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CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

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

ERNEST L. CLESTER, JR.,	*	
	*	3-99-CV-90013
Plaintiff,	*	
	*	
v.	*	
	*	
KENNETH S. APFEL, Commissioner of Social Security,	*	
	*	ORDER
Defendant.	*	
	*	

Before the Court is Plaintiff's counsel's Petition For Attorney's Fees Pursuant to 42 U.S.C. Section 406(b). The Commissioner resists the petition because counsel's request for fees is "for work done at the Agency level prior to filing Clester's Complaint in the District Court." Petition at 1. This Court agrees with the Commissioner that the Court has no jurisdiction to award fees for administrative work. In *Fenix v. Finch*, 436 F.2d 831, 838 (8th Cir. 1971), the Court wrote:

> [I]t is clear that the court had no authority concerning fees on any sum awarded administratively. It is well settled that the court is without jurisdiction to award fees for services at the administrative level. *Conner v. Gardner, supra,* 381 F.2d at 500; *Robinson v. Gardner,* 374 F.2d 949 (4th Cir. 1967); *Gardner v. Menendez*, 373 F.2d 488 (1st Cir. 1967); *Chernock v. Gardner,* 360 F.2d 257, 259 (3rd Cir. 1966). The matter of fees for legal services performed within HEW on Social Security claims has been committed by statute to the responsibility of the Secretary exclusively, this customary province of the courts having been preempted by Congress. *Robinson v. Gardner, supra,* 373 F.2d at 951; 42 U.S.C. § 406; Soc.Sec Adm. Reg. §§ 404.976, 404.977a, 42 U.S.C App.; *Gardner v. Menendez, supra,* 373 F.2d at 490.

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See also, McDannel v. Apfel, 78 F.Supp.2d 944 (S.D. Iowa 1999) for a discussion of appropriate fee applications after a reversal by the Court.

Counsel points to the language in the Notice of Award which states: "After the court sets the fee, we will let you and the lawyer know how much of this money will be used to pay the fee. We will send the remainder to you." There is nothing in that language which implies that the Court is vested with jurisdiction to determine the amount of a fee for counsel's work before the Social Security Administration. Had counsel timely petitioned the Court under the provisions of 42 U.S.C. § 406(b) for the hours expended preparing the case for submission to this Court for judicial review, the Court could have awarded a reasonable fee for counsel's work. Because Plaintiff had previously been awarded EAJA fees, the lesser of the two amounts would have been returned to Plaintiff by counsel. *Talbott v. Bowen,* 832 F.2d 111, 112 (8th Cir. 1987). As this Court explained in *McDannel* at 950, Fed.R.Civ.P. 54(d)(2)(B) and LR 54.2 impose time limits on an application for fees under 42 U.S.C. § 406(b)(1). That rule provides:

> Unless otherwise provided by statute or order of the court, the motion [for attorneys' fees] must be filed and served no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim made.

The Advisory Committee Notes state, in pertinent part:

> The rule does not require that the motion be supported at the time of filing with the evidentiary material bearing on the fees. This material must of course be submitted in due course, according to such schedule as the court may direct in light of the circumstances of the case. What is required is the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees, and the amount of such fees (or

a fair estimate).

In the case at bar, judgment was entered September 29, 1999. Counsel's 406(b) petition was filed March 30, 2000. Clearly, the petition is not timely and must be denied on that basis as well as the fact that the Court is without jurisdiction to authorize a fee for work done before the Social Security Administration.

In his Petition, counsel notes that he is holding four thousand dollars of Plaintiff's money in a trust account. Because counsel's petition must be denied, that money is to be returned to Plaintiff forthwith. Counsel is hereby ordered to explain, in writing, to his client that counsel had no authority to retain four thousand dollars of Plaintiff's money. Counsel shall, within ten days of this Order, provide a copy of his letter, along with a photo copy of his check payable to his client, to the Court and to the Social Security Administration.

For all of the foregoing reasons counsel's petition for fees is hereby denied.

IT IS SO ORDERED.

Dated this 20th day of April, 2000.

Robert W. Pratt

ROBERT W. PRATT
U.S. DISTRICT JUDGE