

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EPHRAIM GREENBERG,)
individually and on behalf)
of all others similarly situated,)

Plaintiff,)

-v-

Civil Action No. 13-01837 RMC

CAROLYN W. COLVIN,)
Commissioner of Social Security,)
et al.,)

Defendants.)

RESPONSE TO CLASS COUNSEL’S APPLICATION
FOR ATTORNEY’S FEES UNDER 42 U.S.C. § 406(b)

This Court has held that Class Counsel “may seek a fee award from past-due benefits owed to class members in an amount no greater than twenty-five percent of any individual’s payment.” ECF No. 19, at *7 (published as *Greenberg v. Colvin*, 2014 WL 3884181 (D.D.C. Aug. 8, 2014)). Class Counsel filed on April 27, 2015, an application for attorney’s fees under 42 U.S.C. §406(b), a part of the Social Security Act. The application seeks an award of attorney’s fees of the maximum allowable amount, twenty-five percent of the payments of past-due benefits made to the class members.

A contingency fee award under § 406(b) requires an affirmative judicial finding that the fee yielded by the use of a percentage figure up to twenty-five

percent is reasonable. See Gisbrecht v. Barnhart, 535 U.S. 789, 795–96 (2002). That case, however, did not involve a class action where the contingency-fee arrangement was approved prior to the completion of the processing of the class members’ claims for past-due benefits. Consequently, some of the elements cited for consideration in Gisbrecht are unknown at this time. For example, “[i]f the benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment is similarly in order.” 535 U.S. at 808.

At this stage in the settlement process, we do not know the number of class members who may opt out of the class and we do not know the number of class members who will end up receiving past-due benefits. The agency has estimated that, of the probable 1,600-plus class members, only about 1,100 class members will seek or be eligible for past-due benefits and that the award of past-due benefits will probably be in the range of \$22,000,000. This conservative estimate takes into account some of the unknowns, the number of claimants who will either opt out or not be eligible for a refund (most likely because they receive, in addition to benefits from Social Security and the National Insurance Institute of Israel (“NII”), benefits from other retirement plans that remain subject to the Windfall Elimination Provision (“WEP”)).

There are other unknowns. For example, we do not know the amount of time that Class Counsel may have to expend in the future in defending the

settlement agreement and/or on issues relating to the processing of claims for past-due benefits. This unknown affects the reasonableness of the percentage awarded as the contingent fee: as noted earlier, if the awarded benefits are large in comparison to the amount of time counsel spent on the case, a downward adjustment in fees would be appropriate. We do know, however, that Class Counsel had, as of the end of April, expended only about 1,600 hours on the case. Because the case has been settled, it is unlikely that a substantial amount of attorney's time will need to be expended in the future. Taking the conservative estimate that \$22,000,000 will be paid in back-due benefits, the contingent fee would be \$5,500,000, far in excess of the dollar value of the time Class Counsel have so far spent on the case (more than \$3,000 per hour).

In deciding Class Counsel's fee application, the Court should also consider, in weighing the risk borne by Class Counsel, the background of the case. In 2004, Class Counsel represented the plaintiff in Jerome Berger v. Barnhart, 04cv00431 (D.D.C.). Berger was challenging the decision by the agency to apply the WEP in calculating his benefits because of benefits he was receiving from the NII. After the action was filed, the agency determined that Berger should not have been subjected to the WEP since the benefits he was receiving from NII were not based on his earnings. Consequently, the agency agreed to a remand of the case for the entry of a fully favorable decision that did not subject Berger's benefits to the

WEP.

By a letter dated December 16, 2005, Martin H. Gerry, then Deputy Commissioner for Disability and Income Stability Programs, advised the Associate General Counsel of Agudath Israel of America that the favorable decision in Jerome Berger's case would be applied to other recipients of NII benefits who had had their Social Security benefits erroneously subjected to the WEP:

We agree that other beneficiaries who are also receiving the NII pension may have had the WEP erroneously applied and that we should recalculate the current benefit amounts of all such beneficiaries and pay any back benefits due. We have begun the process of identifying such persons in our files, and we will take appropriate actions to correct any misapplication of the WEP.

Soon after the filing of this action, the Commissioner agreed with Plaintiff's position on the merits of the case: that the WEP should not be applied to reduce a person's Social Security benefits due to receipt of a NII pension, and accordingly, the Commissioner agreed to remove the application of the WEP and furnish relief to each class member. Although class counsel contend that they have borne the risk of loss in litigating this lawsuit, the fact that both parties have so quickly agreed to its resolution suggests that this risk was not substantial.

The above-considerations counsel against an award of twenty-five percent of the past-due benefits. Beyond this statement, however, it is difficult to conclude precisely what the appropriate percentage award should be, other than it should be

at the twenty percent or lower level.

Respectfully submitted,

VINCENT H. COHEN, JR., D.C. Bar # 471489
Acting United States Attorney
for the District of Columbia

DANIEL F. VAN HORN, D.C. Bar #924092
Chief, Civil Division

BY: */s/ Fred E. Haynes*
FRED E. HAYNES, D.C. Bar #165654
Assistant United States Attorney
555 Fourth Street, N.W., Room E-4110
Washington, D.C. 20530
202.252.2550
fred.haynes@usdoj.gov

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ORDER

Upon consideration of plaintiff’s application for attorney’s fees, and the response thereto, it is this ___ day of _____, 2015,

ORDERED that Class Counsel are awarded a fee of _____ % of the past-due benefits paid to each Class Member, who has not opted out of the settlement, because the Windfall Elimination Provision is no longer applied to determine the class member’s Social Security benefits.

UNITED STATES DISTRICT JUDGE