No. 01-131

In the Supreme Court of the United States

GARY E. GISBRECHT, BARBARA A. MILLER, NANCY SANDINE, AND DONALD L. ANDERSON, PETITIONERS

v.

LARRY G. MASSANARI, ACTING COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Section 406(b) of Title 42, United States Code, provides that, when a claimant for benefits under Title II of the Social Security Act obtains a favorable court judgment awarding benefits, the court may award directly to the claimant's attorney a reasonable attorney's fee as a deduction from the claimant's back-benefits award, in an amount no greater than 25% of the back-benefits award. The question presented is whether the court, when calculating that reasonable attorney's fee, should use an hourly-based "lodestar" method (which multiplies the hours that the attorney worked by the reasonable hourly rate, with certain other adjustments), or should employ a rebuttable presumption that the attorney should receive 25% of the back-benefits award, the maximum award permitted by the statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 238 F.3d 1196. The decisions of the district courts (Pet. App. 12-16, 17-22, 23-32, 33-41) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 2000. A petition for rehearing was denied on April 20, 2001 (Pet. App. 42-43). The petition for a writ of certiorari was filed on July 19, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, establishes a special rule applicable to efforts by attorneys to collect fees from their clients for representation in court in any case in which a claimant seeks old-age, survivor, or disability benefits under Title II of the Act.[1] Section 406(b) of Title 42 sets forth the exclusive method by which an attorney may obligate a claimant for Title II benefits to pay an attorney's fee.[2] Under Section 406(b), a fee for an attorney is proper only when "a court renders a judgment favorable to a claimant." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999). The fee is determined by the court, as part of its judgment. *Ibid.* The court is to determine "a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of" the favorable judgment. *Ibid.* Once the court has set the fee, the Commissioner of Social Security ordinarily deducts the amount of the fee from the claimant's payment of past-due benefits, and pays the fee directly to the attorney. *Ibid.*

A prevailing claimant for Title II benefits may also seek an attorney's fee award under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d), in any case in

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[1] No provision of the Act governs attorney's fee requests for litigation seeking Supplemental Security Income (SSI) benefits under Title XVI of the Act (42 U.S.C. 1382 *et seq.*). See *Bowen* v. *Galbreath*, 485 U.S. 74 (1988).

[2] "[N]o other fee may be payable or certified for payment for such representation except as provided in this paragraph." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999). "Any attorney who charges, demands, receives, or collects" a fee "in excess of that allowed by the court" under Section 406(b)(1) may be charged with a misdemeanor. 42 U.S.C. 406(b)(2).

which the Commissioner's position in the litigation was not "substantially justified." 28 U.S.C. 2412(d)(1)(A). Any EAJA fee is paid by the government, rather than deducted from the claimant's past-benefits award. Congress expressly provided that an award under Section 406(b) of the Social Security Act "shall not prevent an award of fees and other expenses under section 2412(d)." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 3, 99 Stat. 186. Congress also required that "the claimant's attorney refund[] to the claimant the amount of the smaller fee." *Ibid.* Thus, an EAJA award to the claimant is used to offset an award under Section 406(b), so that the amount that the claimant receives for past-due benefits will be reduced only by the amount that the Section 406(b) award exceeds the EAJA award. Certain provisions in EAJA limit the size of an award, including the express limit of fees to $125 per hour, which may be exceeded based on an increase in the cost of living. See 28 U.S.C. 2412(d)(2)(A) (1994 & Supp. V 1999). Moreover, because EAJA is a fee-shifting statute, under which the defendant pays the plaintiff's attorney's fees, the "lodestar" calculation of the fee—which is the product of the hours reasonably spent by the attorney and the applicable hourly rate—may not be enhanced to take into account that the attorney took the case on a contingent basis, that is, that the attorney agreed not to charge a fee if the client loses. See *City of Burlington* v. *Dague*, 505 U.S. 557 (1992).

2. Petitioners brought four separate actions in the United States District Court for the District of Oregon under 42 U.S.C. 405(g), seeking social security disability benefits under Title II.[3] All four petitioners pre-

[3] Although the claimants are named as the petitioners in this case, the real parties in interest on the petition are the attorneys,

vailed on the merits of their claims, with the district courts in each case reversing the decision of the Commissioner to deny benefits. Pet. App. 5. All four petitioners then sought attorney's fee awards against

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not the claimants they represent. Counsel seek to diminish the claimants' net awards of past-due benefits for their own benefit. The claimants are not separately represented. Nevertheless, for ease of reference, we will refer to counsel's arguments in the petition as those of petitioners.

The Commissioner is the respondent to the petition because of his role as the defendant in the underlying claims for benefits, but he ordinarily does not have a direct financial stake in the outcome of this petition, for any increase in an award of attorney's fees under Section 406(b) would usually be deducted from the claimant's back-benefits award, not paid by the government. The Commissioner thus performs a function similar to that of a trustee for the benefits claimant. Nevertheless, in the vast majority of the reported cases similar to this one, the Commissioner has appeared, filed briefs, and argued to limit the fee awards, with little or no comment from the courts of appeals that his role should be limited. One exception is *Coup* v. *Heckler*, 834 F.2d 313, 325 (3d Cir. 1987), in which the court called for a more restricted role for the Commissioner (whose functions were then exercised by the Secretary of Health and Human Services). Only the Commissioner, however, is in a position to present to the courts an opposition to counsel's fee request, for a social security disability claimant is unlikely to hire new counsel to litigate the fee issues. In an earlier case in this Court involving a dispute over attorney's fees under Section 406(b), the Court raised no question over the standing of the then-Secretary of Health and Human Services to argue for a narrower fee award. See *Hopkins* v. *Cohen*, 390 U.S. 530 (1968); see also *Swedish Hosp. Corp.* v. *Shalala*, 1 F.3d 1261, 1265 n.1 (D.C. Cir. 1993) (concluding that government has standing to argue against approval of attorney's fee award out of common fund, even though government has surrendered control of the fund); *Freeman* v. *Ryan*, 408 F.2d 1204, 1206 (D.C. Cir. 1968) (per curiam) (similar).

the Commissioner under EAJA, which all four district courts granted.[4]

Counsel also moved for fee awards under Section 406(b). Attorneys Tim Wilborn and Ralph Wilborn represented petitioners in all four cases, and in three of the four cases, they asked for the statutory maximum award of 25% of petitioners' back benefits. See Pet. App. 19, 30, 33.[5] The employment contracts signed by all four petitioners state that they agreed to pay counsel 25% of past due benefits recovered, with no mention of any other method for calculating fee payments, such as an hourly rate method. *Id.* at 69, 74, 79, 84. Counsel also submitted affidavits, from themselves and from other lawyers, asserting that it is the standard practice, in Oregon and across the country, for counsel to undertake social security litigation on a contingency basis, with the claimant agreeing to pay counsel 25% of their retroactive benefits. *Id.* at 56, 60, 88, 89, 91.

Counsel also submitted excerpts from an Oregon State Bar Economic Survey (the Flikirs Report), giving ranges of hourly rates for different types of lawyers, by geographic location in the State, years of practice, and subject-matter areas of practice. Pet. App. 93-97. The Flikirs Report found, among other things, that the Oregon statewide median rate for all lawyers is $130 per hour, and that the range in Portland is $25-$300 per

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[4] Anderson was awarded $5866.84 under EAJA (Pet. App. 15); Gisbrecht was awarded $3339.11 (*id.* at 17); Miller was awarded $5164.75 in fees and $80.42 in expenses (*id.* at 27); Sandine was awarded $6836.10 in fees and $253.16 in expenses (*id.* at 33).

[5] In the fourth case, Anderson, the Wilborns asked instead for $10,013.50, calculated at $175 per hour, a sum that would have been 7.8% of the back benefits award. Pet. App. 12.

hour. *Id.* at 94. Lawyers with 4-6 years' experience (such as Tim Wilborn, principal counsel in these cases, see *id.* at 45) have a median rate statewide of $115 per hour ($125 per hour in Portland). *Id.* at 95.

3. In all four cases, the district courts denied counsel's claims for fee awards in substantial part, and in particular denied counsel's request for the statutory maximum of 25% of the back-benefits award. Each district court determined the fee awarded to counsel by using the lodestar method (multiplying a reasonable number of hours spent by a reasonable hourly rate for the lawyer's local market). Pet. App. 12-14, 18-19, 24-25, 29-30, 35. Each court also rejected counsel's arguments that the market rate is 25% of the back-benefits award. *Id.* at 19-21, 24-25, 30-31, 36-38; see also *id.* at 14 (also rejecting $175 per hour rate in *Anderson*). Instead, three of the four courts adopted a rate of $125 per hour for Tim Wilborn. *Id.* at 21, 31, 39.[6] The courts also refused to enhance the hourly rates to take in account the contingent basis of the fees. *Id.* at 14, 21-22, 26, 39-40.

4. Petitioners appealed in all four cases, which the court of appeals consolidated for argument and decision. Pet. App. 5. The court of appeals affirmed the fee awards. *Ibid.*

The court explained that its prior precedent made clear that it follows the lodestar method of calculating fees under Section 406(b). See Pet. App. 6. The court noted that the Fourth, Fifth, and Eighth Circuits also follow the lodestar method, but that the Second, Sixth and Seventh instead follow what it called the "contin-

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[6] The *Anderson* court set Tim Wilborn's rate at $150 per hour. Pet. App. 15. The *Miller* court set a separate rate for Ralph Wilborn at $150 per hour. *Id.* at 31.

gency" method, under which the court treats as presumptively reasonable the agreement between the claimant and the attorney to pay the attorney a percentage of the recovery. The court also observed that it has previously "noted the split of circuits and has rejected the contingency method expressly." *Id.* at 6 n.2.

The court rejected petitioners' argument that the "market rate" that should be used to calculate fees under the lodestar method is 25% of the past-due benefits. The court reasoned that to do so would "in essence" mean that it would be adopting the contingency method, even though it had previously rejected that method. Pet. App. 7. To the extent that petitioners "are attempting to blur the distinction between the lodestar and contingency methods," the court held, "their argument is unavailing." *Ibid.* The court next found that the district courts did not abuse their discretion in setting hourly rates at $125 and $150 per hour, as the Oregon State Bar survey shows those rates to be the average hourly rates for lawyers of their experience. *Id.* at 8.

The court further rejected petitioners' argument that it should increase the lodestar to reflect the contingent nature of their fee agreements, holding that the Ninth Circuit had already rejected counsel's argument that contingency should be considered based on the riskiness of social security cases as a class. Pet. App. 8-9. The court also noted that petitioners "do not argue that any of these four cases was particularly risky on an individual basis." *Id.* at 9 n.3. The court remarked that to enhance the lodestar rates to take into account the fact that lawyers sometimes lose their cases and thus do not get paid under Section 406(b) would mean "essentially asking victorious claimants to subsidize the claims of losing claimants by taking large portions out

of disabled people's recoveries to fund the representation of other claimants." *Id.* at 9 (internal quotation marks and brackets omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court. The decision does, however, implicate a conflict among the circuits. Nevertheless, the "lodestar" approach to attorney's fees followed by the court of appeals in this case represents the majority view as well as the correct rule, which continues to be adopted by additional circuits. By contrast, no court of appeals has adopted the contrary "contingency" rule in more than a decade, although one circuit has adopted the "contingency" rule in an *en banc* decision. Moreover, the ways in which the two different rules operate in practice, which vary somewhat from circuit to circuit, substantially reduce the actual effect of the difference between the two approaches. Finally, the burden of having different rules in the different circuits has not caused practical operational problems for the Commissioner. Accordingly, under all the circumstances and despite the split in authority, further review is not warranted.

1. Petitioners correctly point out (Pet. 11-14) that the circuits have reached differing conclusions as to whether the "reasonable fee" provision of Section 406(b) requires application of the lodestar method. As petitioners explain (Pet. 12-13), at least six other courts of appeals follow the Ninth Circuit's view that attorney's fees in Title II litigation should be calculated by the lodestar method.[7] Another circuit has not explicitly

[7] The court of appeals cited cases from the Fourth, Fifth, and Eighth Circuits. Pet. App. 6 n.2; see *Craig* v. *Secretary, Dep't of Health & Human Servs.*, 864 F.2d 324 (4th Cir. 1989); *Brown* v.

required the lodestar method, but has rejected the contingency method.[8] In contrast, only three circuits have held that the attorney's fee in Title II cases should be determined by some percentage of the back-benefits award, rather than based on a lodestar calculation.[9] But while the Second and Seventh Circuits quickly adopted the contingency model in the immediate wake of the Sixth Circuit's decision in *Rodriquez* v. *Bowen*, 865 F.2d 739 (1989) (en banc), no court of appeals that has considered the issue since 1990 has done so. Instead, each such court of appeals since then has expressly rejected the contingency model.[10] The trend is therefore away from the contingency model in favor of the lodestar model that the court of appeals followed below.

Moreover, the practical difference between the two rules is somewhat less than might at first appear,

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Sullivan, 917 F.2d 189 (5th Cir. 1990); *Cotter* v. *Bowen*, 879 F.2d 359 (8th Cir. 1989). In addition, the Third, Tenth, and Eleventh Circuits follow the lodestar rule. See *Coup* v. *Heckler*, 834 F.2d 313 (3d Cir. 1987); *Hubbard* v. *Shalala*, 12 F.3d 946 (10th Cir. 1993); *Kay* v. *Apfel*, 176 F.3d 1322 (11th Cir. 1999).

[8] *Ramos Colon* v. *Secretary of Health and Human Servs.*, 850 F.2d 24, 26 (1st Cir. 1988) (per curiam) (noting that, "[a]lthough the statute allows for a 25 percent maximum, it will often be the case that a reasonable fee is a much smaller amount," and that "a court is not required to give blind deference to [a] contractual fee agreement, and must ultimately be responsible for fixing a reasonable fee for the judicial phase of the proceedings") (internal quotation marks omitted).

[9] These are the Second, Sixth, and Seventh Circuits. See *Wells* v. *Sullivan*, 907 F.2d 367 (2d Cir. 1990); *Rodriquez* v. *Bowen*, 865 F.2d 739 (6th Cir. 1989) (en banc); and *McGuire* v. *Sullivan*, 873 F.2d 974 (7th Cir. 1989).

[10] See *Kay*, 176 F.3d at 1325 (Eleventh Circuit); *Allen* v. *Shalala*, 48 F.3d 456, 458 (9th Cir. 1995); *Hubbard*, 12 F.3d at 948 (Tenth Circuit).

because under certain circumstances, courts applying either method have been willing to adjust the fee in the direction of the other method. In *Rodriquez*, for example, the Sixth Circuit held that a fee less than the presumptive 25% of the award would be allowed in at least two circumstances: "those occasioned by improper conduct or ineffectiveness of counsel" (such as delay), and "situations in which counsel would otherwise enjoy a windfall because of either an inordinately large benefit award or from minimal effort expended." 865 F.2d at 746.[11] In addition, at least one of the circuits that follow the contingency model has declined to adopt an explicit presumption in favor of an award of 25% of the back benefits, in part out of concerns about unequal bargaining positions between claimants and their attorneys. See *McGuire* v. *Sullivan*, 873 F.2d 974, 981 (7th Cir. 1989) ("If, for instance, there is evidence that the client did not know she could negotiate other terms than a twenty-five percent contingency, then the contract should not be enforced."). But if, as petitioners maintain, social security attorneys universally seek a 25% contingency agreement from claimants (see Pet. 9), that very possibility that claimants effectively cannot obtain representation on other terms suggests that the Seventh Circuit, upon further consideration of the matter, might refuse to enforce such agreements on a routine basis.

On the other hand, some courts that follow the lodestar method under Section 406(b) have been willing

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[11] Moreover, the court of appeals in *Rodriquez* remanded the cases before it to the district courts for redetermination of the fees (including one case in which the district court had awarded 25% of the recovery to the attorney); it did not simply order payment of 25% to the attorneys in those cases. 865 F.2d at 747.

to enhance the fee award above the strict hourly rate model, for reasons that include contingency. For example, in *Allen* v. *Shalala*, 48 F.3d 456 (1995), the Ninth Circuit reversed a district court's award of fees in part and remanded the case because the district court had ruled that it is always impermissible to allow any enhancement to reflect contingency. See *id.* at 460. The Ninth Circuit does not allow routine enhancement of fees in social security cases to reflect the contingent nature of those cases as a class, see Pet. App. 8-9, but it will allow a contingency enhancement in a case that is "particularly risky on an individual basis." *Id.* at 9 n.3. Thus, the lodestar method does not flatly prevent an attorney from demonstrating to a court that unusual factors in a case warrant a 25% fee, even if the number of hours expended and the typical hourly rate for such a case would yield a smaller fee.

Finally, although the application of different fee rules in different circuits may lead to claimants with similar claims obtaining different net recoveries based on the circuit in which they live, any unfairness is ameliorated somewhat by the fact that claimants can generally receive at least what they bargained for. Moreover, in most of these cases, the party left to litigate the issue of fees is the Commissioner (see page 4, note 3, *supra*). The Commissioner has not experienced substantial operational difficulties in the decade since the circuits have adopted the varying methods of calculating fees. Accordingly, practical considerations and administrative burdens do not counsel significantly in favor of immediate review.

2. a. Petitioners contend (Pet. 16-18) that Section 406(b) requires the courts to treat as presumptively reasonable, and therefore controlling, any agreement between a claimant for Title II benefits and counsel to

pay the attorney 25% of the claimant's back benefits that are awarded by the court. That contention is incorrect. Section 406(b) provides that *the court* may determine and allow "a reasonable fee for such representation," with no mention of any deference that the court owes to the terms of the lawyer's employment agreement. The statute also provides that the reasonable fee allowed by the court must not be "in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled." 42 U.S.C. 406(b)(1)(A) (1994 & Supp. V 1999). Thus, the statute requires both that the court determine a reasonable fee, and that the fee be no greater than 25% of the back-benefits awarded.[12]

If it were appropriate, as petitioners contend, for the courts to presume that 25% of the claimant's back benefits is the proper award in any case in which the claimant and the attorney had agreed to that arrangement, then the statute's requirement that the court determine a "reasonable" fee would lose much of its meaning. The 25% level, which Congress intended as a ceiling, would

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[12] Petitioner maintains (Pet. 14-16) that Section 406(b) requires contingency fee agreements, and so Congress presumably intended the courts to defer to the agreements arrived at between attorneys and clients, subject to the 25% ceiling. Section 406(b) does not by its express terms, however, require contingency-fee *agreements*. It does require a contingency *fee*, in that any award of attorney's fees must depend on the claimant's prevailing in court (and must be limited to, at most, 25% of the award to the claimant), and it also prohibits other arrangements such as non-contingent hourly fees. But a court may award a fee under Section 406(b) even if the claimant and the lawyer have not entered into an arrangement setting a determinate contingency-fee percentage. The claimant and the lawyer may agree, for example, that the lawyer will receive whatever reasonable fee the court will award, subject to the 25% cap.

become the presumptive floor as well simply because the parties had agreed to that level (and lawyers would likely insist on a fee of 25% of the award in most cases). But if Congress had wanted to authorize a 25% fee award in every case (or almost every case), it would have been easy for Congress to have so provided directly. Section 406(b) does not say, however, that counsel will get 25% of the award unless that amount is inequitable and unreasonable. Rather, it says that the court will determine the "reasonable fee" to be awarded to counsel, and that the fee in any event must not exceed 25% of the back-benefits award. The touchstone of the statute is thus a determination by the court as to the reasonable fee, with 25% the upper limit; the touchstone is not 25%, with reasonableness as an exception. Thus, the fact that Congress limited fees to a percentage of the award to the claimant suggests that Congress assumed that fees would be awarded based on the hours of work performed.

b. The legislative history of Section 406(b) provides no support for petitioners' argument that Congress intended a regime in which lawyers would presumptively receive a 25% fee award. Congress adopted the fee provision of Section 406(b) to prevent abusive fee practices of lawyers in social security cases. The Senate Report explained the Senate Finance Committee's findings as follows:

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (fre-

> quently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1, at 122 (1965).

A presumption that the attorney's fee award should be 25% of the back benefits would be contrary to the concerns that Congress expressed about lawyers' extracting "inordinately large fees" from claimants. Congress acted on the understanding that lawyers who handle social security cases have unequal bargaining power vis-à-vis claimants, which could allow lawyers to extract unfairly generous terms in their representation contracts. Thus, a contingency fee agreement at which the lawyer and the client arrive is by no means necessarily or presumptively "reasonable" as Congress understood that term in Section 406(b). Consequently, those courts that follow the contingency method are mistaken when they suggest that "the best indicator of the 'reasonableness' of a contingency fee in a social security case is the contingency percentage actually negotiated between the attorney and client, not an hourly rate determined under lodestar calculations." *Wells* v. *Sullivan*, 907 F.2d 367, 371 (2d Cir. 1990). To the contrary, Congress gave the courts the responsibility of determining a reasonable fee precisely because it concluded that claimants were not able freely to negotiate attorney's fees but rather were often compelled to agree to "inordinately large" contingent fee arrangements with fixed percentages. See *Ramos Colon* v. *Secretary of Health and Human Servs.*, 850 F.2d 24, 26 (1st Cir. 1988) (per curiam) (emphasizing that "a court

is not required to give 'blind deference' to [a] contractual fee agreement" under Section 406(b)).

c. Under the lodestar method of calculating a "reasonable" attorney's fee, an objectively reasonable attorney's fee is determined based on documentation of the hours that the attorneys reasonably spent on the case, and identification of the fair hourly rate charged by lawyers of similar skill, experience, and reputation in the local market. Under that method, the fee awarded will fairly reflect the value of the services rendered by the attorney. Attorneys are also likely to receive roughly similar compensation in cases of similar complexity.

By contrast, petitioner's rule that presumptively allows a 25% attorney's fee can lead to different compensation for attorneys in cases where the attorney's efforts were almost identical. For example, the back-benefits award from which the contingency fee is deducted can vary considerably, depending on the monthly benefit level that the particular claimant seeks (which in turn varies based on the claimant's income when he was working and the number of years in which he contributed payroll taxes to the system), whether the claimant has dependents who will also be entitled to back benefits, and whether the claimant seeks benefits for an open-ended period of time or instead for only a closed period of time (if, for example, his medical condition improved at a later date). On the other side of the coin, cases yielding the same amount of back benefits would produce the same attorney's fees under petitioners' method, even if the work that counsel put into the case varied considerably. Thus, a case where counsel filed a short complaint and a short summary judgment memorandum, with both containing substantial amounts of boilerplate, would generate the

same fee as a case in which counsel had to file lengthy briefs before the magistrate judge, the district court, and the court of appeals, with oral hearings at each level. Even if, under a contingency method, fees might be reduced from the 25% level in extreme cases to prevent gross overcompensation of attorneys, petitioners' position nonetheless presents a significant risk that the attorney's compensation will bear little correlation to the efforts expended.

d. Petitioners argue (Pet. 18-23) that application of the lodestar method of determining a reasonable fee under Section 406(b) is inconsistent with supposedly more generous methods for calculating attorney's fees in other social security cases, including work done in Title II cases at the administrative level and cases seeking supplemental security income (SSI) benefits. That contention is wide of the mark.

First, as petitioners explain (Pet. 20-21), under 42 U.S.C. 406(a)(2)(A), counsel have the option, when seeking a fee for services rendered at the administrative level in Title II cases (such as for the hearing before the administrative law judge), of using a special expedited method for calculating fees. Under that expedited method, the Commissioner will approve any fee agreement between the claimant and counsel if the agreement calls for a fee that "does not exceed the lesser of" 25% of the past-due benefits or $4000. 42 U.S.C. 406(a)(2)(A)(ii). Petitioners overstate the significance of that provision, however. In a relatively simple case that is resolved favorably to the claimant at the administrative level, the back-benefits award will likely be far lower than it would be after litigation, and thus 25% of those benefits would produce a relatively small fee. But in more complex cases where substantial delay has generated higher amounts of back benefits,

counsel would likely not choose the expedited-fee option of Section 406(a)(2), but instead would seek certification of "a reasonable fee" by the Commissioner under Section 406(a)(1). If counsel makes a fee request under that provision, the Commissioner will "not base the amount of fee [he] authorize[s] on the amount of the benefit alone, but on a consideration of all the factors listed in" 20 C.F.R. 404.1725(b)(2). Those factors are similar to the traditional lodestar factors, including "[t]he complexity of the case," "[t]he level of skill and competence required" of the attorney, and "[t]he amount of time the [attorney] spent on the case." 20 C.F.R. 404.1725(b)(1)(ii)-(iv).

Petitioners point out (Pet. 19-20) that, in cases in which claimants seek SSI benefits, attorney's fees are not limited by statute at all. But, as petitioners also point out, the Commissioner does not withhold a portion of the SSI back benefits and pay it directly to counsel, as he does in Title II cases. Nor may courts order the Commissioner to make any such withholding or direct payment to counsel in SSI cases. See *Bowen* v. *Galbreath*, 485 U.S. 74 (1988). Thus, attorneys who handle SSI cases take considerable risks of nonpayment or underpayment, compared to those who handle Title II cases. Successful SSI claimants are, by definition, low-income individuals with few assets. Lawyers handling SSI claims may often find it difficult to collect fees from their clients, even after the clients receive a back-benefits award. By contrast, the fee awarded in Title II litigation is made part of the court award and may be payable to the attorney directly by the Commissioner. Thus, while the fee that a lawyer may recover in SSI cases may be less restricted by law than the fee for Title II court litigation, as a practical matter

it may be considerably easier for the Title II lawyer to recover the fee.

e. Petitioners' reliance (Pet. 17-18) on *Venegas* v. *Mitchell*, 495 U.S. 82 (1990), is unavailing. In *Venegas*, the Court held that 42 U.S.C. 1988, which authorizes the district court to award a reasonable attorney's fee to a prevailing party in an action brought under 42 U.S.C. 1983, as part of the costs payable by the losing party, does not of its own force prevent the attorney and the client from agreeing to a larger, contingent fee (or prevent a court from enforcing such a contingent-fee agreement). As the Court explained, "there is nothing in [Section 1988] to regulate what plaintiffs may or may not promise to pay their attorneys if they lose or if they win." 495 U.S. at 86-87. The Court also emphasized that "Section 1988 makes the prevailing *party*" (rather than the lawyer) "eligible for a discretionary award of attorney's fees," and so the party is free to waive, settle, or negotiate with his counsel (or an opposing party) the attorney's fee that might be awarded under Section 1988.

These points are inapposite to Section 406(b). Unlike 42 U.S.C. 1988, Section 406(b) manifestly does limit the freedom of an attorney and client to arrive at terms for the attorney's compensation: the attorney's fee must be contingent on the client's recovery, and must be no greater than 25% of the award. Section 406(b) therefore does not embody any broad principle of deference to the freedom of social security claimants and their attorneys to arrange for the attorney's compensation. Moreover, the attorney's fee awarded under Section 406(b) is payable to the attorney, not the client, and accordingly is also more subject to regulation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2001