# The Case for Adjusting the Fee Cap
# In Fee Agreement Cases: Part II
# October 2016

This white paper provides results of a survey of NOSSCR members in follow up to the meeting between the Social Security Administration and the Co-Chairs of the Social Security Task Force of the Consortium for Citizens with Disabilities that took place on September on September 7, 2016. This paper attempts to answer some of the questions raised at the September 7 meeting.

Overall, the survey shows:

- Revenue for NOSSCR members has declined significantly over the past few years due to a combination of fewer hearings being scheduled each year, the significant reduction in on the record decisions by both ALJs and senior attorneys, the decline in approval rates, and the failure to adjust the fee cap.
- Although the delays in scheduling hearings may have increased the number of cases that reach the $6000 fee cap for some representatives in some cases, the increase in expenses created by the delay (additional client contacts, additional health records that need to be collected) and the lower number of hearings due to the delay have resulted in overall decreased revenue, making it difficult for representatives to survive financially. Representatives are not fully compensated for the additional work created by the delays even if the fee in the case reaches the current fee cap.
- Among the reasons that evidence is sometimes submitted close to a hearing are: providers take a long time to provide the evidence, ongoing treatment occurs close to a hearing, and claimants sometimes fail to tell their representatives about (or are unaware of) an impairment or treatment. In addition, claimants often hire representatives very close to the hearing date.
- Claimants are having trouble accessing representation due to firms cutting staff and representatives, firms going out of business, representatives becoming more selective regarding the cases they accept, and representatives who shifting their practice into other areas of law and therefore representing fewer Social Security claimants.

**Characteristics of Survey Respondents:**

A survey was sent out to all NOSSCR members and NOSSCR received 38 responses to the survey. The responses came from 18 states with geographical diversity with multiple responses coming from several states (states included CA, CO, CT, FL, GA, IA, MD, MO, NC, NY, OH, OK, PA, SC, TX, UT, VT, and WI). The NOSSCR members who responded to the survey worked in a variety of practice settings, with the majority of respondents being solo practitioners or working in firms with less than 5 representatives. Several respondents worked in large firms (over 10 representatives in the firm)* and several also worked in large firms but were the only attorneys who handled Social Security disability cases for the firm or the office of the firm in which the respondent worked. (* The majority of respondents were attorneys but some may have been non-attorney representatives.)

Survey respondents also have a wide range of open Social Security disability cases open at one time, with a range from a low of 40 open cases for a solo practitioner to over 3000 at a large firm. The average number for a solo practitioner was around 150 cases. This results in a wide range of the number of hearings for each firm, from a low of 30-40 hearings a year to a high of over 2,200 hearings per year.

Unsurprisingly, respondents indicated that the majority of their cases are won at the ALJ hearing level. Representatives who said they take a large percentage of cases at the initial application, however, indicated a high percentage of cases won at the initial level. The vast majority of respondents indicated they receive very few, if any, on the record decisions. Some also indicated that hearing offices have told them that they no longer issue on the record decisions. Respondents noted a precipitous decline in the number of on the record decisions issued over the past 3-5 years. Some respondents indicated that they don't even bother requesting them anymore because they file a request and never hear anything back about them.

Actual respondent answers to some of the questions asked are included in this paper to provide additional information which might be helpful to SSA in making a determination regarding adjusting the fee cap. All actual respondent answers are indented and appear in quotation marks. The answers appear exactly as written except where they have been edited for clarity, brevity, and to protect the anonymity of the respondent. No substantive changes have been made.

**When Do Claimants Hire Representatives?:**

As discussed at the September 7 meeting, the results of this survey support the proposition that Social Security disability claimants engage representatives at all stages of the disability adjudication process. Most respondents indicated that they do not generally represent claimants at the initial application level prior to the initial denial. A few survey respondents said, however, that they are brought on at the initial level by most of their clients. Most respondents said they are retained by a majority of their clients after the initial/ reconsideration denial notice is received by the claimant or right after the claimant requests a hearing.

Survey respondents said it is not uncommon to be hired within 30 days of an already scheduled Administrative Law Judge (ALJ) hearing. Several respondents said that approximately 1 in 10 to as many as 1 in 5 of their clients hired them within 30 days of a scheduled hearing date. Survey respondents also indicated that they are hired after a claimant attends a scheduled hearing without a representative and the ALJ suggests they should retain a representative (one respondent said this happens in an estimated 5% of cases handled).

Several respondents also indicated that people who retain them after an initial denial sometimes mention that they had been counseled by SSA field office personnel not to retain a

representative earlier in the process. The survey respondents indicated that they believe that many such individuals probably would have been awarded benefits at the initial level if they had been represented.

**Are Representative Getting the Maximum $6,000 Fee Cap in More Cases Due to the Hearing Delays?:**

The answers to this question do not paint a clear picture on the percentage of cases in which a representative receives the maximum fee or of the effect of hearing delays on the number of cases that reach the fee cap. Representatives indicated they received the $6,000 (minus the user fee) fee in a widely varying percentage of their successful cases – on the low end, 10% of successful cases resulted in a $6000 award, and on the high end, a representative reported that 95% of favorable decisions resulted in such an award. The majority of respondents indicated they received the maximum fee between 30 and 50% of the time.

Respondents were also split almost equally on whether they think the increased processing time for hearings and decisions affected the percentage of favorable decisions in which they received the maximum fee. They indicated they had represented an individual an average of at least 2 years (but sometimes more) when they received the maximum fee. Respondents offered a number of reasons why the delay has not increased the number of successful claims that reach the fee cap:

- Cases that will result in the maximum fee usually do so in 12-18 months. Delays beyond that do not increase the fee received.
- An increase in the number and percentage of awards in which the ALJ amends the onset date or issues a partially favorable decision, resulting in lower back benefits and lower fees as a result.
- The application of offsets negates any increase in back benefits due to claimant as a result of the delay (the longer the delay the greater the amount of the offsets).
- Delays had not significantly increased in their area.

**Do the Hearing Delays Increase Expenses for Representatives?:**

Respondents overwhelmingly remarked that the increase in hearings-level processing time increased their expenses. Most respondents were unable to quantify exactly how much the delay had increased expenses, indicating that they don't track the expenses per client. Two main reasons were cited for the increase in expenses: the need to gather more medical records during the wait for a hearing (and the additional treatment claimants receive while they wait) and the significantly increased amount of client contact required during that time.

NOSSCR member survey responses:

> "Costs increase and attorney time increases as a result of hearing delays. This is because counsel must obtain and submit medical information as it becomes available. Each records request requires a fee payment for production of records. These costs add up and are almost never reimbursed by the clients. If a medical source statement is requested, some doctors charge $300.00 and if counsel determines there is a need for a medical evaluation, the cost is quite a bit more. Again, if counsel advances the cost, clients rarely reimburse counsel."

> "Expenses have definitely increased in light of the delay in hearing processing times; every day that goes by means an increase in the amount of medical records that will need to be obtained, submitted, reviewed, and summarized by the time the hearing is held resulting in increased costs (and time) to me and my client. Because the record is so much larger than it used to be, I have had to hire a paralegal to help me review these files. I used to do that all myself. Having someone else do it is not ideal, but again, there simply are not enough hours in the day."

> "Yes, we need up-to-date, current and most recent treatment notes and have to expend support staff time and effort to constantly update the medical documentation so it is not stale by the time the hearing is scheduled. Same goes for the RFC or MSS, it has to be current (not older than 3 months at the time of hearing). This means support staff is working double duty to requesting medical evidence. More importantly, the client is spending more money on medical records and completion of MSS."

> "There is an increase in the cost of medical records – have to obtain them more times, and it's at least $35-40 each time per provider, minimum. This fact does deter me from taking riskier cases, for sure, as it significantly reduces profit of the case."

> "Much, much more expensive. Every month you keep a case you have to babysit a client. You have to keep them informed and when they feel like it's taking a long time you to have to spend time figuring out why and then explaining that to the client."

> "it is also more expensive to handle cases now in terms of staffing, as the longer waits require more client communication and meetings (we spend the majority of the hours working on a case prior to the holding of a hearing), and we now spend an additional hour (on average) on each case dealing with the substantial slow-down at the Title II payment centers and handling SSI award-reduction errors by field offices."

> "My expenses have increased because of the delay. We are required to make more contacts with the claimants to keep them informed about what is going on. We are also required to request medical records more often, although this is not very significant."

"Of course. I have a payroll to meet twice per month. Having cases take years to get a hearing, then another 3-7 months to get a decision, then having to wait another 3-5 months before the fee is released means I have a rather large overhead each month. The time value of money is important here. I can't tell you how many months where I've had to borrow money at high interest rates in order to meet my overhead despite having $60,000++ in awaiting payment cases that were approved more than 3 months previously."

"Yes, mostly because more and more health care providers are charging the maximum copying fees. The state agency…does a poor job of collecting records and with the long wait times, the records are larger and more expensive."

"Yes. It takes forever to get medical reports. It costs a lot of money to get medical records!!"

"Yes. Increase in cost of records due to a longer timeframe. Also, general overhead costs have increased and the reduced amount of hearings and decisions cause those costs to be deferred."

"Yes. Also the stress of handling cases increases for attorneys because the clients – with whom we have longer relationships – have more extreme life stressors. Clients without income longer are prone to become homeless, have more mental issues, attempt suicide, end up in jail, or other negative consequences associated with extreme poverty."

**How Has Representative Revenue Changed in the Past Few Years?:**

Survey respondents indicated that generally their revenue is down significantly over the past few years due to the delays in processing cases, the decline in ALJ approval rates, and the increase in expenses as a result of the delay.

NOSSCR member survey responses:

"The overall revenue has declined due to lower number of favorable decisions, more so than anything else. But the fee cap makes it less likely to be profitable too, because of the significant time involved from time of case opened until resolved."

"[O]ur overall revenue is down substantially, and it has declined every year for the past five years. We typically see overall revenue decline about 10% each year."

"My gross revenue has decreased significantly, by more than 35%, due to the fall in approval rates. My profitability has also significantly decreased, but this is a result of the combination of the fall in approval rates and greater expense in preparing for hearings. Medical record acquisition costs are significantly higher. Social Security is requiring a

greater amount of evidence and with the lower approval rates I find it necessary to spend more time on preparing arguments, briefs, and advising clients about needed medical testing and evaluations. The amount of time I spend per case, which is the most significant cost, has increased by at least 40% since 2012. This is helped us maintain a high level of success, but has resulted in a significantly lower profitability."

"Revenue has decreased significantly because I have to spend considerably more time per case than I did 5 years ago, which means I take fewer cases."

"We have a revenue problem. Between fewer fully favorable decisions, decisions made to cut back fees, longer wait times, and very long wait times to be paid even after a fully favorable decision, it is becoming very hard to represent claimants."

"Overall revenue has decreased due to fewer favorable decisions and higher costs."

**Why Is Evidence Submitted Close to the Hearing?:**

We asked NOSSCR members to tell us why evidence might need to be submitted close to the hearing. We provided the following list and asked members to tell us any other reasons it might be the case:

a. Attorney not hired at earlier stage
b. Attorney did not know about the specific evidence
c. Client forgot to mention condition, episode, or treatment
d. Client didn't want to mention mental issues – for fear of stigma, or effect on long-term disability benefits
e. Representative requested it and followed up several times but it took a long time.
f. Health conditions are not static. Condition deteriorated or client had another episode or received additional treatment
g. Hospitals or providers closing, makes getting the records harder

NOSSCR members indicated that generally all of the above reasons are reasons why evidence is submitted close to a scheduled hearing date. The most likely reasons reported are that despite ongoing and repeated efforts to get the evidence it takes a long time for providers to provide it (with some reporting that it is not uncommon to take up to 6 months to receive requested evidence) and that the client did not know that they had a condition (generally a mental health condition), in addition to claimants failing to mention a condition or treatment. The fact that health conditions are not static and ongoing treatment occurs (and new conditions/complications might develop) close to the hearing was also cited by many respondents. One respondent summed this reason up by saying "[d]uring the representation, the client is always undergoing additional treatment. So there will always be records to submit from the last month or two of doctor visits, ER visits, admits, etc." Survey respondents also indicated that a reason why more evidence is being submitted close to a hearing is that the client was unrepresented during the initial/reconsideration phase and the DDS failed to

adequately develop the record. The representative is therefore collecting evidence identified to, but not collected by, the state agency.

NOSSCR member survey responses:

*Takes a long time for providers to give records:*

> "There are numerous reasons, but the real question is how soon do we seek evidence we learn about. The answer is we always seek evidence immediately after we learn of its existence, and always follow up regularly. Some sources take as long as six months to provide evidence. We average 3 to 4 requests for every medical record we receive. Some deny having records until asked multiple times, or the client calls them. Some want exorbitant fees for records (I've received invoices for $1,500 for 30 pages of hospital records, for example). Often clients do not tell us about treatment, and we don't learn about it until we read an agency-obtained CE, or review treatment records, or interview family members to prepare for the hearing. Sometimes the doctor or hospital cannot be found, or simply fails to respond to repeated requests."

> "Some providers are extremely difficult to handle. Some large hospitals will send records within 20 days after a request, and then without warning slow down to taking 4 or 5 months to do so. We resort to HIPAA timing complaints and threaten litigation. We write, fax, call, and visit medical offices personally to obtain records and remind staff. 25% of our staff time is consumed by following up on pre-hearing medical records requests. Despite all of this, 50% of late-submitted evidence is caused by the provider sending the records in an unpredictably late manner. Most of the remainder (40%) of late-submitted evidence is caused by the evidence being created at a late date, by an appointment that happens immediately before the hearing, for example."

*Claimants don't know they have a condition or forget to mention treatment:*

> "One thing you don't mention is that clients almost never understand why they are disabled. They usually think the thing that annoys them the most frequently is the biggest problem, and fail to mention, or deny, other problems that are worse. And most claimants have mental impairments that they are unaware of. There is frequently a need to get new evidence."

> "Regardless of how many varied techniques I have used over the past 30 years, including different types of forms, asking questions as many ways as I can think of and as often as I can, and admonishing my clients that they MUST tell me about everyone they have seen for evaluation and treatment, they inevitably come up with more new information at the last minute about Dr. X who they saw 2 years ago. 'Oh, didn't I tell you about him? Sorry' they say. Our clients are facing the most distressing time in their lives, many have mental health issues, they are on high doses of narcotic medication for pain, and

live chaotic lives. Remembering to tell me everything is simply not going to happen in every case, or even most cases."

"We gather information from the client about sources of evidence monthly. Nevertheless, 10% of the late-submitted evidence is caused by the claimant not having described it until later, normally because the claimant is too low-functioning to handle reporting the information (this could be a memory issue, or poor judgment in failing to realize that we gather all evidence)."

**Are Claimants Having Trouble Getting Representation?:**

The respondents to the NOSSCR survey indicate that claimants are already having trouble accessing representation and that they see this difficulty increasing in the future. There are a variety of ways in which this is already occurring.

NOSSCR members survey responses:

*Firms are closing or cutting their staff and attorneys*

"I also practice employment law and ERISA benefits. another attorney dropped SSA cases because the fees were not reflective of the time spent with clients, medical records reviews and paper work."

"Low approval rate, small fees and SLOW payment putting attorneys out of business."

"We make less money and do more work. I have had to cut my office staff, including attorneys, in half in order to stay open and I believe this is in direct correlation [the percentage of approvals dropping from ] approximately 60% to 40% nationwide. We used to be an office of 6 attorneys and 19-20 staff. We now have 3 attorneys and 10 staff. I will not hire any new attorneys because I cannot afford to do so. I know that we need more staff and attorneys to handle 1600 open cases, but I have had to reduce my staff in order to survive as a law firm. Having been in business for 25 years, it is not the time for me to close down my practice and try something new and so, my only choice is to adapt or die… Many of my colleagues have retired. I am not old enough to retire or I would."

"[My firm now has] two full time attorneys. We used to also have one part-time attorney writing pre-hearings memos…I laid her off last year"

"Most of the law firms have gotten out of disability law in [my town] altogether because it is so difficult to make any money practicing disability law here. [three named firms went out of business]. These were all major players but they just can't deal with the razor thin margins."

"We have reduced compensation for both attorneys and staff by between 10% and 50% depending on the role. We have cut all forms of benefits. We have terminated more senior staff with higher salaries."

"In our area, many of the other Social Security lawyers have either closed their practices or moved to other areas of law. We no longer accept as high a percentage of new requests for representation. Ten years ago we had to perform outreach to find referral sources, but now there is no longer any need. Doctors, legal aid programs, and others will commonly give clients a list of three choices for whom to hire to help on a Social Security case, and our firm is usually the only one of the three choices that still exists. Even then, we often don't accept the new case. If a caller has a hearing that is coming up too soon, we do not take the case because the new ALJs will refuse to postpone. If a caller has a scheduled hearing, but goes to a hospital that is running too slow on providing evidence, we do not take the case because the new ALJs will refocus on the case on those issues rather than disability. We have greatly increased our federal court practice (it has tripled), and that has provided some additional revenue that has allowed us to remain solvent. If we had not increased our federal court litigation successfully, we would have had to reduce our staff even more."

*Existing firms and representatives are more carefully screening cases and taking fewer cases, resulting in many people going unrepresented.*

"Because of the low revenue in SS practice, I have moved into a WC practice in my firm and strictly screen potential SS cases, cutting way back on the number and types of cases I will accept. Previously I did not screen cases at all, and offered anyone with merit on their medical issue an opportunity for representation. But, I cannot afford to do that now, with the fee cap and with the decline in the number of favorable decisions. It is especially not profitable if I have to pursue [district court] appeals, in terms of the time and expense and reduced fee."

"I can tell you with absolute certainty that hundreds of claimants seeking our help have gone unrepresented because of the combination of unreasonable ALJ denial rates and the fee cap. I run a business, not a charity. If the average fee is fixed while my overhead rises, I have to adjust. The main adjustment I can make is to decline to represent claimants who are disabled, but where the current hostile climate means that the amount of work required to help them will far outstrip the available fees. Ten years ago, I declined <10% of potential clients. Now I decline >50%. So, yes, many claimants are going without representation…"

"I take fewer cases now due to the decreased approval rate and it takes me longer to determine whether I can take a case because I have to make sure the case can be fully developed. I am not able to take as many of the cases that seem more of a "long shot", which ends up hurting the claimants as they have difficulty getting representation."

“I am taking fewer cases, more selective in case selection and I will be closing my office and working out of my home before the end of the year.”

“I have changed taking certain cases, such as cases where there is limited treatment or there is the suspicion of DA&A (or other issues affecting credibility). I am taking fewer younger individuals (but do not exclude younger persons).”

“I am a younger attorney as far as SSA reps go (33) and I strongly question whether I can continue doing this type of work while supporting my family. I also turn down a lot more claimants these days.”

“We are more hesitant to take cases of people under 50 years old. We are more willing to dismiss non-cooperative claimants or claimants that lack conclusive objective evidence.”

“I have limited my practice in SSD matters. I rarely handle cessation matters or overpayment matters. I simply cannot expect to be paid. I do not handle cases at the Federal Court level. Lower approval at the hearing level . . . requires greater selectivity of claimants.”

“I am more selective in taking cases, because you have expenses with each case and judges are not awarding as many. I certainly won’t travel for a case like I used to.”

“The reduction in income from S.S. cases has caused me to increase the non-social security part of my practice. Although I cannot quantify it, the fee cap has an effect on case selection.”

“I am now imposing much higher criteria before I will represent an SSI only claimant. I don't earn enough. My average fee for SSI only cases is about $2200. For the amount of work, it is simply not profitable. I am instead shifting my focus on attracting SSD clients to the detriment of SSI only claimants. It’s a shame as these people need the most help and are usually very, very deserving. They also have had the least out of life coming from low economic circumstances.”

“My SSD attorney fee revenue has been about the same for the past three years. I screen the cases better and take more SSD/Title II and less SSI/Title 16, CDR, child’s cases and overpayment cases. I also appeal the cases to federal court and upon remand there is no fee cap, so I petition for the full 25% to make up for the fewer cases taken in and the higher number of unfav[orable] decisions. My thought is why take 200 cases with the exact same revenue as 150 cases. Unfortunately, this means many individuals go unrep[resented] (mainly SSI and child’s SSI who need representation the most).”

"Due to higher denial rates, and lower fees generated, I have cut back on my SS practice substantially. I do maybe about 60 hearings a year."

"[W]e are no longer accepting cases of younger individuals children, cessation cases, or overpayment cases. In the past, we accepted all of these cases, but we have found that the SSA takes so long to review these cases and it is so unlikely to win, that it is not worth it to our firm to do these cases. We no longer do Social Security law exclusively because we need to make more money. We take Veteran's cases, long-term disability, ERISA cases, and we do some trust work."

"Since I'm a solo practitioner with no full-time support staff, I have to screen and scrutinize cases very carefully for such a small maximum fee. If I had the possibility of a higher fee cap that might make it more bearable to attempt certain other cases."

"Well, most firms will not take SSI only cases, we are considering this change. We are much more selective in taking cases now compared to before. We've also shifted away from Social Security disability law, you just can't make enough $$. We've stopped hiring attorneys and increased the workload of our staff."

"In the last year I have been more selective about choosing cases. It is just so hard to win. Cases that I would have taken in the past, I now turn down. I need to take a really hard look at any case for a claimant younger than age 50. I am now trying to take fewer cases as long as they are high quality."

*General reasons why claimants are having or will have trouble getting representation in the future:*

"I would like to conclude that the fees generated by my Social Security/SSI practice do not support the amount of time and effort required. This summer I decided that I needed to scale back the number of Social Security cases I handle. Even if I receive the maximum fee, which is $5,909.00 after deduction of the service charge, I usually have a profit of about $1,000 to $1,500 on the case. If, however, the case must be appealed to the Appeals Council or Federal Court, the maximum fee will not cover the amount of time I and my paralegal invest at the agency level. If you factor in the number of unfavorable decisions we receive, the Social Security cases do not pay for themselves."

"In other types of contingent fee cases (i.e., personal injury and debt collection), the contingent fee received is large enough to compensate you for the unsuccessful contingent fee cases you handle. This is not the case with Social Security cases because the maximum fee is intended to preclude the successful attorney from receiving a "windfall." The sum of $5,909.00 is not a "windfall" and does not provide sufficient compensation to cover the cost of unsuccessful cases."

“The SSA disability process has become increasingly cumbersome, especially in the last three years. Regulatory requirements demand increasingly more effort from representatives with decreasing profitability for the work performed. In most cases time spent in representation would result in fees that would exceed $25,000.00 in the context of non-SSA disability cases. The fee cap does not begin to represent fair compensation in most cases, especially since it is not possible to predict which cases may require multiple appeals…Reliance strictly on SSA disability cases used to be sufficient to maintain a law practice devoted exclusively to that genre. Because of problems with delays and fee payments, including a fee cap that is now too low to generate an adequate income steam, counsel must turn to other sources of revenue to keep the practice alive. This means taking fewer SSA disability cases. Also, case selection criteria are being tightened. I am disinclined to handle child disability cases, younger adult cases, cases where the person seeking representation is receiving public assistance, cases involving a remote DLI and cases where a prior attorney has declined to waive an attorney’s fee.”

“Yes, the fee cap stagnation will affect the ability of claimants to obtain attorneys. As noted above. my revenue is going in the wrong direction, despite the increase in the number of hours I have to work and the increase in my expenses for a paralegal and for medical records costs. This situation is unsustainable for me both professionally and personally. I feel deeply that my clients have meritorious claims and need my expertise, and I believe that I actually assist the ALJs in structuring the case in such a way that they can evaluate it easily, explaining all the issues to the client so the ALJ doesn't have to prepare the client for the hearing in order to make it as efficient as possible for the ALJ. etc., but the current situation is simply not sustainable. I have developed as much efficiency in my practice as is humanly possible, and yet the workload per case has increased exponentially, all without any increase in the fee cap.”

“I know that claimants are having a hard time being represented. I hear from other offices that they are very strict about what types of claims they take, including placing simple restrictions like refusing to take claims for people who are under a certain age. I would like to hire an additional attorney. My workload is very high. However, I cannot do so because I don't have sufficient income. I have had to reduce my staff. I have also increased my non-Social Security caseload. I work longer hours. It is rare that I don't work a weekend. I have considered doing a more significant screening of my cases to eliminate claims that don't have what appears to me to be a good chance of winning. However, I've done this for long enough that I have enough experience to know that it is very difficult to tell from the beginning of the case what a case will look like at the end of the case. And I think that everyone deserves a chance to prove their case, if that's what they want to do. I know of other attorneys in my area who have attempted to represent people in Social Security disability cases. However, most of them now refer clients to me because they are unable to do so profitably.”

"It boils down to the bottom line. If one cannot generate enough revenue to show a profit, then one must focus on other areas of the law in order to stay afloat. Every year the fee cap is not increased to keep up with the true inflation rate, the less "money" one can make representing the most vulnerable amongst us. SSA makes it very difficult to maintain a successful practice focused on disability appeals."

"I'm barely surviving. ODAR is setting hearings at a snail's pace. Payment center is paying fees at a snail's pace. I have fee petition cases where I am going on 2 years waiting for payment. Generally, with the long delay, the work up for hearing has increased by 40%. More medical records are needed for which I am out of pocket which less than 5% of my clients reimburse me for. On the other side there ends up being lack of treatment due to client's inability to continue to pay for treatment which requires an evaluation that I have to set up and pay for and for which, again, I am rarely reimbursed for."

"Definitely, people are losing out on representation! … I am taking fewer cases and refusing difficult cases when I never did this before. I find myself apologizing to folks quite often, because I just cannot help them."

"Due to the falling approval rates and lower income, I am giving serious consideration to retiring (I'm 65). I'm the only attorney in at least a 9 county area in…who handles federal appeals. I am also the only attorney who limits his practice to disability in that region. I am also the only attorney who does not select based on age, deselect based upon unfavorable factors such as a criminal record or past alcohol abuse, etc. When I retire, there will be no recourse for many people. I have already decided to stop taking appeals to the Appeals Council and court that I did not represent administratively."

**Conclusion:**

These survey results support the conclusion that representing Social Security disability claimants is becoming more complicated, requiring representatives to spend more time per case and increasing the cost per case to representatives. New regulatory requirements enacted over the past several years (such as the requirement to submit all evidence under 20 CFR §404.5112) combined with the significant increase in the delays in scheduling hearings and issuing decisions, falling approval rates and productivity levels by ALJs, significant delays in the payment of fees, and the failure to adjust the fee cap have resulted in an environment that makes it extremely challenging, if not impossible, for representatives to maintain a profitable practice.

Representatives have already begun to respond to this challenging environment in a number of ways that negatively impact the ability of claimants to find representation. Firms and attorneys are leaving the practice area, reducing staff and attorneys, and not hiring new staff and attorneys. Representatives are becoming more selective about the cases they take and rejecting claimants they think are eligible for benefits based solely on medical evidence but

believe will be denied under the current environment. SSI only claimants, younger claimants, claimants who are more difficult to work with (due to their memory problems, tardiness at meetings, need for repeated explanations, and other factors that are often tied to their impairments) and cases with no past due benefits, such as continuing disability reviews or overpayments are especially at risk. Of concern for the future is that respondents indicated they have trouble hiring or recruiting new representatives to practice in the Social Security disability area.

The trends highlighted by this and the previous NOSSCR member survey responses are very concerning. Although this data cannot provide conclusive evidence about the number of claimants who cannot currently find representation, waiting until very large numbers of representatives choose to no longer represent Social Security disability claimants to adjust the inadequate fee cap might be too late. Representatives who retire and might have practiced longer if it had been even modestly profitable to do so will not likely return to practice. Young attorneys who enter other fields of law are not likely to change practice areas once they establish themselves in those areas. Neither is it likely that attorneys who represent Social Security disability claimants who move into other areas, such as worker's compensation or ERISA claims, will return once they stop a disability practice.

It is also clear from the surveys that the failure to adjust the fee cap in fee agreement cases since 2009 is but one of many factors affecting the profitability of representing Social Security disability claimants. The amount of the fee cap, is however, the only one of those factors that the Commissioner has the authority to change and can do so without additional funding or negatively impacting other SSA priorities. SSA is undertaking initiatives to decrease the hearing backlog, for example, but those efforts are being hampered by inadequate appropriations and the resulting inability to hire additional staff and ALJs. Increasing the fee cap would increase ALJ productivity because some cases that currently involve fee petitions would be handled instead by fee agreements, which are easier for ALJs to review. In addition, raising the fee cap is the only action that can have an immediate effect to assist representatives struggling to make ends meet to continue to practice in the Social Security disability field.