

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DEBORAH OGLE,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 99-314-P-H

RECOMMENDED DECISION ON PLAINTIFF’S MOTIONS FOR ATTORNEY FEES

The plaintiff, who prevailed before the commissioner following remand of the instant Social Security Disability (“SSD,” or “Title II”) case by this court, securing a substantial award of past-due benefits, applies for awards of attorney fees pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412, and the Social Security Act, 42 U.S.C. § 406(b). *See* EAJA Application for Fees and Expenses (“EAJA Motion”) (Docket No. 12); Plaintiff’s Motion for Award of § 406 Fees (“Section 406 Motion”) (Docket No. 11). I recommend that the EAJA Motion, which is unopposed, be granted on that basis, and that the Section 406 Motion, which is opposed, be granted in the amount of \$4,572.50 – substantially less than sought.

I. Context

The plaintiff's counsel, Francis M. Jackson, filed the instant complaint on her behalf on October 7, 1999. *See* Complaint (Docket No. 1). Shortly thereafter, on October 26, 1999, the plaintiff signed a contingent-fee agreement with her counsel's law firm, Jackson & MacNichol, providing in relevant part:

A. Client agrees to pay a fee equal to twenty five percent (25 %) of the total amount of any past-due benefits awarded to Client, to include any dependents benefits, subject to the approval of said fee by the court. It is understood that this Contingent Fee is to be paid by the Client directly to the Attorney from any past-due benefits awarded on the basis of the Client's claim. . . .

B. The Client acknowledges that the services of the attorney have value and would ordinarily be billed to a client by the hour at a rate in excess of \$135.00 per hour. However, if the Attorney is not successful in vacating the adverse agency decision in whole or in part then there shall be no obligation on the part of the Client to pay any fee to the Attorney for the representation before the Court. If the Attorney is successful in vacating the adverse decision there can be no guarantee of success in obtaining any past-due benefits. In the event that there is no award of fees by the court and there are no past-due benefits awarded to the Client by the agency upon a readjudication of the matter, then there shall be no fees owed by the Client to the Attorney for representation of the Client in this matter.

C. . . . The parties have agreed to a full twenty five percent, rather than a lesser "reasonable" amount calculated on an hourly basis because the client acknowledges that there is a high risk of failure and resulting non-payment in these cases and that as a result the only way the attorney can afford to do these cases is to charge and collect a contingent fee sufficient to not only pay a reasonable fee when he is successful but also sufficient to pay personnel costs and other office overhead expended on those cases where he is unsuccessful and receives no payment. The further basis for this entitlement to a percentage interest in the Client's past-due benefits, is that BUT FOR the Attorney's efforts in vacating the adverse decision the denial of benefits would have become final and the Client deprived of the opportunity to re-litigate before the Agency the entitlement to past-due benefits.

Contingent Fee Agreement for Representation Before the Court with the Law Firm of Jackson & MacNichol dated October 26, 1999 ("Court Fee Contract"), attached to Section 406 Motion, ¶ 3.

On May 25, 2000 Jackson filed a statement of errors with the court on behalf of the plaintiff asserting that the administrative law judge erred in (i) halting his analysis at Step 2 of the commissioner's sequential evaluation process, based in part on inadequate assessment of the plaintiff's credibility, and (ii)

failing to apply Social Security Ruling 83-20 (“SSR 83-20”) to determine the onset date of her disability. *See* Report and Recommended Decision (“Recommended Decision”) (Docket No. 7) at 3; Plaintiff’s Itemized Statement of Specific Errors (“Statement of Errors”) (Docket No. 6) at 2-9. He also asserted that the Appeals Council had erred in failing to address the plaintiff’s request to reopen its substantive review when presented with new evidence in the form of several lay affidavits. *See* Recommended Decision at 2-3; Statement of Errors at 10-11.

Following oral argument held before me on October 5, 2000, I recommended that the court vacate the commissioner’s decision and remand the case for further proceedings on the basis of the premature halting of analysis at Step 2. *See* Recommended Decision at 1 n.1 & 3. I found that SSR 83-20 was not implicated. *See id.* at 4. I declined to address the third point (regarding the Appeals Council’s failure to act on the plaintiff’s request to review the late-submitted affidavits) inasmuch as counsel for both parties agreed at oral argument that the case did not hinge on those affidavits. *See id.* at 7 n.3. No objections having been lodged, the recommended decision was adopted on October 27, 2000. *See* Order Affirming Recommended Decision of the Magistrate Judge (Docket No. 8). On October 30, 2000 a judgment issued, vacating the commissioner’s decision and remanding the case for further proceedings consistent with the recommended decision. *See* Judgment (Docket No. 9).

On or about October 12, 2001 the plaintiff executed another contingent-fee agreement directly with Jackson relating to services on remand, pursuant to which she agreed that if the commissioner decided her claim favorably at the administrative level she would pay Jackson a fee equal to the lesser of (i) twenty-five percent of past-due benefits or (ii) \$4,000. *See* Contingent Fee Agreement dated October 12, 2001 (“SSA Fee Contract”), attached to Section 406 Motion. Following a supplemental hearing held on remand, an administrative law judge rendered a decision dated March 4, 2002 that was fully favorable to the

plaintiff, finding her to have been disabled on or before her date last insured of December 31, 1992. *See* Decision, *In re Deborah L. Ogle*, Social Sec. Admin., Office of Hearings & Appeals (Mar. 4, 2002), attached to EAJA Motion. The plaintiff was awarded past-due SSD benefits totaling \$118,908.¹

Jackson represents, and the commissioner does not contest, that the commissioner withheld from the plaintiff's past-due benefits and paid to Jackson \$4,000 for his work performed on remand pursuant to the SSA Fee Contract. *See* Section 406 Motion at 2 n.2; *see generally* Defendant's Opposition to Plaintiff's Motion for Section 406 Attorney's Fees ("Opposition") (Docket No. 14). Jackson now seeks a total of \$25,727.00 pursuant to section 406(b) and the Court Fee Contract, representing twenty-five percent of the total award of past-due benefits less the sum of \$4,000 already deducted from those benefits and paid to him for work performed before the commissioner on remand. *See* Section 406 Motion at 4-5.²

In connection with his EAJA Motion, Jackson submitted a copy of an invoice billing the plaintiff at an hourly rate of \$155.00 for a total of 15.6 hours of court-connected work and 7.8 hours of agency-connected work, resulting in a bill of \$3,627.00 for 23.4 hours of work on this case. *See* Invoice submitted

¹ Jackson failed to submit a copy of the commissioner's notice of award of benefits or any other evidence demonstrating the total award of back benefits to the plaintiff. In his brief, he represented that the sum of either \$30,300.25 or \$30,680.25 (one of those figures evidently contains a typographical error) equaled twenty-five percent of the back-benefit award. *See* Section 406 Motion at 4. During oral argument on other matters held before me on December 11, 2003 involving the same attorneys, I therefore sought clarification on the amount of back-benefit award in this case. Counsel for the commissioner offered to supply that figure and did so by e-mail the following day, representing that the total awarded to the plaintiff and her two children was \$118,908. That sum did not comport with either of the two twenty-five percent figures Jackson had provided in his brief, as a result of which I arranged for a followup teleconference with counsel on December 12, 2003. During that teleconference, Jackson orally amended his Section 406 Motion, without objection from counsel for the commissioner, (i) to represent that the total award of back benefits was \$118,908 and (ii) to request twenty-five percent of that sum, or \$29,727, minus the sum of \$4,000 already awarded by the commissioner, for a total requested section 406(b) fee award of \$25,727. These ancillary proceedings underscore the necessity for counsel requesting section 406(b) fees to supply evidence of the total amount of a back-benefit award. Counsel is admonished to submit such evidence in future section 406(b) petitions or risk disallowance of his requested fee on that basis.

² Jackson represents, and the commissioner does not contest, that the commissioner is holding the balance of the twenty-five percent contingent-fee amount pending resolution of the instant motions. *See* Section 406 Motion at 2 n.2; *see (continued on next page)*

to: Deborah Ogle (“Invoice”), attached to EAJA Motion.³ Of the court-connected work, 3.8 hours relates to post-remand services, including preparation of the two fee motions in issue here. *See id.* Thus, 11.8 hours were spent in court-connected work related to obtaining the ultimately successful remand in this case. *See id.*

II. Analysis

Section 406 provides, in relevant part:

Whenever a court renders a judgment favorable to a claimant under this subchapter [*i.e.*, Title II] 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). The commissioner opposes any such award in this case on the bases that the court lacks authority pursuant to section 406(b) to award fees related to work performed before the agency and, in any event, has no power to award fees when (as here) benefits were awarded by the agency, as a result of which there is no “favorable judgment” from this tribunal that would trigger the provisions of section 406(b). *See* Opposition at 2-5.

Jackson concedes the first point, clarifying that he seeks via the Section 406 Motion only to be recompensed for his court-related services – specifically, for services in obtaining the remand by this court. *See* Plaintiff’s Reply Memorandum Regarding Award of § 406 Fees (“Reply”) (Docket No. 15) at 3.⁴ With respect to the second point, he observes that along with his fee motions he submitted an unopposed motion for final judgment from this court, which he understands to be acceptable practice for purposes of

generally Opposition.

³ The bill includes a charge of \$150.00 for the court filing fee, bringing the total to \$3,777.00. *See* Invoice.

⁴ Inasmuch as Jackson is the real party in interest with respect to his fees, I refer to the proponent of the fee motions as “Jackson” rather than “the plaintiff.”

triggering a court-related section 406(b) fee award once a claimant has obtained past-due benefits from the commissioner on remand. *See id.* at 2-3; *see also* Plaintiff’s Motion for Entry of Judgment (Docket No. 10).

As an initial matter, there can be no doubt that this court has authority to award court-related fees pursuant to section 406(b) even though the benefits award itself was made by the commissioner on remand. To the extent the commissioner is espousing the so-called “single tribunal rule,” that position has been soundly rejected. *See, e.g., Horenstein v. Secretary of Health & Human Servs.*, 35 F.3d 261, 262 (6th Cir. 1994) (overruling “single tribunal rule” of *Webb v. Richardson*, 472 F.2d 529 (6th Cir. 1972), pursuant to which only the tribunal that ultimately upheld a claim for benefits could approve and certify payment of section 406 attorney fees; joining majority of circuits – including First Circuit – in ruling, *inter alia*, that “in cases where the court remands the case back to the [commissioner] for further proceedings, the court will set the fee – limited to 25 percent of past-due benefits – for the work performed before it, and the [commissioner] will award whatever fee the [commissioner] deems reasonable for the work performed on remand and prior administrative proceedings.”).

As Jackson suggests, the only real question is one of procedure. *See* Reply at 3. The parties agree that this is a so-called “sentence six” remand. *See* Opposition at 1; Reply at 1. Post-remand entry of a final judgment by the court is contemplated in such a case. *See, e.g., Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991) (“If petitioner is correct that the court remanded the case under sentence six, the Secretary must return to District Court, at which time the court will enter a final judgment.”). Section 406(b), in turn, permits the court to reflect an award of section 406(b) fees in its favorable judgment. *See* 42 U.S.C. §

406(b)(1)(A). Jackson has petitioned the court for such a final judgment, doing all that is necessary (if not more than is necessary) to lay the groundwork for a section 406 fee award.⁵

As Jackson also notes, *see* Reply at 3-4, the commissioner offers no argument at all regarding the substance of his section 406(b) fee request, *see generally* Opposition. However, this hardly means that the fee sought automatically is granted. As Jackson recognizes, *see* Reply at 3-4, the money at stake in a section 406(b) request comes not out of the commissioner's pocket but rather that of the claimant, and the court has an independent duty to satisfy itself that a section 406(b) contingency fee is "reasonable," *see, e.g., Gisbrecht v. Barnhart*, 535 U.S. 789, 807 (2002) ("Most plausibly read, . . . § 406(b) does not displace contingent-fee arrangements 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, . . . the attorney for the successful claimant must show that the fee sought is reasonable for the services rendered.") (citations and footnotes omitted).

As one might expect, the outer boundaries of a test of "reasonableness" are difficult to plot. However, this much is clear: Reduction in the amount that otherwise would be payable pursuant to a contingent-fee agreement between a claimant and attorney is appropriate to the extent that (i) counsel's

⁵ Arguably, a "final judgment" is unnecessary to trigger award of section 406(b) fees. I find authority for the proposition that a court's original judgment (ordering remand) can serve as the predicate for a court award of court-related fees pursuant to section 406(b)(1)(A) after a claimant has prevailed at the agency level and secured past-due benefits on remand. *See Ott v. Chater*, 916 F. Supp. 1120, 1124 (D. Kan. 1996), *rev'd on other grounds*, 1997 WL 26575 (10th Cir. Jan. 24, 1997) ("Courts have held that remand of a case for further administrative proceedings constitutes a 'judgment (continued on next page)

conduct is improper or representation substandard; for example, an attorney is responsible for a delay that has caused an accumulation of past-due benefits, or (ii) the benefits are large in relation to the amount of time counsel spent on the case (thereby resulting in a windfall). *See id.* at 808; *Rodriquez v. Bowen*, 865 F.2d 739, 746-47 (6th Cir. 1989) (*cited with favor in Gisbrecht*, 535 U.S. at 808).

The instant request implicates the windfall concern. According to his own invoice, Jackson spent a total of 11.8 hours on court-related work to obtain the remand in this case. *See Invoice*. Dividing the contingent fee sought (\$25,727.00) by these hours yields an effective rate of \$2,180.25 per hour. As Jackson points out, the impact to the plaintiff would be softened by the EAJA attorney-fee award (which is paid by the commissioner, not the plaintiff) inasmuch as a claimant must be refunded the lesser of an EAJA or section 406(b) award. *See Reply* at 5-7; *Gisbrecht*, 535 U.S. at 796. However, even if I were to take this into consideration by subtracting the amount of EAJA fee sought (\$3,777.00), *see EAJA Motion* at 2, from the amount of section 406 fee sought (\$25,727.00), yielding a new total of \$21,950.00, the effective hourly fee would remain an astronomical \$1,860.17.

The burden falls squarely on the attorney for the successful claimant to show that the fee sought is reasonable for the services rendered. *See, e.g., Gisbrecht*, 535 U.S. at 807. Jackson does not argue that any of the issues he raised in this forum were particularly novel or difficult, *see generally* Section 406 Motion, nor could he persuasively do so. His arguments regarding credibility, Step 2 and SSR 83-20 covered well-trod ground in the arena of Social Security appeals. In addition, one of his three points (the SSR 83-20 issue) was found inapposite, and the parties agreed that a second (the Appeals Council issue) was not outcome-determinative. The remand turned on the relatively straightforward Step 2 issue. What

favorable' to the claimant within the meaning of § 406(b)(1), if the claimant subsequently receives an award of benefits.'").
(*continued on next page*)

Jackson argues, instead, is that contingent-fee agreements such as his should be honored because, on the whole, they represent a fair allocation of risks and benefits in what is essentially the risky business of taking a Social Security appeal, providing sufficient economic incentive for counsel to continue taking such appeals. *See Reply at 4-5.*

Without doubt, Jackson's work before this court paved the way for obtaining the excellent result he ultimately secured for his client at the agency level upon remand. And, without doubt, the taking of risk via a contingent-fee agreement should be rewarded with payment above and beyond one's normal hourly fee. *See, e.g., Royzer v. Secretary of Health & Human Servs.*, 900 F.2d 981, 982 (6th Cir. 1990) ("It is not at all unusual for contingent fees to translate into large hourly rates if the rate is computed as the trial judge has computed it here. In assessing the reasonableness of a contingent fee award, we cannot ignore the fact that the attorney will not prevail every time. The hourly rate in the next contingent fee case will be zero, unless benefits are awarded. Contingent fees generally overcompensate in some cases and undercompensate in others. It is the nature of the beast.").

Nonetheless, Jackson cites no authority (and I find none) holding fee awards as astronomical as those sought in this case to be "reasonable" for purposes of section 406(b) under any circumstances, let alone circumstances involving straightforward issues and well-worn ground. To the contrary, "[w]here a case has been submitted on boilerplate pleadings, in which no issues of material fact are present and where no legal research is apparent, the benchmark twenty-five percent of awards fee would obviously be inappropriate." *Rodriquez*, 865 F.2d at 747; *see also, e.g., Hearn v. Barnhart*, 262 F. Supp.2d 1033,

However, inasmuch as Jackson does not rely on the original judgment in this case, I need not resolve that issue.

1037 (N.D. Cal. 2003) (canvassing section 406(b) fee cases; observing that courts had approved *de facto* hourly rates ranging from \$187.55 to \$694.44).

Such concrete guidance as I can find indicates that, as a rule of thumb, a multiplier of two times a practitioner's usual and customary hourly rate provides adequate recompense for the taking of contingent-fee risk without raising windfall concerns. *See, e.g., Hayes v. Secretary of Health & Human Servs.*, 923 F.2d 418, 422 (6th Cir. 1990) (“We believe that, under *Rodriquez*, a windfall can never occur when, in a case where a contingent fee contract exists, the hypothetical hourly rate determined by dividing the number of hours worked for the claimant into the amount of the fee permitted under the contract is less than twice the standard rate for such work in the relevant market. We believe that a multiplier of 2 is appropriate as a floor in light of indications that social security attorneys are successful in approximately 50% of the cases they file in the courts. Without a multiplier, a strict hourly rate limitation would insure that social security attorneys would not, averaged over many cases, be compensated adequately.”).

Jackson invoiced the plaintiff at a rate of \$155.00 per hour for his work on this case.⁶ Two-and-half times this hourly rate results in a rate of \$387.50 per hour, which in my view affords reasonable, appropriate compensation for the contingent-fee risk assumed, and the successful result obtained, in this forum in this case. This yields a total section 406(b) fee of \$4,572.50, which I recommend that the court award.

III. Conclusion

⁶ Although Jackson submitted evidence that the rate of \$155.00 hourly “is not reflective of [his] normal market fees” and he has “routinely been approved for fees at rates of \$225.00 per hour or more based upon [his] age and over 25 years of experience,” Affidavit in Support of Application for Fees Under the EAJA and 42 U.S.C. Section 406 (Docket No. 13) ¶¶ 5-6, he clarified at oral argument that he is not paid \$225.00 per hour for Social Security cases in Maine.

For the foregoing reasons, I recommend that the EAJA Motion be **GRANTED** as prayed for (in the amount of \$3,777.00) and that the Section 406 Motion be **GRANTED** in the amount of \$4,572.50 and otherwise **DENIED**.⁷

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of December, 2003.

David M. Cohen
United States Magistrate Judge

Plaintiff

DEBORAH OGLE

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⁷ Inasmuch as the commissioner is continuing to withhold a portion of the plaintiff's past-due benefits pending resolution of the instant motions, and counsel for the commissioner has not opposed the plaintiff's request for EAJA fees, it would be appropriate for the court to direct prompt payment from the withhold of \$4,752.50 to Jackson, with the balance to be released to the plaintiff, and to direct that the plaintiff be refunded the amount of the EAJA fee award, totaling \$3,777.00. *See, e.g., Boyd v. Barnhart*, No. 97 CV 7273 SJ, 2002 WL 32096590, at *3-*4 (E.D.N.Y. Oct. 24, 2002) (similar directive).

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