

withheld 25 percent of Shackles' total retroactive benefits (\$19,040.77) for attorney's fees.¹

In support of his fee request, Boyle has submitted an accounting of time spent on this case totaling 19.1 hours. This includes 2.1 hours for preparation of the EAJA petition. Although the Commissioner has no direct financial stake in a § 406(b) fee award, she is involved because she "plays a part in the fee determination resembling that of a trustee for the claimants" with the district court determining the reasonableness of the fee request. Gisbrecht v. Barnhart, 535 U.S. 789, 798 n.6 (2002). The Commissioner contends fees in the amount of \$19,040.77 is excessive.

1. Standard of Review

Section 406(b) provides in part:

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 past-due benefits . . .

42 U.S.C. § 406(b). Where the fee does not exceed the 25 percent contingency limit, the court must still assure counsel does not receive a "windfall." Gisbrecht, 535 U.S. at 808. Thus, the court must consider the character of the representation and the results achieved. The fee may be reduced where: 1) counsel is responsible for delay in the proceedings resulting in an increased award of retroactive benefits; or 2) it is excessive in comparison to the time counsel spent on the case. Id. To aid the court in this assessment, counsel may submit a record of hours spent representing the claimant and a statement of counsel's normal hourly rate. Id.

¹ On August 10, 2004, counsel for Plaintiff received fees in the amount of \$2,998.50 under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and this amount is to offset an award of fees under § 406(b).

2. Discussion

Boyle seeks fees in excess of \$19,000 pursuant to his contingency fee agreement with Shackles. This fee does not exceed the 25 percent limit set by § 406(b), and thus, meets the first step of the Gisbrecht analysis.

Boyle asserts this fee is also reasonable. First, there was a substantial risk he would recover no fee because the case had already been denied at several levels of agency review. Second, he has extensive experience litigating Social Security disability cases, and he devoted significant time and careful attention to the case resulting in a positive outcome for his client. Finally, there is no indication that Boyle was responsible for any delay in the case.

The Commissioner has no argument with these assertions; however, she notes that a fee in excess of \$19,000 for 17 hours of work (subtracting the 2.1 hours for EAJA fee petition), would result in the type of windfall Gisbrecht disallows. Under these circumstances, the hourly rate would be \$1,120.50. The Commissioner suggests a reasonable fee would fall between \$6,800 (\$400 per hour for 17 hours) and \$10,200 (\$600 per hour for 17 hours).

I agree that the fee Boyle seeks would constitute a windfall, because such a high hourly rate could not be considered reasonable. However, I disagree with the Commissioner's proposed method of calculation. A simple lodestar calculation does not include the type of subjective evaluation contemplated in Gisbrecht. See Mudd v. Barnhart, 418 F.3d 424, 428 (4th Cir. 2005) (finding Gisbrecht rejected case law from the majority of circuits that applied lodestar method for awarding fees under § 406(b) in the routine evaluation of contingency fee agreements).

Instead, I find a more reasonable approach would be to limit the retroactive benefits subject to the contingency fee to the amount awarded to Shackles and exclude fees for the award

to her children. I conclude that it is this additional amount that constitutes a windfall to counsel because no additional work was required or risk taken to obtain this portion of the award. On the contrary, once the mother was found disabled, her minor children were automatically entitled to an award of benefits.

Therefore, I have reduced the retroactive benefit subject to the contingency agreement to \$50,799.10, and I award Boyle counsel fees in the amount of \$12,700. This fee will be offset by \$2,998.50, the amount of Boyle's EAJA fee. An appropriate order is attached.

BY THE COURT:

J. WILLIAM DITTER, JR., J.

