

Social Security Disability Law: Childhood SSI Evaluation

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CHILDHOOD SSI EVALUATION

Children with a disability can receive SSI benefits if certain poverty guidelines are met. The sequential evaluation for children's cases is different than for that of adults. Analysis of a child's claim of disability requires three sequential steps.

First, a child will be found not disabled if he or she is engaging in substantial gainful activity. 20 C.F.R. § 416.924(b).

Second, if a child does not have an impairment or combination of impairments that is severe, the child will not be found disabled. 20 C.F.R. § 416.924(c).

Third, a child will be found to be disabled if he or she has an impairment or combination of impairments that meets or equals an impairment listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1, Pt. B. 20 C.F.R. § 416.924(d). If an impairment does not "meet" a listed impairment, disability may nonetheless be established if the child's impairment is medically or functionally equivalent to a listed impairment.

If the Listing cannot be proven, the claim can still be won if an impairment or combination of impairments functionally equals the listings and one must assess the claimant's functioning in terms of six domains: (1) acquiring and using information; (2) attending and completing tasks; (3) interacting and relating with others; (4) moving about and manipulating objects; (5) caring for yourself; and (6) health and physical well-being. In making this assessment, one must compare how appropriately, effectively and independently the claimant performs activities compared to the performance of other children of the same age who do not have impairments. To functionally equal the listings, the claimant's impairment or combination of impairments must result in "marked" limitations in two domains of functioning or an "extreme" limitation in one domain.

Steps of the Process

1. Application

The claimant should apply as soon as he/she becomes unable to work. It can take a long time to process an application for disability benefits (three to six months). The application can be started online (preferable), in person at a Field Office, or over the telephone.

2. Reconsideration

3. Hearing Before an Administrative Law Judge

Nationally:

- Average processing time: 577 days (down from 582 in February of 2018, but still up from 573 in July of 2017, 525 days in January of 2017 and up from 444 in May of 2015)
- 43% of cases approved (down from 45% of cases approved in February of 2018)

4. Appeals Council

If a claimant's Social Security Disability or SSI claim is denied by an Administrative Law Judge, then the claimant has sixty days to appeal an unfavorable ruling to the Appeals Council. 20 C.F.R. §§ 404.967, 416.1467, 404.955, 416.1455. The Appeals Council first decides whether it will even hear an appeal. If it grants a review, it has the power to affirm, reverse in whole or part, and it can remand for a new hearing. 20 C.F.R. §§ 404.967, 404.979, 416.1467, 416.1479.

The scope of review at the Appeals Council is limited. The Appeals Council will review a case if:

1. there is an abuse of discretion by the ALJ;
2. there is error of law;
3. the action finding or conclusions of the ALJ are not supported by the substantial weight of the evidence; or
4. there is a broad policy or procedural issue that may affect the general public interest.

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If the AC affirms the unfavorable ruling of the ALJ, then all administrative remedies under the Social Security Administration have been exhausted and the only remedy is to file a claim in Federal District Court or start over (if possible due to DLI issues). 20 C.F.R. §§ 404.981, 416.1481. The claim must be filed within 60 days of the denial by the AC or else a request in writing must be made to the AC and must demonstrate good cause for the late filing. 20 C.F.R. §§ 404.982, 416.1482.

5. Federal Court

When a claimant files in Federal Court following unfavorable administrative action by the Social Security Administration (SSA), the person is not asking the judge to find necessarily that he or she is disabled, but that the SSA erroneously decided his or her case.

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.

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 later on.

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

1. It must be filed with SSA before the date of 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; and
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 \$6,000.00. 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 and 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 5%, but the representative can later petition the SSA for more fees. Direct payment from withheld benefits for attorney fee's 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 none 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 up front. This cannot be treated as a non-refundable retainer. The representative can get payment up front, 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 fine 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 have access to the Court systems 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 for fees under SSA for the same work. The representative can make 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.

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