On October 27, 2009, Counsel submitted an amended request to
27 the court because she had erroneously calculated the date in her
28 second motion for extension of time. (Doc. #19, 20.) As a result,
Counsel only received an additional thirty days to file the Opening
Brief, rather than the thirty-four initially requested. (*Id.*)

1 Counsel total 92 days, which is analogous to the 105 total days of
2 extension granted in *Wojtecki*. No evidence in the record suggests
3 that the requests were intended to cause delay in the proceedings,
4 and since the requests were limited in frequency and duration,
5 Counsel will not profit from an accumulation of benefits.
6 Accordingly, as in *Wojtecki*, reduction under this factor is not
7 warranted.

8 **D. Proportionality of the Fee Request to the Time Expended**

9 The court may reduce a § 406(b) fee "for . . . benefits that
10 are not in proportion to the time spent on the case." *Crawford*,
11 586 F.3d at 1151 (citing *Gisbrecht*, 535 U.S. at 808, 122 S.Ct.
12 1817). The Supreme Court explained, "[i]f the benefits are large
13 in comparison to the amount of time counsel spent on the case, a
14 downward adjustment is . . . in order." *Gisbrecht*, 535 U.S. at
15 808. In making this determination, the court may look to counsel's
16 record of hours spent and a statement of normal hourly billing.
17 *Crawford*, 586 F.3d at 1151.

18 Counsel has submitted time records in support of her request
19 for EAJA fees indicating that a total of 46.1 hours have been spent
20 on Abed's case, which results in an effective hourly rate of
21 \$203.67 ($\$9,389.00 / 46.1$), if the full 25 percent fee was approved.
22 Counsel normally works on a contingent basis and does not have a
23 normal hourly rate. Counsel therefore argues that her fee is
24 reasonable "when considered in context of customary billing rates,
25 risk of non-payment, and other relevant factors[.]" (*Id.* at 5.)

26 For instance, Counsel points out that the Oregon State Bar
27 ("OSB") 2007 Economic Survey ("the Survey") establishes that the
28 average hourly non-contingent billing rate in Portland is \$244 per

1 hour. (*Id.* at 5-6.) Apparently, the Survey does not address the
2 issue, but the OSB 1998 Survey establishes that Portland attorneys
3 spend 15% of their time on contingency matters and derive 17% of
4 their income from such matters. (*Id.* at 6.) Counsel claims this
5 “establishes that average Oregon attorneys *more than make up in*
6 *contingency-enhanced rates* for the time they expend on contingency
7 cases they lose (by a factor of 17/15).” (*Id.*) (emphasis in the
8 original). Counsel contends that this statistic requires use of a
9 multiplier of 17/15 here. (*Id.*)

10 Counsel next claims that, in Social Security cases, there is
11 only a 33.52% chance of winning benefits for the claimant. (*Id.*)
12 In order to make for the risk of non-payment, Counsel argues that
13 a contingency multiplier of 2.98 (100/33.52) is warranted to make
14 up for the risk of non-payment. (*Id.*) Applying both multipliers
15 to the average hourly rate of \$244 produces a rate of \$824.07 an
16 hour. (*Id.*) Counsel claims this effective hourly rate is the
17 average for all cases in which in which § 406(b) fees are awarded,
18 and is the rate that would properly compensate Counsel for the risk
19 of non-payment. (*Id.*) Counsel then states, “in most cases, the §
20 406(b) award is significantly lower than \$824.07 per hour, and so
21 the award in some cases must be higher than \$824.07 for the average
22 to be \$824.07.” (*Id.* at 7.)

23 This argument misses the mark entirely. The Ninth Circuit’s
24 decision in *Crawford* made clear that while risk is an appropriate
25 factor to consider in evaluating a § 406(b) fee award, the risk
26 analysis must be specific to the case at bar. See also *Albert v.*
27 *Astrue*, No. CV 05-890-CV, 2011 WL 2116987, at *3 (D. Or. Apr. 28,
28 2011) (rejecting the same lodestar approach for failing to comply

1 with *Crawford's* directive that risk analysis should be case
2 specific); see also *Stokes v. Astrue*, No. 09-cv-01264, 2011 WL
3 3322563 (D. Or. July 8, 2011) (stating that, "the product of the
4 lodestar calculation can at best be of extremely limited utility in
5 assessing the reasonableness of a contingency fee.")

6 Counsel did attempt to make arguments which she deemed case
7 specific, however. For example, she claims the case was risky
8 because

9 the Appeals Council, attorneys specializing in social
10 security law, affirmed the decision of the [ALJ], another
11 specialist in social security law. That means that by
12 the time this case made it to federal court the case had
13 gone through the initial application, reconsideration, a
14 hearing in front of an [ALJ] and an appeal to a council
15 of attorneys whose specific and sole function is [to]
16 review social security disability decisions. That is
17 four levels of intensive review with the fifth one being
18 this appeal to [the] United States District Court. Taking
19 a Social Security case at the federal court for an
20 attorney involves considerable risk.

21 (Mem. Supp. Pl.'s Mot. (doc. #36) at 9.) The court disagrees with
22 Counsel that these arguments are case specific because the
23 procedural posture delineated above is the same in every Social
24 Security case that reaches federal court.

25 The court finds *Stokes* instructive in assessing the
26 proportionality of the fee requested by Counsel. In *Stokes*, Judge
27 Papak recommended that the Commissioner's decision be reversed and
28 remanded for a calculation and award of benefits. *Stokes*, 2011 WL
3322563, at *1. The claimant's counsel sought \$10,275.59 in §
406(b) fees, or 25% of the retroactive benefits awarded.⁴ *Id.* at
*4. Counsel had spent 37.5 hours of attorney time on the case,

⁴ Counsel was previously awarded \$6,193.09 in EAJA fees.
Id. at *1.

1 which resulted in an effective hourly rate of \$274.02 (\$10,275.59/
2 37.5). *Id.* at *6. Judge Papak ultimately concluded that,
3 "compensation at an effective hourly rate of \$274.02 would not
4 disproportionately overcompensate Stokes' counsel[.]" *Id.*

5 While I reject Counsel's comparative approach, I find
6 \$9,389.00 in § 406(b) fees to be reasonable based on the following
7 reasons. First, the OSB Survey shows that the average hourly non-
8 contingent billing rate in Portland is \$244 per hour, which is
9 significantly greater than the \$203.67 an hour resulting from a 25%
10 fee award in this case. Additionally, in *Harden v. Comm'r*, 497 F.
11 Supp. 2d. 1214, 1215 (D. Or. 2007), Judge Mosman observed that
12 "[t]here is some consensus among the district courts that 20-40
13 hours is a reasonable amount of time to spend on a Social Security
14 case that does not present particular difficulty." Judge Mosman
15 also stated that absent unusual circumstances or complexity, "this
16 range provides an accurate framework for measuring whether the
17 amount of time counsel spent is reasonable." *Id.* at 1216. Here,
18 Counsel spent 46.1 hours on this case, which, in the court's view,
19 is slightly more than necessary for the amount work completed
20 before the district court. Nevertheless, had Counsel only spent 40
21 hours on this matter, a reasonable amount of time under the *Harden*
22 standard, the effective hourly rate would still be \$234.73
23 (\$9,389.00/ 40). Certainly \$37,556.00 in past-due benefits is not
24 insignificant, but it is not so large as to make a 25 percent fee
25 disproportionate to the time Counsel spent on the case.

26 In short, *Crawford* made clear that district courts have an
27 "affirmative duty" to assure the reasonableness of a § 406(b) fee
28 award because the SSA "has no direct interest in how much of the

1 award goes to counsel and how much to the disabled person[.]” *Id.*
2 at 1149. I find that a reduction is not warranted in this case
3 after taking into account Counsel’s miscalculation.

4 **Conclusion**

5 For the reasons stated above, Abed’s Stipulated Motion For
6 EAJA Fees (doc. #33) and Abed’s Motion For Approval Of Attorneys
7 Fees (doc. #35) are GRANTED. Counsel is awarded \$9,389.00 in §
8 406(b) fees less the \$7,499.99 awarded in EAJA fees.

9 IT IS SO ORDERED.

10 Dated this 21 day of October, 2011.

11
12 /s/ Dennis J. Hubel

13

Dennis James Hubel
14 Unites States Magistrate Judge
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