IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

MICHAEL WRIGHT,	*	
	*	4:07-cv-95 RWP TJS
Plaintiff,	*	
	*	
v.	*	
	*	
MICHAEL J. ASTRUE,	*	
Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	
	*	

Before the Court is a Motion for Attorney Fees filed by Steven C. Jayne, the lawyer for Plaintiff Michael Wright. Clerk's 50. By way of background, Plaintiff filed a complaint on March 5, 2007, seeking Judicial Review of Defendant's denial of his application for disability benefits under the Social Security Act. See 42 U.S.C. 423 et seq. After Defendant's answer and the filing of the transcript of the administrative proceedings, the Court entered an Order setting a briefing schedule with the Plaintiff's brief being due June 8, 2007.

On May 26, 2007, Plaintiff filed a document entitled Motion for Leave to Supplement Administrative Record; Motion for Reversal and Remand. On June 1, 2007, Plaintiff filed a Motion for Extension of Time to File Relief From Scheduling Order. This Motion was granted by Magistrate Judge Shields on June 6, 2007. Defendant filed, under seal, his response to Plaintiff's Motion, requesting the Court not permit Plaintiff to supplement the administrative record pointing out, among other things, that a Judicial Review proceeding was not a fact finding procedure but rather a review of an existing administrative record to see whether or not the Defendant's final administrative decision was supported by substantial evidence. The Court held a hearing on June 11, 2007. The Court entered an Order on June 22, 2007, denying Plaintiff's

Motion to Supplement the Administrative record. The Court found the attempted supplementation concerned evidence that was not relevant to Plaintiff's claimed period of disability at issue. Plaintiff sought to submit evidence that was dated a month after the Administrative Law Judge's decision.

Plaintiff filed a motion on June 27, 2007, requesting an extension of time to file his brief. The Magistrate Judge granted Plaintiff's motion and ordered Plaintiff's brief be filed by August 27, 2007. Plaintiff filed a second request for extension of time on August 24, 2007. Again Magistrate Judge Shields granted the extension and ordered that Plaintiff have until August 29, 2007, to file his brief. Plaintiff filed a third extension on August 29, 2007, and also asked to file his appeal brief under seal. This requested order was granted on August 30, 2007. Defendant then filed a Motion to Set Aside and Reconsider the Magistrate Judge's Order to Seal. Defendant asserted in this motion that "the public has a right to be known the particulars of litigation involving the decisions of public officials." The request to reconsider the sealing of Plaintiff's brief was granted on September 7, 2007. Defendant's brief was then filed on October 23, 2007. Plaintiff's reply brief was filed on November 1, 2007 and the matter was considered submitted.

The Court granted Plaintiff's motion for reversal of the Commissioner's final administrative decision finding that Plaintiff's obesity met or equaled the Commissioner's listing of impairments at step three of the sequential evaluation. *See* Court's decision (Clerk's 36) dated March 20, 2008 at page 4. Plaintiff filed an application for attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA). In that application Plaintiff sought EAJA fees in the amount of $9,142.50. The parties however agreed upon an EAJA award of $7,245.00 and an

order was entered awarding Plaintiff that amount for EAJA attorney fees.

On January 28, 2009, Plaintiff filed a Motion for Attorney Fees Under 42 U.S.C. § 406 (b)(1) seeking additional attorney fees out of Plaintiff's past-due benefits that were withheld from him. Attached to the Motion was Plaintiff's "consent" to his Attorney's claim. (See Exhibit C of Clerk's 41). Defendant's response was filed on February 10, 2009. Defendant stated the motion was premature in that Plaintiff had not received a Notice of Award and that the statute prohibited any attorney fee award that exceeded 25 per cent of past-due benefits to which claimant was entitled. Defendant then requested that when the amount of past-due benefits was determined that Plaintiff attach the Notice of Award to his pleading because Defendant's regional counsel and the United States Attorney did not, as a matter of course, receive such documents. Defendant then apprised the Court of its duty to conduct an "independent check" on the request for fees under the holding in *Gisbrecht v. Barnhardt*, 535 U.S. 789 (2002).

On May 7, 2009, Plaintiff filed a Supplemental Motion for attorney fees acknowledging that on April 29, 2009, he received an authorization to charge and receive an attorney fee of $5,300.00 for "services before the Social Security Administration." Counsel also said that "plaintiff appreciates that the court cannot act upon this motion until amount of past-due benefits to which the claimant is entitled is correctly determined." On January 19, 2010, Plaintiff supplemented his motion again, this time asking the Court to rule "using the Administration's $13,893.25 past due benefit calculation as the amount of the plaintiff's legal fees less any credits required by law." On February 5, 2010, Defendant filed a motion for extension of time reciting it needed time to respond to Plaintiff's Motion for Attorney Fees. Magistrate Judge Shields granted to motion for extension of time for Defendant to file a response. Plaintiff filed a

Supplement #3 to Plaintiff's Motion for Attorney Fees under 42 U.S.C. § 406 (b) (1). In that filing Plaintiff claimed "the record is now complete and the motion for fees is ripe for determination." Plaintiff states in this filing that an award notice had issued March 3, 2010 "which reveal that the Office of Hearing and Appeals has authorized a fee of $18,576.90, that $18,138.25 should have been withheld for the payment of attorney fees (rather than the $18,893.25 that was withheld) and that the difference ($4,245.25) had been released to the Plaintiff." This filing is clearly at odds with the other information regarding what fee had been authorized for Mr. Jayne by the Social Security Administration. That amount appears to be $5,300.00. The Court finds, as a fact, that Plaintiff's counsel was authorized a $5,300.00 attorney fee out of Plaintiff's past-due benefits. On March 18, 2010, Defendant filed a response to the Motion acknowledging that the Court may award a successful claimant's counsel attorney's fees for worked performed before the Court in a "reasonable" amount, not to exceed twenty-five percent of the total past due benefits awarded to the claimant and that are withheld from the claimant by the Commissioner. Defendant wrote: "Defendant has no objection to an award in the amount requested, $18,576.90 under § 406 (b). However, the Court must independently determine whether an attorney fee in this amount is reasonable."

In performing this independent check the district court must assess the reasonableness of a fee request by analyzing a number of factors. Justice Ginsburg wrote in *Gisbrecht*,

> Most plausibly read, we conclude,§ 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. § 406(b)(1)(A) (1994

> ed., Supp. V). 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 rendered.

Gisbrecht, 535 U.S. at 807.

The Court continued: "Courts that approach fee determinations by looking first to the contingent-fee agreement, then testing it for reasonableness, have appropriately reduced the attorney's recovery based on the character of the representation and the results the representative achieved." *Gisbrecht*, 535 U.S. at 808. The Court then gave examples of matters that concerned the "character of the representation." These included, substandard representation, any delay attributable to the lawyer, and if the benefits are large in comparison to the amount of time counsel spend on the case. Courts were told to disallow fees seen as "windfalls" for lawyers. According to *Gisbrecht*, that is the reason why judges must look to a record of the hours spent representing the claimant and a statement of the lawyer's normal hourly billing charge for noncontingent-fee cases.

The starting place, therefore, for Mr. Wright's case is to determine initially if there was a contingent fee arrangement in place regarding this claim for work performed before the Court. Based upon the submission of Plaintiff's counsel, the Court, *sua sponte*, initiated a hearing between government counsel and Mr. Jayne. The Court was unable to read the written submission of Plaintiff counsel with respect to the written fee contract. After counsel emailed a copy of that contract it was unclear as to whether a contingent fee agreement existed between Plaintiff and his lawyer. The contract is attached as appendix one to this opinion.

While the contract makes reference to "Federal District Court," it does not refer to the judicial review process that was undertaken in this case. However, the contract goes on to state

"I further agree to call my attorney's office as soon as I receive any back benefit check, or as soon as I am notified of a direct deposit of back benefits and **to pay the fees and expenses immediately from that check or deposit**. (Emphasis in the original).

In *Gisbrecht*, after reciting the history of "lodestar" and "contingent" fees, Justice Ginsburg wrote of the compromise that Congress acknowledged when it wrote 42 U.S.C. 406 (b),

> Congress recognized that "attorneys have upon occasion charged ... inordinately large fees for representing claimants [in court]." S. Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 122 (1965), U.S. Code Cong. & Admin. News 1965, pp. 1943, 2062. Arrangements yielding exorbitant fees, the Senate Report observed, reserved for the lawyer one-third to one-half of the accrued benefits. *Ibid*. Congress was mindful, too, that the longer the litigation persisted, the greater the build-up of past-due benefits and, correspondingly, of legal fees awardable from those benefits if the claimant prevailed." *Ibid*.
>
> Attending to these realities, Congress provided for "a reasonable fee, not in excess of 25 percent of accrued benefits" as a part of the court's judgment, and further specified that "no other fee would be payable." *Ibid*. Violation of the "reasonable fee" or "25 percent of accrued benefits" limitation was made subject to the same penalties as those applicable for charging a fee larger than the amount approved by the Commissioner for services at the administrative level – a fine of up to $500, one year's imprisonment, or both. *Ibid*. "[T]o assure the payment of the fee allowed by the court, "Congress authorized the agency "to certify the amount of the fee to the attorney out of the amount of the accrued benefits." *Ibid*.

Gisbrecht, 535 U.S. at 804-05.

The compromise legislation resulted in the Commissioner withholding benefits of the claimant pending authorization by the district court which in turn provided assurance to lawyers that they will be paid while limiting their fees to an amount that is "reasonable." The Court must then take into account the factors noted above including the fact of the contingent fee that is in

place. The Court was and is concerned, and frankly disturbed, by the highlighted provision of the contract executed by the Plaintiff Mr. Wright.

Because of that concern the Court held a hearing regarding this matter by telephone on April 29, 2010, regarding this contract. Mr. Jayne acknowledged that the "contract" does not provide for any work performed before the district court. Mr. Jayne stated, after searching for the contract, "I found it. Well, years ago, I just took this off a form that Social Security said I should use, but I'm with you, I don't see a specific reference to services after it leaves the ALJ. Though I do have, you know, client signed off on the application." The Court continued the colloquy with Mr. Jayne:

> It says "I further agree"– Well, it says, "I further agree to call my attorney's office as soon as I receive any back benefit check or as soon as I am notified of a direct deposit of back benefits and to pay the fees and expenses immediately from that check or deposit."
>
> Mr. Jayne: Yeah, I see that.
>
> The Court: Is that what happened in this case?
>
> Mr. Jayne: Not–
>
> The Court: Well, I've never seen a contract like this. You say you got this from Social Security?
>
> Mr. Jayne: Yeah, I don't pay–I don't pay attention to that at all, you know.
>
> The Court: You don't pay attention –
>
> Mr. Jayne: I–I don't even know what's it mean.
>
> The Court: Wait a minute. You don't pay attention to the contract?
>
> Mr. Jayne: Well, I don't pay attention to that provision. I – No, I really don't. I know it's a 25 percent, that's the deal and we move on.

During the hearing Mr. Jayne stated: "This is the only contract that I have that I have ever used."

Under *Gisbrecht* the burden is on Plaintiff's counsel to show that his fee request is a reasonable one. Here, an examination of the Court's merits decision reversing the Commissioner's administrative decision reveals that the case was a straight forward finding by the district court that the Commissioner erred in failing to find that Mr. Wright met or equaled the morbid obesity listing found in Social Security Ruling 02-01p. A review of Plaintiff's brief shows that he alleged this as an error by the Commissioner and cited an earlier ruling of the district court as well as the Social Security Ruling in support of his argument. Mr. Wright's opening brief in support of reversal or remand included five pages of his 36 page brief that argued this point. Mr. Jayne filed on Mr. Wright's behalf a timely reply brief in resistance to the Commissioner's argument and again urged reversal based upon the erroneous failure to find that Mr. Wright met the listing.

The "character of the representation" includes looking at the timeliness of counsel's work so as to avoid any build up of past due benefits that would possibly help create an "unreasonable" fee. Here Plaintiff's counsel obtained two extensions of the court imposed briefing schedule but in light of the legal and factual record involved it does not appear that any delay was involved and in any event was not designed to create a larger period of disability so as to artificially inflate the amount available for attorney fees. However "character of the representation" could also include violation of the prohibition against charging or receiving a fee without prior authorization as required under 42 U.S.C. § 406 (B) (2). If counsel in this case enforced his agreement with Plaintiff that would be a violation of the attorney fee statute and could subject Plaintiff's lawyer to prosecution and criminal sanctions upon his conviction. The Court will accept Counsel's statement that he does not enforce this provision of the agreement

and has not read the agreement although that fact seems improbable on its face.

Part of the reason for the delay in the submission of this case as shown by the docket is that on May 26, 2007, Plaintiff's counsel filed a "Motion for leave to File supplement administrative record; Motion for Reversal and Remand." In this motion, Mr. Wright urged the Court to remand the case to the Appeals Council for reopening and consideration of Plaintiff's evidence and written argument." Eventually, the Court held a hearing on this matter and refused to remand the matter and also refused to permit Plaintiff to supplement the existing administrative record compiled by the Commissioner. This order of denial by the Court was entered on June 27, 2007, and thereafter a briefing schedule was again ordered. Plaintiff's counsel obtained extensions to file Plaintiff's opening brief. Given the complexity of all of the issues that Plaintiff argued, however, the Court does not believe that this delay was "undue" or "unreasonable."

The third factor that Justice Ginsburg mentioned in *Gisbrecht* was "If the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is in order." *See Gisbrecht*, 535 U.S. 808. Here counsel claimed he spent 55.7 hours working this case before the district court. However, many of Counsel submissions involve block billing" where it is difficult to determine what exactly he did. Block billing has been defined as "the time keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks." *Welch v. Metro. Life Ins.Co*., 480 F3d 945 n. 2 (9th Cir. 2007) quoting *Harold Stores, Inc. V. Dillard Dep't Stores, Inc*., 82 F.3d 1533, 1554 n. 15 (10th Cir. 1996). For example, counsel claims five entries between August 13, 2007 and August 29, 2007, where the only description of what he did are

entries that refer to either "draft appeal brief" or "revise appeal brief." These entries don't tell the Court what counsel did. He asserts he spent 24 hours. Without further description the Court finds it impossible to say this was a "reasonable expenditure of time." Also telling in this application is that the EAJA application sought fees for 53 hours but the Court awarded fees based upon agreement between the Commissioner's counsel and Mr. Wright's counsel of reimbursement for 42 hours. Plaintiff counsel impliedly conceded that the hours he claimed were apparently excessive.

Despite the "block billing" in this case the court nonetheless believes that Counsel is entitled to a substantial fee for his work on this case. Even a reduction in hours in this case would not be a substantial factor in determining the reasonableness of counsel's fee request. This is so because of the contingent nature of claimant's case and because the purpose of the statute here is to encourage lawyers to take on disability claims for worthy applicants. Taking the reasonable hours *claimed* to be expended in this case and dividing the amount available for fees (55.7 hours divided into $18,138.50) creates a hypothetical hourly rate of $325.65. While Justice Ginsburg noted in *Gisbrecht* that the lawyer's "normal hourly billing rate" could be considered in fee determinations under the Social Security Act, the Court will take judicial notice that most lawyers who practice Social Security law work on a contingent basis.

Taking into account the record in this case and the statute under which the Court is working, it is the Court's determination that a contingent fee agreement is not necessary for Mr. Jayne to recover a reasonable fee under 42 U.S.C. 406 (b) (1). So the fact that Mr. Jayne did not have a contract for court services to be rendered to Plaintiff does not bar the Court from awarding Mr. Jayne an attorney fee from Mr. Wright's past due benefits. As the *Gisbrecht* Court

wrote: "Congress ... designed § 406 (b) to control, not to displace, fee agreements between Social Security benefits claimants and their counsel." *See Gisbrecht*, 535 U.S. at 793. The Court is to review such agreements for reasonableness. Since there was no agreement here the Court is reviewing what fee Mr. Jayne is entitled to under all the circumstances of this case without regard to any contract. Congress authorized the Social Security Administration "to certify and withhold the amount of the fee to the attorney out of the amount of the accrued benefits" to ensure that the attorney would be notified of the award.

Given all of the *Gisbrecht* factors, the Court concludes upon its "independent check" that an award of $12, 500.00 is a reasonable one in this case. It appears from the filings in the case that the Commissioner has withheld the sum of $13,893.25 and not the sum of $18,138.50. It appears further that Mr. Jayne was previously awarded an EAJA fee of $7,245.00. The Commissioner is ordered to pay Plaintiff's counsel from Plaintiff's past-due benefits the sum of $12,500.00 as a reasonable attorney fee in this case and Mr. Jayne is ordered to reimburse Mr. Wright the sum of the previously awarded EAJA fee in the amount of $7,245.00.

IT IS SO ORDERED.

Dated this ___4th___ day of June, 2010.

ROBERT W. PRATT, Chief Judge
U.S. DISTRICT COURT

SOCIAL SECURITY DISABILITY ATTORNEY FEE AGREEMENT

I, Michael Wright, hereby employ STEVEN C. JAYNE, Attorney at Law, to represent me in my Social Security Disability case. My attorney and I understand that for a fee to be payable, the Social Security Administration (SSA) must approve any fee my attorney charges or collects from me for services my attorney provides in proceedings before SSA in connection with my claim(s) for benefits, or must approve this agreement.

We agree that if SSA favorably decides the claim(s), at any stage through the first hearing at the Administrative Law Judge level, I will pay my attorney a fee equal to the lesser of 25 percent of the past-due benefits resulting from my claim(s) or $5,300. If the Social Security Administration or Federal law raises or lowers the maximum amount I may charge, that amount will apply, including amounts which may be approved by an Administrative Law Judge. If this case goes to Federal District Court, the $5,300.00 maximum does not apply. **No attorney fee will be charged if we do not win.**

I agree to pay my attorney's reasonable expenses which are incurred in representing me, whether we win or lose my case. Such expenses may include medical reports, photocopying and mileage. I understand that the 25% attorney fee does not include expenses, and that **I am responsible for those expenses, whether we win or lose, and that the expenses are in addition to the 25% fee if we win**. I further agree to call my attorney's office as soon as I receive any back benefit check, or as soon as I am notified of a direct deposit of back benefits and **to pay the fees and expenses immediately from that check or deposit.**

My attorney may agree with another attorney to help in my case, but I will not pay any more for being represented, even if he does bring in another lawyer to help in my case. I understand that, if at any time my attorney determines that there is not sufficient merit to continue with the appeal, he will advise me of the need to withdraw from representing me in this case.

I understand that Social Security past-due benefits are the total amount of money to which I [and any auxiliary beneficiary(ies)] become entitled through the month before the month SSA effectuates a favorable administrative determination or decision on my Social Security claim and that Supplemental Security Income (SSI) past-due benefits are the total amount of money for which I become eligible through the month SSA effectuates a favorable administrative determination or decision on my SSI claim. We further understand that the fee for both claims may not exceed the lesser of $5,300 or 25 percent of the combined past-due benefits, except as set out above, including any increases by statute or regulation. If the Social Security Administration or Federal law raises or lowers the maximum amount I may charge, that amount will apply.

I have not been promised I would win, but that my attorney would do his best in this case. We have both received signed copies of this agreement.

Dated this 16 day of November, 20 04.

Michael Wright
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EXHIBIT
A