UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

TANIKA D. COOK (LEWIS)	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No.: 1:16-cv-01105-JDB-jay**
	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

ORDER AWARDING FEES UNDER 42 U.S.C. § 406(b)

Upon Motion of counsel for the Plaintiff, John D. Hamilton, pursuant to 42 U.S.C. § 406(b) (Docket Entry ["D.E."] 13, 28), and upon referral for determination, the Magistrate Judge finds as follows:

Background

Plaintiff Tanika D. Cook (Lewis) was the prevailing party in her appeal to this Court from an unfavorable decision by the Social Security Administration. She and her attorney on the appeal, Mr. Hamilton, entered into a valid representation agreement which provides for attorney fees of 25% of any back pay obtained by her if successful in the remanded claim. Cook's hearing representative[1] was successful on remand, and Plaintiff was awarded, according to the Commissioner's Response [D.E. 24], $52,781.82 in back pay,[2] 25% of which is $13,195.45.

[1] Cook's hearing representative was not Mr. Hamilton. Mr. Hamilton was counsel in the appeal, and it is the amount of fees owed to him that this Motion raises.

[2] The back pay award was originally calculated at $48,326.93, 25% of which is $12,081.73, *see* Pl. Mtn. for Attorney Fees, D.E. 13 at 1, however this number has been updated in the most recent briefing before the Court.

Pursuant to a fee agreement, Plaintiff's hearing representative was paid $6,000.00. Mr. Hamilton, who was Cook's counsel in the appeal, did not request an Equal Access to Justice Act ("EAJA") fee under 28 U.S.C. § 2412(d), instead requesting 406(b) fees as allowed. Mr. Hamilton requested $6,081.73. He explains that in requesting that amount he took into account the hearing representative's fee of $6,000.00 (paid to another office) and offset his request accordingly: 25% of the withheld back pay of $52,781.82, or $13,195.45, less $6,000.00 paid to the hearing representative, for a requested fee of $7,195.45.[3] Counsel for Plaintiff and the Commissioner filed their Motion, Response and Reply regarding the requested fee [D.E. 13].

While Plaintiff's Motion was awaiting a ruling, the United States Supreme Court decided *Culbertson v. Berryhill*, 586 U.S. ___, 139 S. Ct. 517, 202 L. Ed. 2d 469 (2019), which held that § 406(b)'s 25% cap on court/appeal stage fees does not apply to § 406(a) agency/hearing stage fees, nor does it apply to the aggregate of §§ 406(a) and (b) fees. Put another way, the 25% cap in the Social Security Act provision limiting attorney fees for representation in federal court to 25% of past-due benefits applies only to fees for representation before the court, not to aggregate fees awarded for representation before both the court and the agency, abrogating *Dawson v. Finch*, 425 F.2d 1192. In light of this decision, Plaintiff's attorney now asks the Court in his Notice of New Law for an attorney fee award of 25% ($13,195.45) per his fee agreement with Plaintiff, in lieu of the amount originally requested which included the § 406(a) offset of $6,000 [D.E. 28]. Accordingly, the Court must examine whether the fee requested is reasonable, as well as what effect *Culbertson v. Berryhill* has on the matter.

[3] While Plaintiff's attorney originally requested $6,081.75, the adjusted amount based on the actual award is $7,195.45

Argument

Plaintiff's counsel argues that *Culbertson* justifies this Court disregarding his original fee request with its offset of fees. Before the *Culbertson* ruling, Sixth Circuit precedent provided that the total fee award made under the *combination* of § 406(a) and § 406(b) may not exceed 25% of the total award of past benefits, so this was not a voluntary offset by Counsel. *Tibbetts v. Comm'r of Soc. Sec.*, No. 1:12-CV-894, 2015 WL 1637414, at *3 (S.D. Ohio Apr. 13, 2015) (emphasis added).

Significantly, the Commissioner has responded in opposition.[4] The Commissioner reminds that section 406(b) "calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases." *Gisbrecht v. Barnhart*, 535 U.S. 789, 805 (2002). A court may exercise its discretion to reduce an attorney's contractual recovery based on the character of the representation and the result achieved. *Id.* "If the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is similarly in order." *Id.* To prevent windfalls for attorneys and assist the reviewing court in making a reasonableness determination, the court may require the attorney to submit a record of the hours spent on the case and a statement of the normal hourly rates charged. *See id.* The Commissioner objects that Counsel has not explained what has changed in his representation of Plaintiff's claim to justify an hourly rate of about $814.53, about quadruple the EAJA fee.

[4] *See Tibbetts v. Comm'r of Soc. Sec.*, No. 1:12-CV-894, 2015 WL 1637414, at *3 (S.D. Ohio Apr. 13, 2015) ("As has been discussed by this Court and others, the Commissioner has little incentive to file any response at all to a § 406(b) motion given that fees for such an award are not borne by the Commissioner (as with EAJA fees), but instead are subtracted from an award previously made to the claimant. Even when a response is filed by the Commissioner, it often expresses no position.") Thus, when the Commissioner does oppose a motion for fees, courts typically factor that opposition into their determination on the fee award.

Analysis

As the parties acknowledge, 20 U.S.C. §406(b) expressly allows contingent fee agreements for federal court work if they do not exceed 25% of past due benefits. Section 406(b)(1) further provides for court review of all contingent fee arrangements within this 25% cap "to assure that they yield reasonable results in particular cases." *Gisbrecht v. Barnhart*, 535 U.S. 789, 807 (2002). "Within the 25 percent boundary," prevailing counsel bears the burden of "show[ing] that the fee sought is reasonable for the services rendered." *Lasley v. Comm'r of Soc. Sec.*, 771 F.3d 308, 309 (6th Cir. 2014) quoting *Gisbrecht v. Barnhart*, 535 U.S. at 807, 122 S.Ct. 1817. The *Tibbetts* court explained:

> By statutorily capping contingency fee awards in social security cases at 25%, Congress has attempted to protect often-desperate plaintiffs from giving up too much of their future benefit awards for the sake of obtaining legal representation. The Sixth Circuit has explained that § 406(b) includes a directive to the federal courts to affirmatively examine the "reasonableness" of any fee award up to that maximum. The court has emphasized that the 25% statutory cap should not be "viewed as per se reasonable" and instead, should be "a starting point for the court's analysis." Thus, federal courts must balance the rights of counsel to a fair fee with the need to safeguard the rights of litigants whose interests are necessarily adverse to those of counsel in the limited context of a § 406(b) award. . . An attorney seeking fees under § 406(b) "must show, and the Court must affirmatively find, that a contingency fee sought, even one within the 25% cap, is reasonable for the services rendered" (internal citations omitted).

Tibbetts v. Comm'r of Soc. Sec., No. 1:12-CV-894, 2015 WL 1637414, at *3 (S.D. Ohio Apr. 13, 2015). Of course, notably, because these cases are pre-*Culbertson*, they examined fee request amounts that included offset for hearing fees; i.e., smaller maximums than what is now potentially available post-*Culbertson*, where there is no duty to offset.

Plaintiff's counsel correctly contended in his original Motion for Attorney Fees that a rate twice the EAJA rate was *per se* reasonable and did not constitute a windfall. See Pl.'s Motion for

Attorney's Fees. Counsel's Affidavit shows 16.2 hours of time spent in the federal case only. According to Plaintiff's counsel, doubling the EAJA rate gives an effective fee rate of $375.41 per hour. Pl. Memorandum in Support at 3.

Plaintiff has also urged that in the Sixth Circuit contingency agreements that do not exceed the 25% cap enjoy a "rebuttable presumption of reasonableness." *Lasley v. Commissioner*, 771 F.3d 308 (6th Cir. 2014). However, as noted before, the cases relied on are pre-*Culbertson*, and in the Sixth Circuit at that time, the 25% cap included the fees at the hearing level as well, capped at $6,000.00. The Sixth Circuit did not go so far as to say that a 25% cap *excluding* the hearing fees would enjoy any rebuttable presumption of reasonableness. Indeed, in the *Hayes* case, the Sixth Circuit expressly contemplates a multiplier of 2 given the average success rate of 50%:

> 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. *See, e.g., Kirchoff v. Flynn*, 786 F.2d 320, 326 (7th Cir.1986)

Hayes v. Secretary, 9 23 F.2d 418 (6th Cir. 1991)

Thus, contingency fee agreements that have a multiplier of two are a floor, and 25% of a back pay award is the absolute maximum allowed. While the *Culbertson* decision has certainly increased the possible maximum, it has not displaced *Gisbrecht's* directive to the courts to ensure that any awarded fees within those parameters are reasonable. *Gisbrecht* instructs reviewing courts to "look[ ] first to the contingent-fee agreement, then test[ ] it for

reasonableness." *Id.* at 808, 122 S.Ct. 1817. Importantly, the Supreme Court approved of reducing fees to avoid windfalls and expressly authorized district courts to consider the attorney's hours and standard rates in reviewing the reasonableness of contingency fees. *Gisbrecht*, 535 U.S. at 808, 122 S.Ct. 1817.

In *Lasley* the Sixth Circuit considered the reasonableness of a requested fees award after the award had been reduced by the district court. *Lasley v. Comm'r of Soc. Sec.*, 771 F.3d 308, 310 (6th Cir. 2014). It noted that the district court had begun its analysis by acknowledging the contingency fee agreement and § 406(b)'s 25% ceiling. *Id.* The district court then considered the effective hourly rate "as one relevant factor in determining the reasonableness" of the contingency fee. *Id.* In affirming the district court, the Sixth Circuit opined that "the effective hourly rate of $733.80 ($26,049.73 ÷ 35.5 hours) grossly exceeded—indeed, more than quadrupled—the standard rates applied to social security fee requests in the Southern District of Ohio. S*ee, e.g., Jones v. Astrue*, No. 3:09–cv–80, 2012 WL 3251865, at *3 (S.D. Ohio Aug. 8, 2012) (Report & Recommendation) (using "conservative" hourly rate of $180), adopted, 2012 WL 3763909; *Edwards v. Comm'r of Soc. Sec.*, No. 1:08–cv–815, 2011 WL 1002186, at *1 (S.D. Ohio Mar. 16, 2011) (relying on $165 hourly rate approved in counsel's application for fees under the EAJA as standard rate for assessing the reasonableness of the contingency fee under § 406(b))." *Id.* The Sixth Circuit noted that the district court considered other factors, too, including counsel's delay in filing the § 406(b) motion, the Commissioner's opposition to the fee, and the "brevity" and "relative simplicity" of the representation. *Id.*

After reviewing the pleadings in this case, the Court finds the original amount requested of $7,195.45 to be reasonable and well-documented but cannot go so far as Counsel now requests in his Notice of New Law to justify an award with an effective hourly rate of over $800

an hour. While Counsel advocated effectively for his client, there were no undue delays on his part, and ultimately the outcome was successful, Counsel has failed to persuade the Court that the case is so complex or unusual to justify such a high award of fees.

Plaintiff's counsel has noted that this case has taken six years, with no undue delay on his part. The Court observes that this passage of time, consequently, has resulted in a larger back pay award, and the Court is mindful to factor this into its reasonableness evaluation. *See Tibbetts v. Comm'r of Soc. Sec.*, No. 1:12-CV-894, 2015 WL 1637414, at *4 (S.D. Ohio Apr. 13, 2015) ("A full contingency award constituting 25% of the past due benefits may constitute a windfall in cases where the total award is large due chiefly to the passage of time—even (as is usually the case) when the delay is not attributable to counsel but instead merely results from the slow wheels of justice and inevitable delays occasioned within the social security agency itself.") *Accord Dearing v. Sec. of Health and Human Servs.*, 815 F.2d 1082 (6th Cir.1987); *Boston v. Com'r of Soc. Sec.*, 2014 WL 1813012 at *1 ("Courts are generally reluctant to award large contingency fees in social security cases in which the chief reason for the size of the award is the ponderous pace of the administrative process."); *Wallace*, *supra* ("[B]y definition, litigants who have been determined to be entitled to Title II disability benefits may be especially vulnerable to the imposition of exorbitant fees, particularly given the near certainty that years will have elapsed between their initial applications, remand by this Court, and the ultimate award of benefits."). The Court is further mindful of its duty to the Plaintiff in ensuring that the fee awarded is reasonable, and the devastating effect that unreasonably large attorney fee awards undoubtedly would have on this vulnerable population. Finally, the Court has taken into account the Commissioner's objection in assessing the reasonableness of the fee request in making this decision.

As the *Tibbetts* court noted, there is an unfortunate lack of uniformity in the case law involving § 406(b) fees within the Sixth Circuit. However, case-to-case discrepancies are to be expected due to the unique factors that apply to a trial court's discretionary review of each case. *Tibbetts v. Comm'r of Soc. Sec*., No. 1:12-CV-894, 2015 WL 1637414, at *5 (S.D. Ohio Apr. 13, 2015). It is ultimately Plaintiff's counsel's burden that the fee sought is reasonable, and it is the Court's duty to independently review these contingency fee arrangements. While *Culbertson* makes clear that a 25% contingency fee agreement under 406(b) need not offset 406(a) fees, and therefore raises the maximum fee award ceiling, it does not displace the Court's duty to review fees for reasonableness. In keeping with Sixth Circuit precedent and analysis on this issue, a fee of quadruple the EAJA rate is not reasonable in this case as such a fee grossly exceeds the standard rates applied to social security fee requests.

THEREFORE, IT IS ORDERED that Plaintiff's Motion for Award of Attorney Fees [D.E. 13] is granted. Attorney fees are approved in the amount of $7,195.45, as originally requested, which the Magistrate Judge finds reasonable in this case, payable directly to counsel for the Plaintiff from funds withheld by the Social Security Administration for this purpose. Plaintiff's request for an increased fee award in his Notice and Request to Consider New Law, and Request to Reconsider Motion for Fees [D.E. 28] is denied.

IT IS SO ORDERED this 25th day of April, 2019.

s/ Jon A. York
UNITED STATES MAGISTRATE JUDGE