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Nuts and Bolts of Preparing a Fee Petition for Social Security Representation

John M. Driskill
Tasha Dansby Roberts

John M. Driskill, Attorney
Tasha Dansby Roberts, Paralegal
Morgan & Weisbrod, L.L.P.
Dallas and Houston, Texas

jmdriskill@morganweisbrod.com
800.800.6353 214.373.3761 281.250.3899

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Introduction

I feel compelled to begin by stating what this presentation is *not*. It is not about *when* or *if* an attorney needs to request approval of a fee for work performed in the world of Special Needs Trusts. In preparation of this presentation I found an excellent article written by Kevin Urbatsch and a second one by David Lillesand about the ephemeral issuance of SSA's POMS GN 03920.007 that was withdrawn by SSA on September 25, 2019.[1] Those articles led me to an article prepared a couple years ago for this seminar by Constance Somers about SSA Ethical Rules (since updated). These articles provide valuable insight into when you might be required to seek authorization to collect a fee by SSA.

Just to be clear: This presentation is *not* about *whether* an attorney needs to seek authorization for worked performed "in connection with a claim before the Social Security Administration (SSA). . . ."[2]

So what *is* the purpose? The purpose is to persuade each of you about the efficacy of hiring a lobbyist to ensure you never have to waste time in the dark and murky world of SSA fee petitions (written with tongue only *partially* in cheek.)

Two Ways To Get Paid

Authorization for payment under the Social Security Act is found in 42 U.S.C. § 406.[3] There are two methods to charge a fee for work performed before the SSA. There is the Fee Agreement (FA) process and a Fee Petition (FP) process.[4] Under a FA, the SSA approves a contract under which a fee is calculated. Under the FP, SSA determines the actual fee.

SSA will withhold 25% of the past-due benefits for possible payment to the attorney or authorized representative. Note well: That does not mean the attorney will necessarily get 25%. Nor does it mean the attorney is limited to being awarded 25% of the past-due benefits.

At some point after a favorable decision is issued SSA *should* produce a Notice of Award. The claimant, the judge, and the attorney should each receive a Notice of Award and have 15 days in which to object to the fees being awarded to the attorney. In over 25 years of practice, I have

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1 NOSSCR *Forum*, September 2019.

2 From instructions for Form SSA-1560.

3 Attachment 1.

4 Regardless of which process is contemplated, the attorney should file a 1695 and 1696 *immediately* with the Social Security district office after being hired. SSA will not withhold attorney fees unless these two forms are on file. Not surprisingly, they often have to be filed several times on each case. Filing these forms by facsimile is the quickest and easiest way to verify the time and date of submission.

never had a judge object to my fee under the FA. I had one client (out of thousands) object to my fee under a FA, but the ALJ approved it anyway.

Unfortunately, Notices of Award are not always generated in favorable decisions. Obviously, they would not be created if there is an unfavorable outcome.

A. Fee Agreement

An FA is used by attorneys in the vast majority of cases when clients seek disability benefits. It is easy to understand, contingent, leads to faster approval and payments, and is largely ministerial. If the FA meets the statutory guidelines, the judge should approve it. The major drawback about using a FA is there must be a reasonable expectation of past-due benefits.

An FA must clearly state the fee is limited to 25% of the past-due benefits or $6,000, whichever is less.[5] However, there are several instances where a FA cannot be used as listed below.

1. The claimant appoints more than one representative and all representatives did not sign a single fee agreement.
2. The claimant appoints representatives who are not with the same firm, partnership, or legal corporation.[6]
3. The claimant discharges a representative (i.e. gets fired), or a representative withdraws from the case before SSA makes a decision.[7]
4. Cases in which a federal court reverses SSA's decision awarding benefits.

When a decision is issued the decision-maker or judge will state whether the FA was approved. Sometimes the statement is included automatically even if it is clear the FA should not have been approved.

A copy of Morgan & Weisbrod's standard FA is found at Attachment 2. This is often referred to as a "Two-Tiered" FA. The first tier means it will operate as a FA under most circumstances. However, in certain circumstances, the attorney can elect to file a FP. For example, if a favorable decision is obtained after an ALJ denial, he or she can file a FP. Some attorneys add language about a minimum fee if there are insufficient (or no) past-due benefits.

If it is known a FP will be filed a straight contingent fee contract of 25% is used. Attachment 3.

B. Fee Petition

An attorney who does not intend to use a FA has wide latitude to structure the fee contract to suit his or her needs. For example, there is nothing to prohibit an attorney from using a contract with

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[5] 42 U.S.C. §406(a)(2)(A)(ii); 74 Fed. Reg. 6080 (Feb. 4, 2009). The $6,000 was last adjusted in 2009 and does not require Congressional approval for an increase.

[6] 74 Fed. Reg. 68897 (Dec. 29, 2009).

[7] 74 Fed. Reg. 55614 (Oct. 28, 2009).

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