



NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS'
REPRESENTATIVES
ESTABLISHED 1979

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Executive Director
Barbara Silverstone

October 13, 2021

Clerk of Court
Attn: Public Comments
Federico Degetau Federal Bldg.
150 Carlos Chardón Ave.
Room 150
San Juan, PR 00918-1716

Dear Judge Besosa,

Thank you for the opportunity to comment on proposed Rule 9 (Social Security Cases).

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR). NOSSCR is a specialized bar association for attorneys and advocates who represent Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claimants throughout the adjudicative process. Since 1979, NOSSCR has been providing continuing legal education to its thousands of members and public policy advocacy on behalf of its members and the people with disabilities they represent.

Initial Process

We are concerned by proposed section (a)(2), which would require plaintiffs to provide, albeit in a secure fashion, their full Social Security number (SSN) and the full Social Security number of any minor child claimant or person whose wage-record underlies the claim. Using a portion of the SSN would be an improvement. Better still would be if SSA would put a Beneficiary Control Number (BCN) on each Appeals Council denial or other place where it informs claimants about their right to appeal to federal court, so that number could be used on a complaint without risk of identity theft.

Response to Complaint

NOSSCR also has concerns about the portion of proposed section (b) stating "The certified administrative record [CAR] shall constitute the defendant's answer." This suggests that SSA would not be allowed to submit affirmative defenses or respond to claims and allegations in the complaint,

which could prolong litigation and create other problems for plaintiffs and the agency. One option for the final version of Rule 9 would be to state that filing of the CAR will be deemed a general denial to all allegations except those specifically admitted, and a waiver of all affirmative defenses listed in FRCP 8(c).

Additionally, though NOSSCR members are generally supportive of the idea that a motion for voluntary remand can be made at any time during a case, they believe that the CAR should be filed with such a motion if the record has not been filed already.¹ Including such a requirement in the final version of Rule 9, along with a requirement that the Commissioner provide notice before filing a motion to remand, will ensure that plaintiffs can make informed choices about whether to consent to voluntary remands.

Attorney Fees for Social Security Cases

The attorney fee process is an extremely complex area of Social Security jurisprudence, with questions of both law and fact frequently at issue. The Social Security Review Subcommittee of the Judicial Conference's Advisory Committee on Civil Rules, when considering whether there should be specialized federal court rules for Social Security cases, and if so what those rules should say, decided not to include SSA's recommended rules about fees. In fact, the subcommittee omitted all rules about fees from their proposal.²

While some districts or circuits have 14 days after the Notice of Award to request attorneys' fees pursuant to 42 U.S.C. § 406(b), as is proposed in (d)(2) here, others, such as the Eastern and Central Districts of California provide 30 days. NOSSCR would prefer the longer deadline. While FRCP 54's 14-day deadline might be appropriate in non-Social Security cases where a losing party has 30 days to appeal and is assessing what fees they might have to pay if they accepted the Court's decision, these considerations do not apply in Social Security cases because 406(b) fees are paid by the plaintiff and not the Commissioner. A 30-day deadline would also provide parity with the proposed amount of time the Commissioner has to requests for fees. Attorneys would still have an incentive to file fee requests as soon as possible to expedite receipt of any authorized fees.

We are also concerned by proposed (d)(2)(A)(ii), which would require attorneys to provide evidence of the date they received the notice of award (NOA) if not the date issued. It is not clear what evidence would be sufficient. SSA generally mails NOAs, meaning that they are usually received after the date on which they are issued. Therefore, this issue would likely arise in the majority of fee requests. We recommend this subsection be removed from any final version of Rule 9.

NOSSCR members frequently experience significant challenges in obtaining NOAs from SSA. This is especially true where different attorneys represent the plaintiff in federal court and in administrative proceedings. SSA's subregulatory guidance requires the federal court attorney in certain such situations to obtain a signed release from their former client in order to obtain the NOA.³ Even with the release

¹ The one exception should be situations where the Commissioner is filing a Sentence 6 motion to remand the case because the CAR cannot be found. In such cases it would obviously be impossible for the Commissioner to file the CAR with the motion.

² See, e.g., https://www.uscourts.gov/sites/default/files/2018-11-01-cv-minutes_0.pdf p.12; https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf p.97

³ Program Operations Manual System (POMS) GN 03910.025 B.4 <https://secure.ssa.gov/poms.nsf/lnx/0203910025>

signed, the federal court attorney may not know when or if their former client was awarded benefits or how long after the award the NOA was generated (sometimes SSA takes days or weeks, but in some cases the agency takes much longer) making it difficult to request the NOA. In some situations, the former client has died or been found to lack capacity during the year or more it can take for a remanded case to receive a new decision, which creates other challenges in obtaining the NOA. Obtaining NOAs for auxiliary beneficiaries, such as children receiving benefits on their parent's record, can also be difficult.

Some NOSSCR members find that counsel for the Commissioner accepts plaintiff's counsel's word that the NOA has not been timely received. In other cases, problems obtaining the NOA despite diligent efforts has led to the denial of fees for the work that made the award possible. We therefore suggest that any final version of Rule 9 omit proposed (d)(2)(A)(ii) and give counsel 30 days after receipt of the NOA to request fees.

Thank you again for the opportunity to comment on this proposed rule. NOSSCR staff and members are glad to discuss these comments with you if that would be helpful.

Sincerely,

Barbara Silverstone
Executive Director