

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

VIRGIL M. SHAUGER,

Plaintiff,

v.

MICHAEL ASTRUE,
Commissioner of Social Security,

Defendant.

ORDER

11-cv-129-bbc

On May 14, 2012, the United States Court of Appeals for the Seventh Circuit reversed this court's order confirming the commissioner of Social Security's decision and remanded the case to the commissioner for further proceedings. Now before the court is a petition for fees pursuant to 42 U.S.C. § 406(b)(1) in the amount of \$12,526.75 filed by Dana Duncan, counsel for plaintiff Virgil Shauger. Defendant has filed a response stating that he does not object to the motion.

As part of its judgment, the court may allow "a reasonable fee . . . not in excess of 25 percent of the . . . past-due benefits" awarded to the claimant. § 406(b)(1)(A). The fee is payable "out of, and not in addition to, the amount of [the] past-due benefits." Id. Where a claimant and his attorney have made a contingent fee agreement, the court must "look[] first to the contingent-fee agreement, then test[] it for reasonableness." Gisbrecht v. Barnhart, 535 U.S. 789, 808 (2002).

The confusing information provided by counsel makes it difficult to make the analysis outlined above. In the motion itself, Duncan acknowledges that the total award he seeks is \$27,426.75, which under the terms of the contingent fee contract with plaintiff is 25% of \$109,707 that plaintiff was awarded in this case. The \$12,526.75 he seeks is the total contingent amount minus the \$14,900 already awarded plaintiff under the Equal Access to Justice Act, 28 U.S.C. § 2412.

However, in his brief, counsel states, “The total award sought is \$12,526.75. The hours involved in this case are 131.65 hours. As a result, the effective hourly rate is \$132.38.” He then compares this “effective hourly rate” to his usual non-contingent rate and rates usually charged by lawyers in Wisconsin and concludes that “this is not a windfall rate and is a modest rate in comparison.”

Although much of counsel’s reasoning makes sense, I do not understand where the numbers come from. Even assuming that calculation of counsel’s effective hourly rate starts with a numerator of \$12,526.75, this amount divided by 131.65 hours comes out to \$95.15 per hour. Of course, the notion of \$12,526.75 as the numerator is dubious because I understand counsel to be saying that he is also keeping the \$14,900 in EAJA fees. Using the total 25% contingent amount of \$27,426.75 as the numerator, the effective hourly rate for 131.65 hours works out to \$208.33 per hour. As an added problem, the affidavit provided by counsel appears to show a total of 114.6 hours of “federal time,” not 131.65. Without clarification by counsel, I cannot make an award of attorney fees. Accordingly, I will give him a short time to submit a supplemental brief clarifying the issues raised above.

ORDER

IT IS ORDERED that Dana Duncan may have until March 13, 2013 to submit a supplemental brief in support of his motion for attorney fees.

Entered this 27th day of February, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge