

White Paper: The Case for Adjusting the Cap on Fees Under Social Security Disability Fee Agreements August 2016

Claimants for Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI) often hire a representative. Attorney and non-attorney representatives can help claimants by gathering evidence and submitting it to the Social Security Administration (SSA), counseling claimants on Social Security law and policy, interacting with SSA, and advocating for claimants at hearings before Administrative Law Judges (ALJs).

Representatives can receive payment for representing claimants either by signing a fee agreement with the claimant or by submitting a fee petition. The cap on fees under fee agreements was set by the Omnibus Reconciliation Act of 1990 (OBRA) at \$4000 and gave the Commissioner of Social Security authority to increase the cap. The Commissioner has only exercised this authority twice in the past 26 years: the Commissioner raised the fee cap to \$5300 in 2002 and to \$6000 in 2009.

The failure to raise the fee cap to keep pace with increasing costs for representatives threatens claimants' access to representation and is administratively inefficient. This paper lays out the case for increasing the fee cap in 2016 in three parts:

- I. The Fee Cap Has Failed to Keep Pace with the Increased Cost of Business for Representing Claimants
 - II. No Increase in the Fee Cap Since 2009 Threatens Access to Representation for Claimants
 - III. Raising the Representative Fee Cap Will Improve Administrative Efficiency at SSA.
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- I. The Fee Cap Has Failed to Keep Pace with the Increased Cost of Business for Representing Claimants

There are many costs involved in representing Social Security claimants. Just as the cost of living rose between 2009 and 2016,¹ claimants' representatives note that their expenses for doing business have increased as well. What follows is a selection of business expenses, with information from NOSSCR members about their own experiences.

Salaries and Benefits

One of the largest sources of increased expenditures for claimants' representatives is higher costs for wages and benefits. This situation is not unique to the private sector: as the Congressional Research Service notes with regards to SSA's budget, "[b]ecause wages tend to

¹ See <https://www.ssa.gov/news/cola/automatic-cola.htm>.

grow faster than prices, annual increases in payroll expenses, which are largely fixed costs, can increase an agency's administrative expenses faster than the rate of inflation."² NOSSCR members report significant increases in salary costs since 2009³:

- Staff salaries have increased an average of 3% per year, by far the most significant cost in operating a business.
- Salaries have increased at the rate of 5% per year.
- Staff salaries increase about 10-15% yearly. We want to keep good employees, and it is necessary to pay well to avoid turnover. Increase in salaries also results in an increase in payroll taxes.
- Wages for secretary have increased from \$34,498 to \$36,812. That increase has been low because I hired a less experienced secretary. But I now also pay a bookkeeper at the cost of \$6,825 in 2015, which is an expense I did not previously have.
- Salary costs have increased approximately 20% for our full-time secretary since 2009.
- My salaries have increased about 20% in the last 7 years.
- 2009: Wages \$199,444 ... 2015: Wages \$275,250
- I paid my Social Security assistant \$12.00 an hour in 2013. I pay her \$20.00 an hour now.
- The cost of the people who work for me has doubled.

Premium increases for employer-provided health insurance also have been substantial: nationally, annual premiums rose over \$1000 per employee from 2009 to 2015.⁴ These additional expenses affect claimants' representatives and their families, and increase the overhead costs for representatives who provide health insurance to their employees. As NOSSCR members report:

- Health insurance costs for staff, myself, and my partner have increased by about 25% [since 2009].
- Health insurance has gone up well over 100% [since 2009] (while increasing deductibles and stop loss).
- 2009: Insurances & Employee benefits \$20,191 ... 2015: Insurances & Employee benefits \$58,951

² William R. Morton, The Social Security Administration (SSA): Budget Request and Appropriations (April 18, 2016) <https://www.fas.org/sgp/crs/misc/R41716.pdf>.

³ All bullet points represent the responses of NOSSCR members to questions related to fees and current practices. Some answers have been edited slightly for brevity, clarity, grammatical correctness, or to protect the anonymity of the respondent.

⁴ Kaiser Family Foundation, Employer Health Benefits Survey 2015, <http://kff.org/interactive/premiums-and-worker-contributions/>.

- My employees don't get much in the way of raises anymore as the money isn't there and I see the benefits as being more important to them than additional taxable income.

Rising expenses have led some representatives to lay off staff. For example:

- I have been forced to lay off 2 of the 5 people who were working for me in 2009 - one of whom had worked for me for 12 years. The remaining three people have not had a raise in those years. They are incredibly loyal and I've tried to show my appreciation with very liberal work hours and leave with pay policies, instead. But even those policies have been pretty much constant for four or five years.
- We laid our part-time secretary off in 2013.
- June 30, 2016, I had to lay off two employees. I may have to lay off another employee later in the year.

Many NOSSCR members report that their own take-home income has decreased since 2009, given high overhead and limits on the fees they can collect.

Property expenses

It is important for Social Security claimants to have representation in the states and communities in which they live, even if those areas experience increases in the cost of rent or property taxes. Many claimants' representatives described increases since 2009 in the costs related to their office space, or the need to downgrade their office space. For example:

- My office rent has increased about 2% annually
- My rent has increased 5% each year over the past 7 years.
- In 2009, I was renting a more expensive office space than today. From 2010 to today, my rent has increased from \$740 per month to \$930 per month.
- Between 2009 and 2015 my office rent increased 6%
- My rent has increased 16% (for the same space) in the past 5 years.
- Office rent increased by 25% over the last 5 years.
- My rent in 2013 was \$1200.00 monthly. I now pay \$1450.00 monthly for the same space.
- My rent in 2009 was \$5,200.00 per month. My rent at this time is \$6,800.00.
- We own the building, so do not pay rent, but real estate taxes have increased about 8 to 10 percent since [2009].
- The property taxes on our office have nearly doubled since 2009.
- 2009: Rent/Utilities \$27,722... 2015: Rent/Utilities \$49,775

- My office rent in 2009 was \$1,000 and is now \$2,000 although my actual space is smaller.

Utility costs have also increased since 2009. The national average cost per kilowatt hour of electricity in a commercial setting went from 10.21 cents in 2009 to 10.58 cents in June 2016.⁵ Water and sewer costs have also outpaced overall inflation.⁶ NOSSCR members report:

- Our water bill has gone up \$20-\$25 per month since 2009.
- Utility costs are variable, and the very cold winter of 2014-2015 was a huge increase in heating costs.

Insurance

Claimants' representatives purchase a variety of insurance products, to guard against malpractice suits, property damage, unemployment, and other hazards. NOSSCR members report that the cost of insurance has risen since 2009:

- All operating expenses have increased in the last 7 years, especially insurance costs.
- Our professional liability, workers comp, and property insurance have all increased by 10% to 40%.
- Insurance costs have increased about 10%.
- My insurance was \$3200.00 in 2013 and \$5300.00 now. I've not had any claims made or any reports to any ethics boards, etc... Nothing has changed in my practice to warrant this increase.
- My general business insurance increased 23%.
- Malpractice premiums have gone up about 45% in that time frame.
- Professional liability insurance costs about 5% more for us than in 2009.
- Malpractice and other insurance has increased by nearly 50% over the last 5 years.

Medical Records

Representatives gather medical records to understand and support their clients' cases. This helps SSA make accurate decisions on disability claims and saves the agency time and money it would otherwise need to expend to develop claimants' records. However, the cost of obtaining records has grown since 2009. NOSSCR maintains a state-by-state list of the rates medical

⁵ 2009 information: <https://www.eia.gov/electricity/monthly/archive/pdf/02261003.pdf>; 2016: https://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_5_6_a

⁶ <http://www.circleofblue.org/2015/world/price-of-water-2015-up-6-percent-in-30-major-u-s-cities-41-percent-rise-since-2010/>

providers can charge for records.⁷ Many states adjust these rates for inflation and therefore they have increased since 2009. In addition, as a higher percentage of claims require hearings and appeals, processing times increase, and SSA institutes new rules about the submission of evidence, many representatives are finding that they are obtaining more medical records than they did in the past. Among NOSSCR members' reports about medical records:

- The costs of obtaining medical records has more than doubled since 2009, and I am spending an average of nearly \$200 per client to update medical records before hearings. I used to have obviously intellectually limited claimants tested for IQ, since the State Agency will rarely do this, but I have had to stop doing that because of the cost, which itself has doubled since 2009.
- Medical Records costs have increased substantially, including abstracts from hospitals- average costs per case are at least a few hundred dollars.

User Fees

The adage "it takes money to make money" is certainly true for claimants' representatives. SSA receives a user fee for providing direct payment of representative fees out of a beneficiary's retroactive benefits. The user fee is capped at an inflation-adjusted amount: it is currently \$91, but was \$83 in 2009.⁸

Transportation

Gas prices were similar in 2009 and 2015, but were much higher in the years in between.⁹ This affects claimants' representatives, who report that changes in SSA practices and have required them to increase the amount they travel for hearings. For example:

- Automobile expenses have increased 25%, reflecting the fact that I have to travel to attend more hearings because of the significant reduction in on the record decisions.
- Since video hearings in our region have been initiated, (but utilize unsatisfactory technology and thus are generally rejected) travel to remote hearing sites, involving approximately 250 miles of round-trip travel for each hearing, is no longer reimbursed by ODAR.

⁷ <https://nossr.org/state-medical-records-payment-rates>

⁸ <https://secure.ssa.gov/poms.nsf/lnx/0203920019>

⁹ <http://energy.gov/eere/vehicles/fact-915-march-7-2016-average-historical-annual-gasoline-pump-price-1929-2015>

Other Expenses

There are numerous other expenses involved in running a business, and claimants' representatives report that many of these expenses have risen since 2009. A selection of such reports follows:

- Professional services (mostly IT) increased from \$474 to \$3475.
- My office supply expense has increased 22%.
- Legal research and materials expenses have increased 31%.
- My WESTLAW charges have increased about 10%.
- Other costs, such as telephone, Internet, and cell phone have all increased by about 50%.
- My expenses for phone and internet have increased by 40% in that time.

Overall Expenses

The expenses described above have resulted in a large increase in overall operating expenses for claimants' representatives. For example:

- My total operating expenses have risen about 25% over 2009.
- My office manager estimates an overall increase in operational expenses of 25-30% since 2009.
- Between 2009 and 2015 I had a 75% increase in my overall operating expenses.... because now virtually every case has to go to a full hearing, or into multiple appeals beyond the hearing level, my workload in terms of the number of hours spent per case has increased.

II. No Increase in the Fee Cap Since 2009 Threatens Access to Representation for Claimants

As outlined in section I, expenses have increased significantly for representatives since 2009. NOSSCR members also report significant decreases in revenue over that time.¹⁰ The financial reality is that specializing in Social Security disability cases is becoming less and less viable for attorneys and non-attorney representatives. The flat fee cap since 2009 has resulted in:

- a. Difficulty for Representative in Maintaining a Social Security Practice;
- b. Changes in the Number and Types of Cases Representatives Will Take; and
- c. Inability to Recruit New Attorneys to Social Security Disability Practice

¹⁰ NOSSCR members report a variety of reasons for decreases in revenue and increasing difficulty in maintaining a practice representing Social Security disability claimants: the fee cap, increases in wait times for hearings and decisions, increases in wait times for the payment of fees, and decreases in approval rates. This paper will not address the other factors, but they all contribute to an environment in which there are fewer representatives and some claimants are unable to find representation at all.

a. Difficulty for Representatives in Maintaining a Social Security Practice

As a result of this very challenging financial environment, NOSSCR members report having difficulty maintaining their practices and express concern regarding the ability of attorneys and non-attorney representatives to do so in the future. Some NOSSCR members have indicated they plan to retire early, some indicate they are taking on fewer Social Security cases and are increasing their practice in other areas, and some have to borrow and worry about the future of not only their practice but the viability of this field of practice for any attorneys. Members have reported:

- We have had difficulties, especially when not many hearings are scheduled or decisions are made. It is worse when our other areas of practice are not covering the difference. This year we have had to borrow money on several occasions to make payroll and cover other expenses. I think we are maxed out on borrowing at our bank at present.
- It's not that expenses have gone up so much as it is that services have had to go down. So numbers about anything but fixed costs are not going to tell the whole story. ... Because most of the fees we have received are at the cap figure, this effectively means I have haven't had a raise since the last time the cap was raised. I simply have to work harder and longer and, as you can see, we're not holding the line at all either with regard to services to clients or my ability to sustain a viable practice or, for that matter, a living.
- ...because the case processing slowed to a crawl [since 2009], meaning all cases were delayed in coming to hearing and payment. More of those cases exceeded \$24,000 in back pay, but the cap applied and so there was no commensurate increase in cash flow after the delay.
- The cap is unfair considering the increase in operating costs generally and the fact that the amount of the monthly benefits and the cap on user fees increases, giving representatives a proportionately smaller share of the proceeds of the litigation. Of course, it has impacted my practice. I have considered changing the focus of my practice away from Social Security.
- At this point I am considering retiring because I am working longer hours and yet barely covering my office overhead. The combination of the fee cap and the low approval rates has been devastating personally.
- [Maintaining my practice] has been harder each year, given the increased cost of living and the failure to increase income.
- [I] have noticed a lot of attorneys in this area are going out of Social Security business.
- [G]ross revenues are flat while expenses increase every year. Our firm runs a very tight ship and luckily with our experienced and over-worked staff we are to stay above-water.

However, it would be great to be able to hire additional staff to help our clients win their claims.

- My legal assistants are pushed to the brink. My firm refuses to hire additional help, and they're constantly concerned about the small amount of money I'm able to earn on each case. Social Security practices like mine, which exist within larger law firms, are often associated with worker's comp or personal injury practices in which the attorneys' fees are not capped. If the firm I'm in decided to cut out my practice, even if I decided to leave and continue handling SS claims, I would have to branch out into other areas that would support the social security practice. You cannot pay overhead and do the things you need to do to get claims in the door and also make a living handling SS cases. Anecdotally I hear that many of the larger firms my firm is associated with are getting out of the SS practice.
- The fee cap, in large part, makes it not worthwhile to represent disability claimants. The fee cap often does not reimburse for actual time and effort spent on a case. I have had cases that would generate fees in the neighborhood of \$50,000.00 if the billing rate in my non-SSA disability practice were to be used. In such cases, the current fee cap is a pittance.
- Simply put, the ability of most practitioners to continue to represent deserving disabled Social Security claimants has been severely impacted by the lack of any increase in the fee cap. If the current situation does not change, I see this practice dwindling down to a few intrepid legal service agencies and a smattering of private attorneys who will do it more as a public service than an actual viable practice. This will result in a significantly lower number of represented claimants, which will only increase the Commissioner's own workload. Unrepresented claimants will ask for continuances in order to futilely seek counsel. They will come to their hearings unprepared, resulting in longer hearings and more supplemental hearings. The Agency will continue to have a duty to fully develop the record, and without counsel to assist, will have to increase staff to meet this regulatory obligation. This is to say nothing of the human cost to the multitude of disabled workers who will be left to fend for themselves in an increasingly harsh, lengthy, and inhumane disability claims appeal process.

b. Changes in the Number and Types of Cases Representatives Will Take

NOSSCR members report that they will no longer take certain types of cases due to the current practice environment leading to falling revenues, due at least in part to the inadequate cap on fees. The types of cases representatives report no longer being able to take include complex cases, SSI cases, cases with prior representatives, initial applications, overpayments, pro bono cases, and continuing disability review (CDR) appeals. Some members have reported making changes in all these areas. The fee cap might not directly cause some of those decisions (as they are not likely to come into play in overpayment, CDR, or initial application cases, for example) but NOSSCR members indicate that the leanness of payments due to the failure to increase the fee cap means they cannot afford to take these types of cases. NOSSCR members report that in

the past, they were able to take on cases or issues for which they might receive no or little compensation because the cases for which they did receive fees would help cover at least part of the cost of representing those additional claimants. The failure to adjust the fee cap over the last 7 years has contributed in large part to this change in case selection.

Here are some examples of those changes in practice:

- I have recently become more mindful of the possibility that a case that is “complex” and could take an extended period of time is probably not a case I would choose. I was more likely to choose these cases in the past. However, I consider that a case that takes an extended period of time is likely to be a borderline case, or a very unusual impairment, that carries a larger possibility that it may be denied by an ALJ, followed by a lengthy appeals process.
- I no longer accept SSI or overpayment clients. I will not accept a case with a prior representative absent their fee waiver. I also am considering no longer handling SSD applications, as opposed to SSD appeals.
- I am hesitant about taking claims with a prior representative unless the fee is clearly waived. It is frustrating to have to split an already small fee. I have not taken any overpayment cases in a while.
- As a consequence, a lot of the services I was able to provide in the past have now had to go by the boards. I would routinely consult for free on overpayment cases, advising 2 or 3 different clients per month on those issues and accepting a few for pro bono representation. The same could be said for CDR's.
- I am choosy about pro bono cases but do still take some. But I probably do fewer pro bono cases than I might if money were not so tight.
- I will no longer accept a client who had previous representation and the prior representative will not relinquish all fees because my experience with fee petitions has been very difficult, with long waits or no decisions on the fee petitions despite my client's approval. Although I am one of very few attorneys who will handle federal court actions in this region, I have stopped representing people who I did not represent administratively, and I am considering discontinuing federal cases altogether, which would essentially eliminate federal representation of Social Security claimants in a seven-county region. My district has a very low federal court success rate, and I can no longer afford to absorb the time spent on the unsuccessful cases. I am also considering discontinuing SSI only cases because of the small fees.
- The cap has limited my ability to serve as many clients as I have in the past. This last June 30, 2016, I had to lay off two employees. I may have to lay off another employee later in the year. As a result, about 30% of the calls my office receives from potential clients have to be referred to NOSSCR[’s attorney referral service], or to other representatives in the area.

- The cap particularly affects the decision to accept complicated cases, like those with "date last insured" issues, and those involving a multitude of medical providers (especially if services rendered in multiple states).
- I have reduced the number of overpayment cases I can take due to costs.
- I am more cautious about taking complex cases, such as those involving CDB benefits and overpayments.
- I take fewer cases that are likely to take years to reach conclusion because the carrying costs reduce the fee I might realize. I cannot pay someone \$20.00 an hour and overhead costs not to mention the cost of purchasing medical records when the fees are so low. Clients seldom repay me the costs I incur to secure their medical records. Also, I find that I now need to secure my own doctor reports, and these are expensive. I used to "eat" this cost, and now I cannot do so because the fee I realize is too small. Therefore, I cannot take cases that might require me to retain a medical expert.
- I am taking NO SSI cases now, and fewer SSD cases. It is more costly, time-consuming, and difficult to win these cases and the costs to carry these open files for years outweighs the potential for fees. If the fees were higher on the good cases, I would realize sufficiently more profit that I would take more chances on the SSI cases (as I used to do), and on the riskier cases because I would have some margin for loss. As it is, the fee per hour a SS case is too small to allow me to take on much risk.
- Well, when the maximum fee on a typical case is \$6,000, it certainly affects how many of these cases a small office like ours can do and how much time to devote to them... The low fee cap sometimes discourages us from taking on as many social security cases as we would like. We like to help people, but we have to keep our doors open. A maximum fee of \$6,000 certainly does not adequately compensate an attorney who has yielded this benefit from the claimant because the claimant will be getting monthly payments indefinitely. The entire social security fee arrangement seems out of step with normal fee arrangements... A fee cap of \$6,000 and 25% is inadequate.
- I do not take overpayment claims or CDRs because of the amount of time it takes to do a fee petition. I do not accept borderline cases involving a prior rep. I especially do not take them where I know the prior rep has not withdrawn his/her right to charge a fee. I do not take cases I think will take a lot of my time, i.e., cases involving complex medical issues or especially difficult clients, or cases where I'll have to drive more than 75 minutes to the hearing office (also because no hearing office outside of that distance in Virginia will reimburse travel expenses). I haven't reduced my staff so much as I have increased the amount of work I give them because my firm refuses to sink any more money in the Social Security section. This directly results in a diminishment of the services my staff members and I can provide, including a reduction in the number of pro bono cases I take. Since I refuse to provide bad service and because the section cannot afford to hire more staff or more attorneys, I am limited in the number of cases I take.
- There are simply not enough hours in the day to handle as many cases as I used to, because every case requires significantly more time commitment, both in terms of

preparing for a hearing in every single case given the elimination of OTRs, and the increase in appellate work given the reduction in allowance rates by ALJs. The lack of any increase in the fee cap means that when I do win a case, my fee has not kept up with the normal inflation in my operating expenses, and certainly not with the increased amount of work that each case now requires. Because of this drain, I no longer accept referrals from other attorneys for federal court work. I have all I can handle just working on the appeals for the unjustly denied claimants I have represented in the Agency proceedings. Many of the attorneys who previously referred federal court work to me do not themselves practice in the federal courts, so these claimants are left without representation.

- I never take pro bono or overpayment SSI clients. I'm always cautious about spending time on cases that are not clearly winnable.
- [I] am taking fewer SSD cases and trying to work on more ERISA LTD and DI cases.

c. Inability to Recruit New Attorneys to Social Security Disability Practice

Like all employment sectors, the baby boom retirement wave is starting to impact the Social Security disability representation arena. In addition, the financial realities outlined above are causing some individuals to leave the practice area before they retire, or to retire early. In order to ensure claimants—especially claimants with complex cases, extensive medical histories with multiple providers, or post-entitlement issues—have access to representation in the future, it will be necessary to recruit a significant number of new individuals to provide representation to Social Security disability claimants. Unfortunately, these same financial realities are making it difficult to recruit new individuals to provide representation in Social Security disability matters. Many current practitioners report not being able to serve all their prospective clients and lacking the financial resources to hire additional staff or attorneys to meet the demand. However, even if representatives had those resources, they indicate they are having difficulty in recruiting people due to the inability to earn enough to make a Social Security disability practice viable. Examples of the difficulties NOSSCR members report include:

- I cannot find any attorney who is willing to develop a practice whereby he/she might receive 25% of not much in 3 to 4 years.
- Compared to other cases such as criminal law, family law, personal injury, etc. the fees in social security disability cases in relation to time spent are quite low. If SSA wants to encourage a climate where attorneys are still willing to do these cases, the fee cap needs to be increased significantly or eliminated.
- [W]e can't afford to hire any new attorneys or additional staff.
- No we do not recruit new attorneys to the SS practice. We cannot afford to pay them. It is directly related to current fee policies. We cannot even hire support staff with any amount of experience for the same reason. And lest you think I only do a few of these cases, I... have 300 open cases at any one time.

- When young attorneys approach me to ask whether this is a viable practice area, I do everything I can to prepare them for the reality of a likely low income if they take it on. As a result, I believe that new attorneys are not entering this practice at the levels they once were, resulting in an overall reduced pool of attorneys from which a claimant can obtain representation.
- [M]ost attorneys nowadays don't want to do Social Security or at least not as a significant part of their practice because of the difficulty winning and getting paid anything substantial, even with a volume practice.
- I have been attempting to recruit new attorneys during the past 3 years. I have been unable to recruit any qualified attorneys for the salary that I am able to pay.

The failure to raise the fee cap commensurate with the increase in expenses is clearly having an impact on the willingness of representatives to take certain claimants and certain claim types on as clients. It also raises concerns regarding the future viability of this area of representation.

III. Raising the Representative Fee Cap Will Improve Administrative Efficiency at SSA.

Representatives whose clients obtain large awards of back benefits currently have to file fee petitions if they want to request fees over \$6000. If the fee cap were increased to \$6904, some fee petitions would not be necessary because representatives could use fee agreements to obtain these larger fees. Given that fee petitions are more difficult to adjudicate and require efforts from ALJs as well as other components at SSA, increasing the percentage of fees payable via agreements rather than petitions would assist SSA at a time of unprecedented workloads and backlogs. As one NOSSCR member put it, "Eliminating the fee cap altogether would remove the necessity to petition for fees pretty much altogether. Raising the fee cap would help."

There are many reasons why representatives file fee petitions, and raising the fee cap would not completely remove the need for petitions. Cases with multiple representatives and cases with extremely large back awards are just two of the situations in which a fee petition would remain necessary. Although the purpose of this paper is to discuss the necessity of adjusting the fee cap, NOSSCR would be willing to engage in future discussions about additional policy changes that could allow representative fees to be paid more promptly and efficiently.