How Do Representatives Who Help Social Security Disability Claimants Get Paid?

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How do representatives who help Social Security disability claimants get paid?

Fees for work performed on behalf of a claimant are highly regulated so as to protect claimants, but also to encourage competent representation. 20 C.F.R. §§ 404.1725(b), 416.1525(b). The amount of fees can be limited to a set percentage, by agreement of the parties, or set by the SSA. 20 C.F.R. § 404.1730(b).

Generally, the fee is based upon total past due Social Security benefits due the claimant and most often do not exceed 25% of past-due benefits. However, the regulations do allow a fee to be paid to a representative even if the past-due benefits would result in very little or no attorney fee. 20 C.F.R. §§ 404.1725(b)(2), 416.1525(b)(2). The representative must use the Fee Petition method, however, for this type of arrangement.

The two methods for payment are as follows: (1) the Fee Agreement and (2) the Fee Petition Method.

(1) Fee Agreement: When the claimant is going to have sufficient past-due benefits, the most expedient way to get the attorney's fee is through the written Fee Agreement process. In 1991, the SSA instituted an alternative process to the Fee Petition that was a streamlined method to get the approval and payment of fees through a contingent Fee Agreement. Using this method, the attorney can get 25% of past-due benefits not exceeding $6,000 paid directly by the SSA minus a 6.3% fee. The past due benefits include those of the claimant and all auxiliary beneficiaries.

The Fee Agreement is simply a written contract for services between the claimant and the attorney specifying the fee the attorney will charge for certain services rendered. The parties may leave the scope of representation to the entire administrative and appellate process or limit representation to a certain level such as, for instance, the initial determination by the ALJ. The SSA has now come up with a form fee agreement that can be used – Form SSA-1693

If the Fee Agreement is in the file at the time of a favorable ruling, then the ALJ will approve or disapprove the Fee Agreement at the same time. He does not approve the actual fee, just the form of the Fee Agreement. The claimant and attorney will be informed of the amounts of the fee by a Notice of Award letter.

In order to be approved, the Fee Agreement must meet the following conditions:

1. It must be filed with SSA before the date of a favorable decision.
2. The representative and claimant must both sign the agreement.
3. The fee must not exceed 25% of past-due benefits or $6,000.00, whichever is less.
4. The agreement cannot specify a minimum fee.
5. Claimant must get a favorable ruling in order to trigger payment.
6. The claim must result in past-due benefits.

HALLEX I-5 109.IV.1. Obviously, the representative should evaluate the potential past-due benefits of the claim before deciding to use the Fee Agreement arrangement, but it does make payment easier and more efficient. The Fee Agreement system can be used in SSI claims.

Aside from reasons that depart from the conditions above, there are other times when the Fee Agreement system cannot be utilized. If the claimant fires the attorney or the attorney withdraws prior to a favorable decision, then the Fee Agreement will not be valid. Also, if the claimant has been declared legally incompetent and the guardian did not sign the fee agreement.

(2) Fee Petition: The original method for getting paid on disability cases is the Fee Petition. With the introduction of the Fee Agreement, the Fee Petition is now most often used with claims where the attorney seeks a non-contingent fee, or a fee in excess of 25% of past-due benefits or over $6,00.00. This often arises in claims where past-due benefits are small or non-existent, such as in offset cases, recent onset cases, or

continuing disability cases. It may also involve a claim where the representative feels he or she did an unusually large amount of work or the case involved a unique issue.

The Fee Petition process can be long and annoying. The decision-maker is under no obligation to evaluate and decide upon the petition quickly. The actual Fee Petition or Notice of Intent to Charge a Fee (if representation is not complete or the Fee Petition completed in time) must be filed within sixty (60) days of a favorable ruling or completion of the proceedings in which representation was provided. 20 C.F.R. §§ 404.1730(c)(1), 416.1525(a). The petition should be filed with the SSA office from which the favorable ruling was issued.

Federal regulations require the Fee Petition state the dates of representation, a list of services provided, the time spent on the services, the amount of fee the representative wants to charge, and amount of fee the representative wants to charge for any representation before any state or federal court. 20 C.F.R. §§ 404.1725(a); 416.1525(a). The representative must also list any expenses incurred for which he or she expects payment for and must show special qualifications that qualify the representative if the representative is not an attorney. Id. The Fee Petition must demonstrate that the claimant has received a copy of the request for fee approval. The SSA-1560 Petition To Obtain Approval Of A Fee For Representing A Claimant Before The Social Security Administration can be downloaded from SSA's website.

The amount of the fee is not constrained by the contingent fee of 25% of past due benefits up to the prescribed limit. SSA is not bound by the 25% rule for administrative adjudications, but it may also award less than that asked for by the representative. In 2002, ALJs were authorized to approve fees up to $7,000.00. The Regional Office must approve anything over. If the claim is decided by a Court, the Court cannot grant fees in excess of 25%, but the representative can later petition the SSA for more fees. Direct payment from withheld benefits for attorney fees can only be up to the 25% limit and anything over must be collected directly from the claimant.

Some situations arise where there is likely to be little or no past-due benefits where the representative will have little incentive to represent the claimant. Realizing that the Fee Petition method will have to be used to approve a fee in excess of 25% of past-due benefits, the attorney states that he will represent for a flat fee of X amount of dollars to be paid upfront. This cannot be treated as a non-refundable retainer. The representative can get payment upfront, but the money has to be put in an escrow account until the claim and Fee Petition process has been completed. Any excess must be returned to the claimant. The claimant must also agree to the use of the escrow account and the existence of the arrangement must be disclosed on the Fee Petition.

Regardless of the method of obtaining the fee, it must be stressed that the representative can only charge what has been approved by SSD for services. Willfully and knowingly charging a fee in excess of that directed by SSD will result in a misdemeanor punishable by a fine not exceeding $500.00 or by imprisonment up to a year or both. 42 U.S.C. §§ 406(a)(5), 1383(d)(1). The representative will likely be barred from representing claimants before the SSD as well. The Code specifically states that an attorney that collects more than that allowed by the Court shall be guilty of a misdemeanor punishable by fines up to $500.00 or up to one year in prison or both. 42 U.S.C. § 406(b)(2).

Fees under Equal Access To Justice Act (EAJA).

To aid individuals with having access to the Courts to remedy unjust governmental action by paying attorney fees and costs, the Federal government enacted the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504; 28 U.S.C. § 2412. To receive payment under EAJA, several criteria must be met:

(1) The individual must be an eligible party. Under the Administrative Procedure Act, an individual is an eligible party if his or her net worth does not exceed 2 million dollars. 28 U.S.C. § 2412(d)(3).
(2) The individual must be the prevailing party. 27 U.S.C. § 2412(d)(1)(A).

(3) The government's position must not have been "substantially justified" of that no "special circumstances" exist that would make a fee award unjust. 28 U.S.C. § 2412(d)(1)(A). The burden of proof is on the government.
(4) There must be a final judgment. 28 U.S.C. § 2412(d)(2).

Once the above-referenced conditions have been met and an application has been filed, attorney's fees and costs can be awarded. EAJA provides for costs such as filing fees, copying costs, long-distance phone charges, postage, research, etc. Fees under EAJA cannot be collected in combination with fees under SSA for the same work. The representative can file a Fee Petition for work done during the administrative stages and then a petition for EAJA fees for representation in the court system. If the administrative work was unusually large, then the percentage of past-due benefits may not fully compensate the representative for the total amount of work performed. In that case, the attorney can collect under EAJA for the court work performed. There is some authority that the attorney should elect to be paid out of EAJA because that would ease the financial burden on an already cash-strapped claimant. Wells v. Bowen (1988, CA2 NY) 855 F.2d 37, CCH Unemployment Ins. Rep. ¶ 14108A, appeal after remand (1990, CA2 NY) 907 F.2d CCH Unemployment Ins. Rep. ¶ 15579A.

Proving the Case

Once the decision is made to accept representation of a claimant applying for Social Security Disability, the representative should already be thinking of a theory of the case and how to prove it. Just like any legal case, the theory will dictate the proof. The first step then is to assess what information will be needed to get this particular claimant a favorable decision. At the initial interview, take a detailed intake sheet. The intake sheet should note all of the information necessary for the case such as educational background, vocational background, impairment(s), physicians, date of onset, etc.

It is imperative to get a complete history. For instance, a claimant may come in who suffered a back injury at work, had a workers compensation case, and cannot return to his former employment. Though he may want to naturally focus on the back injury, delve into his full medical history because it may be necessary to combine impairments to reduce his RFC to qualify him for disability.

Also, assess what other collaborative evidence you will need to support the claimant's request. If not already in the file, depending on the arrangement with the client, either order the medical records or have the client get them. Get records from all providers including hospitals, physical therapists, psychologists, etc. Use a calendaring system to ensure that records are ordered and received. Send Medical Assessment forms to providers or have the client take them during an examination to establish physical and mental limitations.

Additionally, have the claimant ask his physicians for personal letters describing the impairments in relation to engaging in full-time employment. If the claimant left his employment on good terms, request a supporting letter from a manager, supervisor, or someone with the former employer. Have the supervisor or employer describe the job, the claimant's work ethic, experience, and why the claimant can no longer do that job. At the minimum, try to get a job description and order the personnel file. A personnel file showing a hardworking, long-term employee goes a long way in proving the credibility of the claimant.

If the claimant had a workers' compensation case, there should be a treasure trove of medical and vocational evidence from IMEs, vocational evaluations, depositions detailing physical and mental restrictions, and functional capacity evaluations (FCEs). If another attorney handled the workers' compensation case, contact that attorney to review and copy the file. See if a functional capacity evaluation was performed.

Is the claimant receiving long-term disability? Chances are if he/she is then there will be evidence that can be used for the

hearing. The individual policy may determine the usefulness of the evidence. Some long-term policies require only that the employee cannot do his former job or any job with the former employer. Some policies require that the employee not be able to engage in any meaningful and/or substantial activity. Some policies are a mixture of both at different stages. Physicians and employers will have to fill out restriction forms in order for an employee to qualify for long-term disability. Some actually use a Physical Assessment form similar to SSA forms.

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