IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEPHANIE LYNN STEIGERWALD, *Plaintiff*, v. NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, ET AL. *Defendants*.	)	CASE NO.: 1:17-CV-1516 JUDGE JAMES S. GWIN MAGISTRATE JUDGE DAVID RUIZ **OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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I. STATEMENT OF THE ISSUES

1. Whether Plaintiff's motion for summary judgment should be denied where she has not yet moved for class certification and a judgment would thus bind only Plaintiff, who has already received all of the individual relief she is owed, and where she has not even attempted to prove a systemic error resulting in a pattern and practice of failing to conduct the windfall offset recalculation.
2. Whether, even if Plaintiff's counsel obtains a favorable judgment on behalf of a properly certified class, attorneys' fees should be paid under a statute that does not apply here by making deductions from benefits payable to individual beneficiaries, as their counsel is seeking, or whether they should be paid (if at all) by the government under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), which is the only fee statute that might apply here.

II. SUMMARY OF THE ARGUMENT

This Court should deny Plaintiff's Motion for Summary Judgment. Plaintiff has not shown that a pattern and practice of failing to conduct the windfall offset recalculation at issue in this case exists. Rather than even discussing the applicable legal standard articulated in recent in-Circuit case law, Plaintiff's Motion speculates about the parameters of a putative class, which has yet to be certified, and summarily declares that SSA has conceded liability. SSA has made no such concession, and Plaintiff requests judgment without proving that she is entitled to it. Moreover, because no class has been certified and Plaintiff has not yet even moved for certification, a decision on Plaintiff's Motion is premature and could only bind Plaintiff, who already has received all of the individual relief she is owed.

Plaintiff's counsel also is not entitled to a percentage of benefits owed to putative class members as attorney's fees under 42 U.S.C. § 406(b). Section 406(b) applies only when a court

awards a judgment under which a *claimant becomes entitled* to benefits "by reason of such judgment" in their favor. Because this case concerns only benefits to which putative class members already are entitled, § 406(b) does not, by its terms, apply. Counsel is not entitled to any award of fees under that statute, and certainly not at this juncture, where no judgment has been awarded, and where no future judgment would entitle putative class members to any benefits to which they are not already entitled.

III. FACTS AND BACKGROUND

A. Statutory and Regulatory Background

The Social Security Administration ("SSA") operates vast, complex programs benefitting many millions nationwide. *See Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983). In computing benefits under its two primary disability benefit programs under Titles II and XVI of the Social Security Act, SSA performs a calculation, known as a "windfall offset," to avoid giving a windfall to individuals who become eligible for concurrent past-due benefits under both programs. When a beneficiary uses the services of an attorney or other representative to obtain Title II benefits, the fees paid to that representative should be excluded from Title II benefits in the windfall offset calculation. (*See* Mot. to Dismiss, ECF No. 18, PageID # 68-69); 20 C.F.R. § 416.1123.

In cases like Plaintiff's, where a fee petition is filed and the fee has not yet been authorized when the windfall offset is calculated, SSA calculates the windfall offset twice, once before fees are known (so that past-due Title II benefits may be released to the beneficiary expeditiously), and again after representatives' fees are known (to adjust the windfall offset calculation to account for representatives' fees). Plaintiff alleges that this second calculation, or recalculation, to exclude fees was not performed.[1] (*See* Compl. ¶¶ 11; 79-80, ECF No. 1, PageID # 2-3, 16.)

[1] Plaintiff has adopted this definition of "Subtraction Recalculation" for purposes of her Motion

B. Undisputed Facts

Plaintiff Stephanie Lynn Steigerwald applied for Title II and Title XVI benefits on June 17, 2009, alleging [redacted]. (Mot. to Dismiss, ECF No. 18, Walker Decl. ¶3, PageID # 187.) On July 15, 2014, an ALJ found Plaintiff disabled. (*Id.* ¶4.) On April 20, 2015, SSA received a fee petition from Plaintiff's attorney, Kirk Roose, seeking $17,059.25. (*Id.* ¶ 13.) SSA authorized a fee of $13,500 and provided notice to Plaintiff and Mr. Roose. (*Id.* ¶¶ 22-23.)

On July 18, 2017, Plaintiff filed her Complaint, styled as a putative class action, alleging that SSA failed to recalculate her windfall offset to exclude authorized representatives' fees. (Compl., PageID # 1.) After investigating Plaintiff's allegations, SSA verified that: (1) SSA performed a windfall offset calculation before Plaintiff's representative's fees were authorized, and (2) SSA did not recalculate Plaintiff's windfall offset after those fees were authorized and paid. (Walker Decl. ¶¶10, 27, PageID ## 188, 191.) SSA then completed the windfall offset recalculation in November 2017 and promptly paid Plaintiff $5,392.08. (*Id.* ¶ 27.)

SSA has now identified 28,510 individuals for whom SSA performed a windfall offset calculation before representatives' fees were authorized, for whom representatives' fees were then paid out of retroactive benefits between September 1, 2012, and October 31, 2017, and for whom SSA has not yet recalculated the windfall offset to exclude representatives' fees (and may be due additional past-due benefits).[2] These 28,510 individuals are potentially similarly to Plaintiff and are the only identified individuals for whom Plaintiff *could* move for class certification.

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for Summary Judgment. (Mot. for Summ. J., PageID # 644 n 1.)

[2] SSA identified another 9,165 individuals who met the above criteria but to whom no underpayment would be due even upon performing the windfall offset recalculation. These individuals have suffered no injury as a result of the agency's delay in performing the recalculation and therefore are not similarly situated to Plaintiff. Plaintiff's Motion for Summary Judgment conflates these two groups by referring to 37,675 individuals, when only the 28,510 individuals discussed above could be putative class members. (Mot. Summ. J. PageID # 647.) The larger

IV. LEGAL STANDARDS

Summary judgment is proper only where there are no genuine issues of material fact *and* the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When ruling on a motion for summary judgment, a court must construe the evidence and make all reasonable inferences in favor of the nonmoving party. *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007). The moving party bears the initial burden of informing the court of the basis for the motion and identifying the portions of the record that demonstrate the absence of a genuine dispute over material facts. *Rodgers v. Banks*, 344 F.3d 587, 595 (6th Cir. 2003). In addition to establishing the absence of a material dispute, the movant also must demonstrate that it is entitled to judgment as a matter of law. *Jones*, 488 F.3d at 403.

Furthermore, although a request for attorneys' fees is more properly made in the context of Rule 54(d), *see, e.g., Walker v. Astrue*, 593 F.3d 274, 280 (3d Cir. 2010); *Sinkler v. Berryhill*, No. 6:14-CV-06460, 2018 WL 1748346, at *5 (W.D.N.Y. Apr. 11, 2018) (containing extensive discussion of case law addressing rules governing 406(b) motions), or possibly Rule 60(b)(6), *McGraw v. Barnhart*, 450 F.3d 493, 505 (10th Cir. 2006), than under Rule 56, a premature fee motion can still be considered timely. *See, e.g., Myers v. Sullivan*, 916 F.2d 659, 679 n.20 (11th Cir. 1990). Because resolution of the question whether § 406(b) can apply to the claim in this case will help all parties, Defendants have responded substantively and ask that the Court reject Plaintiff's lawyers' claim of entitlement to fees under § 406(b) on its merits and with prejudice.

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number referred to by Plaintiff is thus irrelevant.

V. ARGUMENT

A. Plaintiff Has Not Established Entitlement to Judgment as a Matter of Law

Because Plaintiff does not even suggest what systemic error SSA committed, she has not met her burden to show that SSA has a systemic pattern and practice of violating its statute and regulations.[3] Moreover, because no class has yet been certified and Plaintiff has not even moved for certification at this point,[4] any decision on Plaintiff's Motion is premature and could only bind Plaintiff herself—who already has received all of the individual relief to which she is entitled. Summary judgment should be denied.

1. Because No Class Has Been Certified, Summary Judgment Would Bind Only Plaintiff, Who Has Already Received Her Requested Relief.

A decision on Plaintiff's Summary Judgment Motion prior to class certification would bind only Plaintiff and thus have no effect because she already has received all the relief she is owed.

Fed. R. Civ. P. 23(c)(1)(A) provides that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Certification typically is decided before the merits. *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) ("[D]istrict courts generally do not grant summary judgment on the merits of a class action until the class has been properly certified and notified."). District courts may delay a certification decision until after ruling on substantive motions, but that typically occurs only when a *defendant* seeks summary judgment to eliminate a claim and the court

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[3] Although Plaintiff pleaded as part of the allegations in Count I of her Complaint that SSA is violating its POMS regarding the "notices which must be sent" to beneficiaries, (Compl. ¶ 101, PageID # 20), she now makes no arguments and has submitted no evidence to support this allegation. She is therefore not entitled to summary judgment on this basis. *See Rodgers*, 344 F.3d at 595 (moving party bears the burden of informing the court of the basis for the motion and providing evidence to support its claims).

[4] SSA does not concede that class certification is appropriate and reserves the right to oppose class certification at such time as Plaintiff might try to meet her burden in this regard.

concludes that a decision will promote judicial economy by rendering moot any decision on class certification. *See, e.g., Thompson v. Cty. of Medina, Ohio*, 29 F.3d 238, 240-41 (6th Cir.1994).

Any merits decision for a plaintiff prior to certification binds only the named plaintiff. *Wright v. Schock*, 742 F.2d 541, 544 (9th Cir. 1984) (merits decision pre- certification is binding only as to named plaintiff); *Tse*, 69 F.3d at 297; *Villa v. San Francisco Forty-Niners, Ltd.*, 104 F. Supp. 3d 1017, 1020 (N.D. Cal. 2015); Manual for Complex Litigation (Fourth) § 21.133 (2004) ("court may rule on motions pursuant to Rule 12, Rule 56, or other threshold issues before deciding on certification; however, such rulings bind only the named parties.")

Here, Plaintiff has already received all the individual relief she is owed. Once Plaintiff raised her individual claim by filing this case, SSA recalculated her windfall offset to exclude the representative's fees authorized after her initial windfall offset and paid her $5,392.08 in past-due benefits.[5] (Walker Decl. ¶¶26, 27, PageID # 191.) Although this Court previously held that Plaintiff's putative class action is not moot by virtue of the picking-off exception, (Op. & Order, PageID # 481), that does not change the fact that Plaintiff cannot receive any additional individual relief. *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986) ("Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief.") Without a certified class, summary judgment has no effect whatsoever.

[5] Plaintiff makes much of the fact that SSA denied liability in its Answer and filed a jurisdictional motion. (Mot. for Summ. J., PageID ## 647, 650, 651, 652.) While SSA contended that the Court lacked subject-matter jurisdiction over the Complaint and thus was not entitled to any relief that might be ordered by the Court, SSA did not state that it would not release funds to Plaintiff because of the Court's lack of subject-matter jurisdiction or that it would not investigate and address any issues it became aware of related to this litigation.

2. Plaintiff Has Not Established the Elements of a Claim Under 42 U.S.C. § 405(g) and Thus Has Not Shown That She is Entitled to Judgment

Even putting aside the problems inherent in seeking summary judgment on behalf of a plaintiff whose claim is moot and a class that has yet to be certified, Plaintiff has not established anything more than that some 28,510 people may be due additional past-due benefits. In other words, an obligation on SSA's part to pay additional funds to beneficiaries does not automatically entitle Plaintiff to judgment. Plaintiff brought suit pursuant to 42 U.S.C. § 405(g), asserting a pattern and practice of avoiding an obligation on SSA's part, (Compl., ¶ 94), and she must demonstrate that a systemic pattern and practice exists. Rather than even discussing the applicable legal standards, Plaintiff's Motion simply speculates about the parameters of a putative class and summarily declares that the "Agency has made a clear concession as to liability, foreclosing the need for trial on the merits." (Mot. for Summ. J., PageID # 651.) SSA has made no such concession, and Plaintiff has requested judgment without first proving that she is entitled to it.

To prove her claim, Plaintiff must prove not only that SSA failed to recalculate her windfall offset but that SSA's error in applying 42 U.S.C. § 1320a-6, 20 C.F.R. § 416.1123(b)(3), and POMS SI 02006.200 is "sufficiently pervasive and systemic to justify class relief." *Dixon v. Shalala*, 54 F.3d 1019, 1029 (2d Cir. 1995). That is, she must identify an actual error committed by SSA, experienced by a class of beneficiaries, and not merely allude to a speculative class of people who demonstrate a similar result. Indeed, the Court of Appeals for this Circuit has affirmed the denial of plaintiffs' summary judgment motion in a case alleging that a pattern and practice involving a specific, widespread error in a government agency's computer system violated putative class members' right to receive benefits from that agency. *Unan v. Lyon*, 853 F.3d 279, 291 (6th Cir. 2017). Even though the Sixth Circuit credited the contention that multiple individuals did not receive their benefits, the court held that summary judgment in favor of plaintiffs was inappropriate

where they failed to show that the errors identified were caused by the systemic computer error and were not the result of repeated human error, as contended by the defendant. *Id.* at 290-91. As such, in this case, Plaintiff must do more than suggest that some broad, systemic error exists; she has done much less. Regardless of Plaintiff's evidence that SSA has not yet recalculated the windfall offset for some individuals, and despite asserting generally that SSA has violated the statute and regulations as to some people, Plaintiff does not even suggest what systemic error led to the result she contends might affect the putative class, let alone whether it is uniform or how it is occurring. (*See* Mot. for Summ. J., PageID # 652.) It is not enough to simply insist that the agency has failed to perform some duty; Plaintiff's argument, if accepted, would turn the Social Security Act into a strict-liability statute. Indeed, it is telling that Plaintiff cites no authority to support her argument that identification of individuals to whom the agency owes a duty, without more, is enough to warrant a grant of summary judgment. Without such a suggestion—and much more—and having failed to recognize the requisites for establishing a claim under the Act, Plaintiff is not entitled to a liability ruling in her favor on her pattern and practice claim.

Moreover, Plaintiff provides no evidence, as she must, to support her allegation that there is any systemic or pervasive error before September 1, 2012. Citing only to her Complaint, Plaintiff baldly alleges that "the Agency's failures go back many more years, and likely implicates thousands more deserving claimants who did not receive the moneys they were owed." (*Id.* PageID # 648.) It is axiomatic that a party may not rest on the pleadings in seeking summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To the extent Plaintiff's reference to the Complaint is an attempt to rely on two class actions from 30 to 40 years ago and on two SSA OIG reports, she still has not met her burden. One case relied on by Plaintiff, *Guadamuz v. Heckler*, 662 F. Supp. 1060 (N.D. Cal. 1986) *rev'd on other*

grounds sub nom, Guadamuz v. Bowen, 859 F.2d 762 (9th Cir. 1988), resulted in SSA adopting the very POMS provision upon which she bases her claims in this lawsuit. The other, *Willis v. Sullivan*, 730 F. Supp. 785 (M.D. Tenn. 1990), was settled by entry of an agreed order in 1993, and the presiding court found that "the government ha[d] completed its obligations under the settlement agreement" as of March 12, 2002. (Attach. A, ECF No. 41-1, PageID # 539.) A case resolved to the satisfaction of the court and the parties simply does not provide sufficient evidence to meet Plaintiff's burden of proving that there was an unresolved systematic and pervasive problem prior to October 2012. Additionally, the two SSA OIG reports, (Compl. ¶¶ 44-74, PageID # 10-15), are irrelevant to Plaintiff's claims in this case. The OIG audits did not aim to, and did not, evaluate or address whether representatives' fees were subtracted from Title II benefits countable as income in performing any windfall offset calculations. (Klein Decl., attached hereto as Ex. A, ¶ 3.) Instead, the audits examined whether windfall offset actions were processed; if processed, whether there was an obvious clerical error or an error in failing to pay the amount that the SSA had determined was due; and whether the windfall offset determinations were processed in a timely manner. (*Id.* ¶ 12.) The audits simply did not determine whether SSA was correctly determining or accounting for representatives' fees when conducting any windfall offset calculations, whether at the time of the initial windfall offset or thereafter. (*Id.*)

Plaintiff's unsupported speculation is insufficient to support summary judgment.

3. <u>SSA Does Not Have A Duty to Immediately Recalculate the Windfall Offset</u>

Finally, Plaintiff has provided no legal basis for her assertion that SSA must recalculate the windfall offset *immediately* after a fee is authorized. (Mot. for Summ. J., PageID # 646.) In support of her contention that SSA has such a duty, Plaintiff cites this Court's order denying SSA's Motion to Dismiss, along with POMS SI 02006.202(A)(1)(c), 02006.202(B), 02006.205(C)(1)(b),

and 02006.210(B), (*id.*), but none of these sources imposes or evidences any requirement to complete the recalculation immediately upon authorization of a fee. Furthermore, agencies are given a reasonable time to complete a required action when no specific time is provided by statute. *See generally*, *Blankenship v. Sec'y of HEW*, 587 F.2d 329 (6th Cir. 1978) (declining to impose 90 day limit on scheduling ALJ hearing); *Heckler v. Day*, 467 U.S. 104, 119 (1984) (same). Given that no such duty exists, Plaintiff cannot be entitled to summary judgment on the ground that SSA failed to recalculate the windfall offset immediately after fees are authorized.

B. *Even if* Plaintiff's Counsel Obtains a Favorable Judgment on Behalf of a Properly Certified Class, Reasonable Attorney's Fees Must Be Paid by the Government, If By Anyone, and Should Not Be Deducted From Benefits Payable to Individual Beneficiaries

Plaintiff's counsel seeks a percentage of benefits owed to putative class members as attorney's fees under 42 U.S.C. § 406(b). But that statute applies only when a court awards a judgment under which a *claimant becomes entitled* to benefits "by reason of such judgment" in her or her favor, thus precluding application of § 406(b) to funds that beneficiaries *already* are owed. Moreover, by definition, putative class members here already have paid representatives' fees in connection with their initial claims for benefits and, should 42 U.S.C. § 406(b) apply, would be placed in the novel and untenable position of paying attorney's fees *again* on an existing award of benefits on which they have already paid fees to the representatives who helped them obtain that award. The claim in this case is not for a ruling that putative class members are entitled to benefits, but rather that SSA has a pattern and practice of failing to adhere to its stated policy of paying a certain category of past-due benefits that are already owed. (Compl. ¶ 94, PageID # 19.) Counsel is not entitled to any award of fees at this juncture, where no judgment at all has yet been awarded, and where no future judgment would entitle putative class members to benefits to which they are not already entitled (and, in Plaintiff's case, to benefits that she has not already received).

Even if counsel secures a favorable judgment through negotiation or litigation, however, reasonable attorney's fees must come from government funds, under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d) (assuming that all of the requirements of that statute are met)—not from money to which Social Security recipients already are entitled regardless of any new judgment.

1. 42 U.S.C. § 406(b) Applies Only to Representation Undertaken to Pursue a Claim for Benefits

42 U.S.C. § 406(b)(1)(A) provides that:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment 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 such judgment*, and the Commissioner of Social Security may ... certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

(Emphasis added). The limiting language of this provision restricts application of § 406(b) to cases in which a *claimant becomes entitled* to past-due benefits as a result of a favorable judgment. *See Gisbrecht v. Barnhart*, 535 U.S. 789, 795 (2002) (recognizing that the "Commissioner has interpreted § 406(b) to 'prohibi[t] a lawyer from charging fees when there is no award of back benefits.'").[6]

The text of § 406(b) by itself is clear and unambiguous in limiting its reach to cases in which a claimant receives an award, (i.e., an entitlement), to disability benefits. The point is

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[6] *See also* 4 Soc. Sec. Law & Prac. § 49:3 *Fee authorization requirement* ("Representational services are provided in connection with a claim for benefits if the services relate to a claimant's asserted right calling for an initial or reconsidered determination by the SSA and a decision or action by an administrative law judge or by the Appeals Council.") Although the cited discussion relates to the Commissioner's authority to authorize a fee under § 406(a), for representation before the agency of a claimant seeking an award of benefits, the statutory text clearly contemplates that a petition for fees from a court under § 406(b) will also relate to a "claim for benefits."

emphasized in the relevant Senate Report: "[T]he new subsection permits a court that renders a favorable decision to a claimant in a case arising under the social security program to set a reasonable fee—not in excess of 25 percent of the total of the past due benefits *which become payable as a result of the court's decision*." Hearings on H.R. 6675 before the Senate Committee on Finance, 89th Cong., 1st Sess., pt. 1, p. 258 (1965) (emphasis added).

Application of this language to the claim at issue in Plaintiff's suit forecloses § 406(b) here because putative class members already are entitled to the past-due benefits sought in this suit. Putative class members are Social Security beneficiaries who were represented by attorney or non-attorney representatives while litigating their initial claim to benefits. Plaintiff's sole allegation is that, after representatives' fees (i.e., fees under one provision or another of § 406) were authorized and paid out of individuals' past-due benefits, SSA did not consistently perform a windfall offset recalculation to exclude representatives' fees from qualifying income. In other words, these beneficiaries received most, but not all, of the past-due benefits to which they became entitled by reason of the judgment or other decisionmaker awarding them benefits. As Plaintiff reiterates, this suit is about individuals "who did not receive the moneys they were owed." (Mot. for Summ J. PageID # 648.) Similarly, this Court recognized that "Steigerwald's current claim is, at its core, simply an attempt to force SSA to finish calculating the amount of the benefits that SSA admits it owes her." (Op. & Order, PageID # 475.) This suit might therefore seek to effectuate an existing entitlement that has yet to be fully paid—but it cannot result in any new entitlement. Furthermore, because putative class members already have paid representatives' fees or they would not be putative class members, an award of § 406(b) fees would have the absurd result that individuals would pay fees under § 406 twice—to different counsel—on the same award of benefits.[7]

[7] It is not unusual for claimants to pay fees under both §406(a) (for work performed before the

Additionally, awarding fees under § 406(b) here would take that provision out of its intended context. As the Supreme Court has noted, "§ 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." *Gisbrecht*, 535 U.S. at 807. Plaintiff's invocation of § 406(b) here is an attempt to go even farther afield from court review of a contingent fee arrangement than mere displacement of such an arrangement; granting Plaintiff's request that fees for her lawyers be deducted from benefits paid to the members of the class she seeks to represent would be to create such a contingent fee arrangement between absent class members and counsel out of whole cloth.

Furthermore, § 406(b) applies when a court enters a judgment favorable to *a claimant*, yet putative class members here are not claimants in this lawsuit. In the context of applications for OASDI benefits, SSA has interpreted the term "claimant" as follows: "Claimant means the person who files an application for benefits for himself or herself or the person for whom an application is filed." 20 C.F.R. § 404.602.[8] In other words, a claimant is an individual seeking an award of benefits from the agency. By contrast, class members here have already been awarded benefits and, as such, are *beneficiaries.* And while the Act itself does not define the terms "claimant" and "beneficiary," it does appear to use those words distinctly. *Compare, e.g.*, 42 U.S.C. § 503(a)(10) (addressing whether claimants have completed certain reemployment services); *id.* § 405(g)

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agency) and under § 406(b) (for work performed in court) on the same award of benefits. That situation is readily distinguishable, however, because all such fees are paid for work performed while *seeking* an award of benefits. Were § 406(b) to apply here, beneficiaries would be paying fees for work unrelated to their award of benefits—a situation for which § 406(b) does not, by its terms, apply.

[8] The agency's interpretation of the statute it administers is entitled to deference. *Chevron v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

(specifying that judicial review of adverse decision on benefits claim will be limited if caused by "failure of the claimant … to submit proof in conformity with" regulations); *with id.* § 403(a)(1) (specifying the maximum "total monthly benefits to which beneficiaries may be entitled" under the Act); *id.* § 402(n) (providing for termination of benefits "upon removal [from country] of primary beneficiary"). Use of these terms in the Act seems therefore to signify a provision's reference to either (1) an individual seeking an award of benefits or (2) a person who has already been awarded benefits.

Here, each putative class member has previously received a favorable determination awarding benefits, (*see* Compl. ¶ 26, PageID # 6), and as such is a *beneficiary*—i.e., no longer a claimant. It matters not that putative class members were "claimants" in the context of the previous representation in which benefits were awarded. This suit seeks payment of money that, under Plaintiff's own theory, became due and payable as a result of that earlier decision, and each successful class member would thus be a "beneficiary" for purposes of this claim. Any additional money owed does not result from a new *claim* for benefits, yet § 406(b) is limited to situations where "a court renders a judgment favorable to a claimant," language that plainly contemplates representation provided in connection with an application for benefits. The statute thus provides no basis for counsel seeking to represent putative class members to disgorge *additional* representatives' fees from past-due benefits that, according to Plaintiff, have been payable since the date on which their previous representatives' fees were authorized.

2. Counsel's Reliance on *Greenberg v. Colvin* Is Misplaced

Counsel relies on a single, extra-circuit district court case as "precedent" for the applicability of § 406(b) to this case. (Mot. for Summ. J., PageID # 656-57; 660 (discussing *Greenberg v. Colvin*, 63 F. Supp.3d 37 (D.D.C. 2014)). As an initial matter, a "decision of a federal

district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." *Camreta v. Greene*, 563 U.S. 692, 709 n. 7 (2011). Further, the analysis in *Greenberg* was deeply flawed and should not be considered persuasive for that reason and because it dealt with a situation readily distinguishable.

Greenberg challenged on behalf of a putative class SSA's practice of reducing SSA benefits where a beneficiary received simultaneous payments from the National Insurance Institute of Israel. 63 F. Supp.3d at 41. SSA agreed that beneficiaries' payments should not have been reduced to account for the Israeli pension. The parties negotiated a class settlement in principle but disagreed on whether counsel could collect attorneys' fees under § 406(b) from the funds payable to class members (to recoup the amount that would have been paid each month had the Israeli pension not been included for income purposes). *Id.* at 41-42, 48-53.

Although the *Greenberg* court concluded that § 406(b) did apply, its reasoning miscomprehended the nature of the statutory provision in critical ways. First, in considering whether the requirements for class certification were met, the court construed the underpayments due to class members as *damages. Id.* at 44 ("The fact that Plaintiff and the putative class members may have different damage amounts does not preclude a finding of typicality"); *id.* at 45-46 ("Moreover, predominance is not negated by the fact that each class member will be entitled to a different damages figure in the amount their OASDI Benefits were improperly reduced.") This is incorrect; an equitable action seeking payment of money owed by the government does not seek "'damages' as that term is used in the law." *Bowen v. Massachusetts*, 487 U.S. 879, 893-94 (1988) ("Our cases have long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing

for ... 'the recovery of specific property *or monies*' ... The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.'"). And there is no waiver of sovereign immunity for damages under the Social Security Act. *See Giesse v. Sec'y of Dep't of Health & Human Servs.*, 522 F.3d 697, 703–04 (6th Cir. 2008).

This misapprehension undermines the *Greenberg* court's analysis of § 406(b) because that court relied on cases applying the common-fund doctrine under which class counsel is paid a portion of a common fund *of damages* to hold that the absence of an explicit signed agreement with each class member did not preclude an award of § 406(b) fees.[9] 63 F. Supp. 3d at 51-52. Cases applying the common-fund doctrine have no relevance to an equitable action seeking injunctive relief requiring a government agency to pay money already due to putative class members, where there is no common fund created and no damages to be divided between class members and counsel. *See, e.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (explaining that common-fund doctrine allows "lawyer who *recovers* a common fund for the benefit of persons other than himself or his client" to receive reasonable attorney's fees) (emphasis added); *Geier v. Sundquist*, 372 F.3d 784, 790 (6th Cir. 2004) (discussing requirements for doctrine to apply).

Second, the analysis in *Greenberg* turned on whether the text of § 406(b) precluded its use in a class action, but that inquiry elides the critical question whether § 406(b) applies *to the particular claim at issue*. In other words, SSA does not now contest that "[n]othing in the language of this provision remotely suggests that Congress intended to deprive courts of the ability to set reasonable attorney fees in class action lawsuits." *Id.* at 48. The issue here is whether § 406(b)

[9] The court declined to reach counsel's merits argument that "fees are warranted under the common fund doctrine" as unnecessary to its decision because § 406(b) applied. *Greenberg*, 63 F. Supp.3d at 47 n.4. That does not change the fact that reliance on caselaw applying the common-fund doctrine to analyze the fee issue weakens the court's reasoning.

applies to this particular case. *Greenberg* does not establish that it does, both because that case was wrongly decided and because it is distinguishable.

By focusing exclusively on whether the text of § 406(b) applies to cases involving multiple claimants, *Greenberg* did not consider whether the case involved *claimants who became entitled to past-due benefits by reason of a favorable judgment.* Class members in *Greenberg* consisted of beneficiaries seeking underpayments from SSA—not claimants seeking an award of benefits, as that term is defined in the Act's implementing regulations. *See* § II.A, *supra.* And because the allegation centered on SSA's failure to properly apply its own regulations, resulting in an underpayment, judgment in that case could not result in any new entitlement to benefits—only equitable relief requiring the agency to fix its error. *Id.*

Moreover, *Greenberg* is readily distinguishable from this case because class members there had not paid attorney's fees to different counsel on the same money they received by virtue of the settlement. As explained above, all class members here have, by definition, already paid fees under one provision of § 406, and it would be grossly unfair—and completely unprecedented—for them to pay fees a second time on the same accumulated past-due benefits to which they became entitled through another representative's previous work.

Finally, the *Greenberg* court explained that it "ha[d] identified no precedents on the question" whether § 406(b) applied to class actions and that there was a "lack of judicial consideration of this issue." 63 F. Supp.3d at 47-48. That appears still to be the case. Members of the Social Security bar (other than the lawyers who represent the Plaintiff here, who also represented the plaintiff class in *Greenberg*) likely limit the circumstances in which they seek § 406(b) fees because multiple types of claims are cognizable under the Social Security Act, but

§ 406(b) applies in one context only—that of a claimant seeking an award of benefits. It is not the class-action context that renders § 406(b) inapplicable here, but the nature of the claim itself.

3. Application of § 406(b) Is Not Required to Effectuate Vigorous Class-Action Representation Against SSA

Counsel argues that application of § 406(b) "to Social Security class actions is clearly in the public interest, as it incentivizes competent class-action attorneys to bring cases, such as this one, where the Agency has been derelict in its duties … ," (Mot. for Summ. J., PageID # 660), and that any requirement that class members affirmatively agree to representation[10] before forfeiting a portion of benefits as attorneys' fees "would eviscerate class actions, is clearly not in the public interest and is by no means required." (*Id.* at PageID # 659.) Of course, the question here is what Congress decided to be in the public interest, and not what Plaintiff might posit the public interest to be. But in any event, Plaintiff's assertions in this regard are demonstrably false; SSA (and its predecessors) have been defendants in many successful class-action lawsuits in the roughly 40 years since the Supreme Court first endorsed such actions in *Califano v. Yamasaki*, 442 U.S. 682 (1979). *See, e.g.*, *Hart v. Colvin* ECF No. 88, No. 15-cv-00623-JST (N.D. Cal. Apr. 17, 2017) (finding EAJA fee fair and reasonable in SSA class action alleging agency had wrongfully denied or terminated benefits to class of claimants); *Padro v. Astrue,* No. 11-CV-1788, 2013 WL 5719076, at *8, No. 11-cv-1788 (CBA) (E.D.N.Y. Oct. 18, 2013) (EAJA award approved in class

[10] Counsel makes much of the black-letter proposition that § 406(b) fees may be awarded where no fee agreement exists between the claimant and his or her counsel. (Mot. for Summ. J., PageID 658-59.) But this misframes the inquiry; in the cases cited by counsel (and others applying § 406(b)), there is nothing problematic about awarding fees in the absence of a signed fee agreement because the claimant has agreed to *the representation.* The fact that absent class members have not agreed to *representation* by class counsel would make it unfair for them to have benefits reduced to pay fees under § 406. And the fact that Fed. R. Civ. Pr. 23 allows class counsel to represent absent class members does nothing to ameliorate the inherent unfairness that would result from beneficiaries being made to forfeit money to which they already are entitled.

action alleging biased ALJs wrongfully denied benefits claims); *Dixon v. Heckler,* No. 1:83-cv-07001-WCC, Doc. No. 125 (Aug. 3, 1996 S.D.N.Y.) (awarding EAJA fees in class action alleging that SSA misapplied its own regulations, resulting in wrongful denial of benefits claims over 17 years); *Hyatt v. Barnhart*, 315 F.3d 239, 243-256 (4th Cir. 2002) (reviewing and reducing in part award of EAJA fees in SSA class action); *Sorenson v. Mink*, 239 F.3d 1140, 1143 (9th Cir. 2001) (affirming in part and reversing in part award of EAJA fees in SSA class action). Not only has the absence of § 406(b) fees not hindered the litigation of these actions, but class counsel in such cases (with the exception of *Greenberg*) have routinely negotiated or litigated attorneys' fees under the Equal Access to Justice Act, 28 USC § 2412(d).[11]

This makes sense, given that "Social Security claimants pay section 406(b) fees out of their benefits—benefit payments that would otherwise go into their own pockets—whereas the government must pay EAJA fees independent of the benefit award." *Minor v. Comm'r of Social Sec.*, 826 F.3d 878, 881 (6th Cir. 2016) ("The purpose of the EAJA is to remove financial obstacles to challenging unreasonable government action."); *see also* 4 Soc. Sec. Law & Prac. § 49:139 ("In light of the fact that attorney's fees awarded under [§ 406(b)] are paid from the claimant's past-due benefits, unlike EAJA fees which are paid by the SSA, and the consequent inherent conflict between the claimant and the attorney regarding fees under § 406(b), it is incumbent upon counsel to pursue attorney's fees under the EAJA before applying for fees under § 406(b), or justify the failure to do so.").

Furthermore, courts routinely deny or reduce fees for attorneys who seek fees only under § 406(b). *See, e.g.*, *Shepherd v. Apfel*, 981 F. Supp. 1188, 1192 (S.D. Iowa 1997) (instructing

[11] SSA does not at this time concede that counsel would be entitled to fees under EAJA, only that, if any attorney's fees become proper at a later in this case, EAJA is the only source of those fees.

lawyers to "remember at all times ... that it remains his or her duty to avoid conflicts of interest" with the client and explaining that "[n]owhere is there a greater conflict of interest involved than in the fee-settings involved in Social Security disability matters"); *Jones v. Comm'r of Soc. Sec.*, 2017 WL 1745569, at *4 (S.D. Ohio May 4, 2017) (reducing § 406(b) award where attorney failed to seek EAJA fees); *Harlow v. Astrue*, 610 F. Supp.2d 1032, 1034 (D. Neb. 2009) (denying application for § 406(b) fees where attorney failed to seek EAJA award); *Salaberio v. Sec. of Health & Human Servs.*, 1988 WL 52235, at *1 (D. N.J. Apr. 18, 1988) (stressing "that counsel fees should not be permitted to reduce the amount [paid to claimants] except as a last resort"). Each of these cases arose in the context of a favorable award of benefits, where § 406(b) clearly applied. The problems with applying § 406(b) to this case would not be ameliorated should counsel seek EAJA fees in addition to § 406(b) fees. But these cases illustrate a presumption in favor of EAJA fees and further illuminate the reason that statute routinely is applied to class actions, like this one, challenging a systemic violation by the agency of a duty under the Act.

Should counsel achieve a favorable resolution of this case through negotiation or litigation, counsel may well be entitled to an award of reasonable attorneys' fees. But those fees should be awarded under the EAJA and paid from government funds, not from past-due benefits already payable to putative class members as a result of an earlier representation. Counsel's extraordinary request to obtain fees under § 406(b) at the expense of beneficiaries who already have paid attorney's fees to obtain an award of benefits should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's Motion for Summary Judgment and rule that Plaintiff's counsel could not be entitled to attorneys' fees under 42 U.S.C. § 406(b) in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(f)

Pursuant to 28 U.S.C. § 1746, undersigned declares under penalty of perjury that this ***Memorandum in Opposition to Motion for Summary Judgment*** is 20 pages in length and is within the page limitation for standard track cases.

s/ Erin E. Brizius
Erin E. Brizius
Assistant U. S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2018, the foregoing ***Memorandum in Opposition to Plaintiff's Motion for Summary Judgment*** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Erin E. Brizius
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEPHANIE STEIGERWALD, Plaintiff, v. NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL Defendants.	)	CASE NO.: 1:17-CV-1516 JUDGE JAMES S. GWIN MAGISTRATE JUDGE DAVID RUIZ

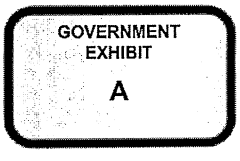
DECLARATION OF JAMES KLEIN

I, James J. Klein, pursuant to 28 U.S.C. § 1746 and in lieu of an affidavit, do hereby make the following declaration and state:

1. I am the Acting Deputy Assistant Inspector General for Audit – Program Audits and Evaluations of the Office of the Inspector General of the Social Security Administration ("OIG"). I have been so employed since February 4, 2018. I previously was the Director of the San Francisco Audit Division of OIG. I was so employed from November 9, 2003 through February 3, 2018. I have been employed by OIG since January 1989.

2. In such capacity, I am familiar with OIG's Audit Report entitled "Old-Age, Survivors and Disability Insurance Benefits Withheld Pending Supplemental Security Income Windfall Offset (A-09-11-11130) (hereinafter "2011 Audit"), released in November 2011 as well as OIG's Audit Report entitled "Old-Age, Survivors and Disability Insurance Benefits Withheld Pending a Windfall Offset Determination (A-09-15-15041) (hereinafter "2016 Audit"), released in March 2016.

3. The OIG audits did not aim to, and did not, evaluate or address whether representatives' fees were subtracted from Title II benefits countable as income in performing any



windfall offset calculations.

4. As part of the 2011 Audit, OIG selected a random sample of 250 beneficiaries out of approximately 158,000 OASDI beneficiaries whose OASDI benefits were withheld pending a windfall offset determination as of March 2010 (2011 Audit at 2).

5. In the 2011 Audit, OIG's use of the term "benefits withheld pending an SSI windfall offset determination" referred to the withholding of retroactive OASDI benefits owed to a beneficiary pending a windfall offset determination. These benefits do not include and are separate and apart from any underpayments that may be due to a beneficiary when a windfall offset is recalculated to account for later-authorized representatives' fees.

6. In the 2011 Audit, OIG identified 56 cases in which SSA had not processed SSI windfall offset actions and did not pay any of the withheld benefits (2011 Audit at 4-5). OIG did not consider whether SSA's windfall offset amount was correct or whether a second windfall offset calculation was necessary. In particular, OIG did not consider whether a second windfall offset determination was necessary because the initial windfall offset determination had not yet accounted for representatives' fees.

7. In the 2011 Audit, OIG also identified 27 incorrectly processed cases (2011 Audit at 5). OIG's analysis of "incorrectly processed" actions in the 2011 Audit did not consider whether SSA correctly calculated the windfall offset amount or whether SSA properly accounted for authorized representatives' fees in calculating the windfall offset amount. Rather, OIG considered whether there had been an error in failing to pay the amount that the SSA had already determined was due and was noted in each beneficiary's Master Beneficiary Record (MBR) as due.

8. As part of the 2016 Audit, OIG selected a random sample of 250 beneficiaries out of 61,984 beneficiaries whose OASDI benefits were withheld pending a windfall offset

determination (2016 Audit at 2).

9. In the 2016 Audit, OIG's use of the term "withheld benefits pending a windfall offset determination" referred to the withholding of retroactive OASDI benefits owed to a beneficiary pending a windfall offset determination. These benefits do not include and are separate and apart from any underpayments that may be due to a beneficiary when a windfall offset is recalculated to account for later-authorized representatives' fees.

10. In the 2016 Audit, OIG identified 53 cases in which SSA had not processed windfall offset actions and did not pay any of the withheld benefits (2016 Audit at 4-5). The OIG did not consider whether SSA's windfall offset amount was correct or whether a second windfall offset calculation was necessary. In particular, OIG did not consider whether a second windfall offset determination was necessary because the initial windfall offset determination had not yet accounted for representatives' fees.

11. In the 2016 Audit, OIG also identified five incorrectly processed cases (2016 Audit at 5). OIG's analysis of "incorrectly processed" actions in the 2016 Audit did not consider whether SSA correctly calculated the windfall offset amount or properly accounted for authorized representatives' fees. Rather, OIG considered whether there had been an error in failing to pay the amount that the SSA had already determined was due and was noted in each beneficiary's Master Beneficiary Record (MBR) as due.

12. The 2011 Audit and the 2016 Audit examined whether windfall offset actions were processed; if processed, whether there was an obvious clerical error or an error in failing to pay the amount that the SSA had determined was due; and whether the windfall offset determinations were processed in a timely manner. The 2011 Audit and the 2016 Audit did not determine whether the SSA was correctly determining or accounting for representatives' fees when conducting any windfall offset calculations, whether at the

time of the initial windfall offset or thereafter. The 2011 Audit and the 2016 Audit did not address whether SSA's windfall offset calculations were correct or if windfall offset amounts were correct in the event that representatives' fees were authorized.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this _26th_ day of February, 2018.

/s/ James J. Klein
James J. Klein