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§600 Considerations Prior to Filing

To hear the Social Security Administration (SSA) tell it, SSA almost never loses in federal court. SSA reported to Congress in 1995 that the federal courts denied or dismissed 90% of disability cases appealed to federal court, and awarded benefits in only 10% of the cases. *See Social Security Forum*, Volume 18, Number 12, December 1996, p.6. Although it's true that SSA almost never loses in the appellate courts—SSA has a 95% win rate there—its district court statistics, which completely ignore remanded cases, are extremely misleading.

Remanded cases are those in which federal courts find that the agency was wrong in denying benefits and send the cases back to SSA for further administrative action. When a federal court remands a case, it is a victory for a claimant. Indeed, the claimant is a “prevailing party” for payment of attorney fees under the Equal Access to Justice Act. 28 U.S.C. §2412(d). *See* §760 *ff.*, *infra*. More than half of these claimants win their cases at remand proceedings.

Federal district courts decide in favor of claimants in about *one-half* of the cases they hear. For example, in 1997 the federal courts remanded 42% of the cases, reversed and paid benefits in 6%, denied 43%, and dismissed another 9%. *See Social Security Forum*, Volume 20, Number 10, October 1998, p.9.

Winning half the time, of course, means that claimants lose half the time in federal district court, too. Why do claimants lose so often? Are too many disability cases being appealed to federal court? Probably not. In fact, a good case can be made that more but perhaps different cases should be brought to district court. Less than 15% of Appeals Council denials—in actual numbers, around 8,500 every year—are appealed to federal court. It is likely that many additional cases could be successfully appealed.

It is apparent from reading federal court decisions that many appealed cases were doomed to failure from the outset by the weakness of the plaintiffs' arguments. What is striking, though, is that claimants in many such cases appear to be more impaired than other claimants whose administrative law judge (ALJ) hearings we routinely win. Thus, it is apparent why their attorneys filed complaints. These cases illustrate why a decision to take a case to federal court should not be based solely on how impaired a claimant is.

As a rule, attorneys who specialize in federal court disability litigation do not file complaints for claimants for whom they feel sorry. Instead, they look for a solid issue, usually one involving an error of law. They tend to avoid cases in which the arguments involve examining evidence to see if it is substantial. By careful case selection, they tend to win more than half of their cases. If we are careful about the cases we take to federal court, we, too, will have a better success rate than fifty percent.

Some disability attorneys never themselves take a case to federal court, but refer appeals to other attorneys. This is a mistake. Federal court work sharpens an attorney's ALJ hearing skills. There is no more educational experience than reading a transcript of your own hearing and thinking about all the questions you should have asked—or questions you should *not* have asked.

There are disability attorneys who don't even refer cases to specialists for federal court appeal. This is also a mistake. Many experienced attorneys feel that failure to pursue an erroneous denial into federal court encourages further erroneous denials by ALJs. Despite the fact that SSA gives no precedential value to district court decisions, these attorneys think that a successful history of federal court appeals is a deterrent to future ALJ denial decisions involving similar issues. Not all ALJs are responsive to federal court reversals, but enough are to make federal litigation an important part of your representation of claimants.

§601 *Is There a Final Decision of the Commissioner?*

A federal district court has jurisdiction to review a "final decision" of the Commissioner of Social Security. 42 U.S.C. §405(g). To receive a final decision, a claimant must exhaust administrative remedies. This means that a claimant must pursue the claim through each administrative appeal level that the agency requires. A complaint challenging a final decision must be "commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow." 42 U.S.C. §405(g).

The "final decision" of the Commissioner is usually the ALJ decision, but an ALJ decision usually does not become a "final decision" until the Appeals Council refuses to review it. As a rule, rather than issuing another full-fledged decision, the Appeals Council will send the claimant and attorney a letter saying that it is denying the claimant's request for review and stating that the ALJ decision stands as the Commissioner's final decision. The letter from the Appeals Council will give notice of the 60-day time limit for filing a complaint in federal district court and provide the

address for serving the summons and complaint on the Commissioner of Social Security. The letter will state that the local United States Attorney and the Attorney General of the United States must also be served.

If a claimant fails to timely appeal each denial, there is no "final decision" for a federal court to review. Even in several circumstances where a claimant has the right to appeal an ALJ's action to the Appeals Council, federal court review may be unavailable. For example, if an ALJ, instead of issuing a decision, *dismisses* a claimant's request for hearing (because an appeal was untimely, the claimant failed to appear at the hearing, or a prior denial is *res judicata*), the claimant may request review by the Appeals Council; but, if the Appeals Council denies review, there is no "final decision" within the meaning of 42 U.S.C. §405(g). When the Appeals Council denies review under such circumstances, its letter will not include information about filing the case in federal court. Without a "final decision," a claimant may not be able to appeal to federal court, at least not using 42 U.S.C. §405(g) as the jurisdictional basis for the action.

Civil actions may be initiated in these otherwise non-reviewable cases by alleging a constitutional jurisdictional basis or invoking mandamus jurisdiction. Because federal courts are very sparing in acknowledging jurisdiction in these cases, this approach should be reserved for the most egregious violations of a claimant's rights. Nevertheless, such appeals probably have greater success than is reflected by reported cases. A truly egregious violation of a claimant's rights may prompt the agency to voluntarily provide a claimant with a new hearing.

A seldom-used regulation provides, in certain unusual cases, for expedited appeal bypassing some steps of the administrative review process. After the reconsideration determination or after the ALJ decision has been issued, this process may be used to skip the next steps of administrative appeals. To use this expedited appeal process, a claimant must convince SSA that the only thing preventing a favorable decision is an unconstitutional provision of the law. The usual 60-day time limit applies; but there is also a provision for requesting an extension. If the request to use the expedited appeal process is denied, the request will be treated as a request for a hearing or Appeals

Council review, whichever is applicable. *See* 20 C.F.R. §§404.923-404.928.

§602 Standard of Review

In federal court there are only two types of challenges to a final decision of the Commissioner of Social Security: (1) the decision is not supported by substantial evidence; and (2) the Commissioner committed some legal error in the decision.

The substantial evidence standard is found in 42 U.S.C. §405(g), which states: “The findings of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive.” In *Richardson v. Perales*, 402 U.S. 389, 401 (1971), the Supreme Court explained that substantial evidence is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” In *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951), the Supreme Court stated:

The substantiality of evidence must take into account whatever in the record detracts from its weight. [A] reviewing court is not barred from setting aside a[n agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency’s] view.

Federal courts will also review decisions of the Commissioner for errors of law. In *White ex rel. Smith v. Apfel*, 167 F.3d 369, 373 (7th Cir. 1999), a federal court described this type of review: “We need not defer, however, to conclusions of law, and if the Commissioner commits an error of law, we may reverse without regard to the volume of evidence in support of the factual findings.”

§603 The Role of the Federal Courts

Substantial Evidence

A federal court does not decide factual issues in a disability case. It is the agency’s job to make factual findings. Nor does a federal court decide if a finding of fact is correct. Instead, a court reviews

the evidence simply to determine if there is *enough* evidence to support the agency’s decision.

Suppose there is a mountain of evidence supporting disability and only a small molehill of evidence supporting a conclusion that a claimant is not disabled. It is a court’s job to decide if the evidence is sufficient to support the conclusion that the claimant is not disabled even when the court, if it were allowed to exercise its own judgment, would come to a contrary conclusion.

How much evidence is enough? We know that the evidence must be more than a “scintilla.” But is a small molehill of evidence supporting non-disability sufficient in the face of a mountain of evidence supporting disability? Most claimants’ representatives would say “not usually.” But most practitioners would also say that they have seen cases going both ways in the mountain versus molehill situation.

Substantial evidence must support every element of a finding that a claimant is not disabled. Sometimes no evidence whatsoever supports a crucial aspect of a finding of non-disability. In this circumstance, a molehill of uncontradicted evidence may demonstrate that the agency’s decision is not supported by substantial evidence.

The substantial evidence standard is one of those legal doctrines that is easier to apply than to describe. Because the doctrine is applied on a case-by-case basis, it is easiest to understand when looking at the facts of a particular case. Therefore, if you have not yet done so, read several substantial evidence decisions from your appellate court and your district court. Be sure to read decisions going both ways, for the claimant and against the claimant.

The substantial evidence standard is the same nationwide; but the way it is applied differs from judge to judge. Sometimes judges appear to bend over backwards to find substantial evidence supporting an ALJ denial decision. Other times judges appear to go out of their way to find in favor of a claimant. Some judges seem to think that if there is any shred of evidence supporting an ALJ denial decision, even if the ALJ never referred to that evidence, substantial evidence supports the ALJ decision. Thus, the claimant’s appeal is denied. Other judges will look carefully at every conclusion by an ALJ and find a lack of substantial evidence

sometimes where, at first glance, there appears to be a lot of evidence supporting the ALJ position.

It is important to recognize that issues of fact and law often become intertwined in disability cases. A court's finding that *substantial evidence* does not support an agency decision may contain an implicit finding that the fact-finder made a *legal error* when evaluating the evidence. A court may hold explicitly that substantial evidence does not support an agency finding because an improper legal standard has been applied. Or a court may find an absence of substantial evidence when the real error in the ALJ decision is failure to explain the basis for the decision.

To understand the law in your circuit, do not spend too much time on substantial evidence cases. Such cases are useful mostly when researching issues involving a specific impairment. For the broad picture of the state of the law in your circuit, focus on the cases that turn on legal error.

Errors of Law

To identify an error of law, the federal courts first must determine what the law is. Courts begin by looking at what the Social Security Administration says the law is. A court must consider SSA's position with deference. For this reason, it is difficult to show that SSA's position is invalid. Therefore, most findings of legal error are based on the agency fact-finder's failure to follow the agency's own rules. This approach simplifies district court litigation since you generally do not need to prove that SSA policy is wrong, but only that the agency fact-finder did not follow it.

Sometimes the federal courts, with a little help from obfuscation by SSA's attorneys, misinterpret SSA policy. Sometimes federal courts make mistakes so that the challenge you must face is how to deal with an erroneous precedential decision from your circuit or district court. In this situation, a later, clearer statement of SSA's position in, for example, a Social Security Ruling makes your job much easier. The interpretation in a later Social Security Ruling ought to control the outcome of your client's case. Social Security Rulings are binding authority. 20 C.F.R. §402.35.

Federal courts occasionally find that SSA failed to follow general principles of law. This group of cases is important and has been responsible

for development of social security law. Several court-fashioned rules based on broad legal principles were later adopted, to one degree or another, by SSA as official policy: the shift of the burden of proof to the Commissioner at step 5 of the sequential evaluation process; the "treating doctor rule" which requires adoption of the treating doctor's opinion unless the ALJ states good reasons not to; and the requirement that the ALJ assess credibility in pain cases. If the case law in your circuit imposes more stringent requirements than the rules adopted by SSA, argue that the case law controls. On the other hand, where case law in your circuit on a particular issue is less favorable to your client, you can argue that SSA policy controls.

Certain appellate cases hold that SSA erroneously interpreted the Social Security Act or its regulations. These decisions conflict with SSA policy. Although this is the smallest category of decisions by federal courts, these cases deserve special attention. Some, but not all, significant court decisions contrary to SSA policy are later published by SSA as "acquiescence rulings." That is, SSA agrees to follow the circuit court decision, but only within the circuit that issued the decision. See Appendix 1, *infra*, Guide to Important Social Security Rulings and Acquiescence Rulings.

§604 Analyzing the Case

Is the claimant disabled?

Before you file a case in federal court, analyze it the same way you analyze a case for an ALJ hearing. You need a theory of disability based on the five-step sequential evaluation process. A solid theory plus a little intuition about what limitations will be accepted by an ALJ are the essential ingredients of a successful ALJ hearing practice. This sort of analysis is necessary because a favorable result in federal court likely means that the plaintiff will receive a new hearing. At any new hearing, you will need to show that the claimant is disabled.

But after you have concluded that the claimant would have a good case before an ALJ, put aside this conclusion. While it is tempting to base the decision whether to take a case to federal court solely on your belief that your client is disabled, this is the recipe for losing in federal court. Your

prospects for success are based on other factors, including the following:

What evidence supports the ALJ decision?

Look carefully at the evidence cited by the ALJ as supporting the decision. Does it really say what the ALJ says it says? Does the decision make sense? How much evidence is there contrary to the ALJ's position? Does the ALJ adequately explain why evidence demonstrating disability was rejected?

Look at evidence supporting each element of the ALJ decision. For example, look at the evidence supporting every aspect of the residual functional capacity finding. Look at the evidence supporting the vocational findings at step 5. Attorneys who specialize in federal court litigation try to find ways to characterize crucial elements of the claimant's proof as uncontradicted.

What are the legal errors in the ALJ decision?

When you review the ALJ decision, you may find some substantial evidence arguments. Indeed, such arguments are present in most cases. But lawyers who litigate many federal court cases rarely file a case in which the primary issue involves reviewing the evidence to see if it is substantial. Instead, they look for legal error. They look for instances where the ALJ decision failed to follow a Social Security Ruling or regulation. They look for transgressions of appellate case law. They often frame a substantial evidence argument as a legal argument involving, for instance, the ALJ's failure to properly evaluate a treating doctor's opinion. The 1996 "process unification" Social Security Rulings—SSRs 96-1p through 96-9p—are a treasury of legal arguments because they set forth a number of things that an ALJ "must" do in evaluating a case and writing a decision. An argument that the ALJ failed to do one of these things is usually stronger than a substantial evidence argument.

Is the legal error harmless?

Not every technical violation of a Social Security Ruling will result in a remand by the federal court. You need to explain how the ALJ would have made a different decision if the ALJ had not made a legal error.

Does the case have compelling facts?

Compelling facts and a sympathetic claimant are not essential. But they help. When your brief tells a compelling story, it adds weight to your legal arguments.

§605 Filing a New Application Instead of Filing in Federal Court

If the claimant's case is strong, the case ought to be taken to federal court. Filing a new application may not be a good alternative when there is a likelihood of success in federal court.

Difficult judgments are involved when you have an average case for federal court review—one where the odds of success in federal court approach the national average success rate, about 50-50. A new application, of course, may be denied. ALJs have a tendency to follow prior unfavorable decisions. Even if a new application is successful, SSA will not set an onset date for the new claim earlier than the day after the date of the prior ALJ decision. Thus filing a new application instead of a federal court action may result in loss of retroactive benefits, which might be awarded if the claimant prevails in a federal court appeal.

If the claimant's insured status lapsed before the day after the prior ALJ decision, the claimant cannot in most instances receive disability insurance benefits via a new application (although the claimant still may be able to obtain SSI if financial eligibility criteria are met). For such claimants, federal court review of the denial decision may be the claimant's only hope of obtaining social security disability benefits.

In conjunction with a new application, SSA may reopen the prior claim pursuant to 20 C.F.R. §§404.987-989. If a prior claim is reopened, a new application could result in the same relief as a federal court appeal. But if the request for reopening is denied, the claimant will probably not be able to obtain judicial review of the agency's refusal to reopen. In nearly all circumstances, federal courts lack jurisdiction to review the agency's refusal to reopen a prior claim. *Califano v. Sanders*, 430 U.S. 99 (1976).

On the other hand, a new application rather than federal court action might be the better course

where, given the current record, the probability of success on judicial review is not great, but there is a likelihood that the claimant will be found disabled on a new application. This arises most often when there is new evidence, deteriorated health or the claimant's increase in age changes the outcome under the Medical-Vocational Guidelines.

§606 *Filing a New Application in Addition to Filing in Federal Court*

Filing a new application is a way of hedging your bets against loss in federal court. After a case is no longer pending at the Appeals Council, the agency will allow a new application to proceed through all levels of administrative review. A new application while a case is pending in federal court is thus treated differently from a new application filed while a request for review is pending before the Appeals Council. Cf. §507. Although SSA will process a new application while a claimant's case is pending in federal court, the decision to file a new application requires careful consideration. This is because filing a new application in addition to federal court action has advantages only if it is successful. At the time you decide to take the case to federal court, be sure to tell your client not to file a new application for benefits without discussing it with you first. As a rule, if a new application is filed, it is best that you be involved early in the process.

Because problems may arise if there are two applications pending at the same time, it is usually best to wait until the eleventh hour to file a new application. For Title II, the day of reckoning comes 17 months after the date of the prior unfavorable ALJ decision. The claimant can wait this long and still receive all available benefits under a new application. (This is because SSA won't set an onset date prior to the day after the ALJ denial decision, there is a five-month waiting period before benefits are payable, and back benefits can be paid for up to 12 months before the date of a Title II application.)

Don't assume that you will be able to use the reopening regulations to then reopen the application currently pending in federal court. ALJs have instructions that they are not to reopen an application that is being reviewed in federal court. *HALLEX I-2-910*.

If a claimant loses in federal court before a new application gets to the ALJ level (i.e., after the case is no longer pending in federal court), an ALJ has the authority to reopen the earlier application based on, for example, new evidence. *HALLEX I-2-910* Note 1. Although *HALLEX I-3-907B* states that a "court's affirmation of the prior decision does not affect the ALJ's jurisdiction to reopen and revise the prior decision," some ALJs will erroneously refuse even to consider reopening the earlier application simply because the prior ALJ decision was affirmed in federal court.

A successful new application may result in certain advantages, for example:

- Since a decision on reapplication will probably be issued much more quickly than the decision of the federal district court, the claimant may receive some benefits sooner through a new application than waiting for a court decision.
- If a claimant receives a favorable decision on reapplication during the pendency of a federal court action, you may be able to use this favorable decision to advantage in the federal court action. In most instances, the fact that the claimant was found disabled at some later date is not directly relevant to the federal court action. But what if the claimant's age and medical condition are essentially the same when approved as when denied? While a fully favorable decision on a later application generally will not convince a federal court to rule in a plaintiff's favor on an earlier application, a plaintiff may argue that the subsequent award is facially inconsistent with the prior denial (e.g., the prior ALJ found that the claimant was not mentally retarded but the claimant was later found to be mentally retarded on the same facts).
- You may also argue that the finding of disability on the second application has limited the issue before the court to eligibility during the closed period not covered by the new application. Ask the court to remand the case for consideration of disability *during a closed period* from the date of onset alleged in the first application to the date of onset found by SSA on the second application. But beware: in the absence of such specificity in the order, SSA has been

known to reconsider *current* eligibility on remand.

The most difficult problem with filing a new application during the pendency of a federal court action arises, of course, if the new application is denied. Then the claimant must fight on two fronts: there are administrative and federal court appeals pending simultaneously. In the unlikely event that the government's attorney in the federal court action finds out about the fate of the subsequent application, the agency's attorney may have the same impulse you would have if the situation were reversed—to try to use the denial decision in federal court. The agency's attorney may argue that SSA looked at the claimant's condition again and the claimant is *still* not disabled. Or the government may try to limit remand to consideration of a closed period.

What happens if the federal court action is remanded for a new hearing but the claimant did not appeal denial of the second application? Is the second application *res judicata*? This is an open question. Because of the horrible possibility that the denial of the second application may preclude anything more than an award for a closed period on the first application remanded by the federal court, you will have to see to it that the second application, once denied, is kept alive by appealing. If the claimant does appeal the second application and if the first application is remanded by the federal court, the two applications may be consolidated before an ALJ for a hearing pursuant to 20 C.F.R. §404.952.

§610 Initiating the Civil Action: Procedure

§611 Filing and Service of Summons and Complaint

From the commencement of a federal court action to a final judgment, including any remand for further administrative proceedings, a federal court action can take more than a year.

Federal court action in most districts is commenced with filing and service of a summons and complaint. (At least one district court has decided

that service of a summons is unnecessary—the Eastern District of Wisconsin.)

The Action of Appeals Council on Request for Review, the letter that a claimant gets from the Appeals Council denying the appeal, states the time limit for filing in federal court (60 days from receipt of the letter with a presumption that the letter is received within five days of the date on the letter) and provides the address for service of the summons and complaint on the Commissioner of Social Security. The Commissioner is the named defendant in federal court review of a disability case as a result of the Social Security Independence and Program Improvement Act of 1994, which took effect March 31, 1995. Previously the Secretary of Health and Human Services was the named defendant in these cases.

Simple notice pleading is all that is required. The sample complaint at §612, *infra*, may be used for most cases. Note that the language appearing in brackets on the sample complaint applies to SSI claims. Whenever there is SSI involved, the jurisdictional basis is founded on both 42 U.S.C. §§405(g) and 1383(c)(3).

Practice Tip

Although the sample complaint will work for most circumstances, before you use this form, just like any other form, consider whether there is any reason to write a special complaint specifically explaining the Commissioner's errors in your client's case. Reasons may include:

1. Your client's case is being filed *in forma pauperis*. Courts have been known to require an explanation why the case is not frivolous pursuant to 28 U.S.C. §1915(e)(2) beyond that provided in paragraphs 6 and 7 of the sample complaint.
2. Your client's case is procedurally or factually unusual, e.g., there is a reopening issue, a dismissal is involved, or mandamus relief is sought.
3. You hope to get the attention of an agency attorney who might choose to offer settlement prior to answering the complaint.
4. You want to ask only that the court find your client entitled to benefits. That is, you may want to appeal if the court remands the case for another hearing.