SOCIAL SECURITY A MINISTRATION

Refer to: TAHC

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

JUN 27 1995

NOTE TO: Molly Brostrom

SUBJECT: REGO II Initiative on Attorney's Fees -- INFORMATION

Per our discussion yesterday, attached are the documents you requested. If you need additional information or have any questions, please feel free to give me a call at (703) 305-0212.

Ora Brown Tilghman

Ora Brown Tilghman

Attachments

cc: Rita Geier

OPTIONAL FORM 99 (7-90)

| FAX TRANSMITTAL | # of pages ▶ 6 |
|---|---|
| To Molly Brostrom | From Ora Tilghman |
| Dept./Agency White House | Phone # 703/305-0212 |
| Fax # 202/456-7028 | Fax # 703/305-0371 |

NSN 7540-01-317-7368 5099-101 GENERAL SERVICES ADMINISTRATION

# Health Advocates Inc.

# Social Security Representatives Inc.

May 30, 1995

Ora Brown Tilghman, Director
Office of Policy, Planning and Evaluation
Office Of Hearings and Appeals
5107 Leesburg Pike
Suite 1702, One Skyline Tower
Falls Church, VA 22041

Dear Ms.Tilghman:

I am writing in response to your letter directed to Nancy Shor dated February 10, 1995 where you asked for comments on the proposed Rules of Conduct and Standards of Responsibility for representatives. Although the American Bar Association currently imposes ethical standards on attorneys only. However, since the representation of claimants is not limited to attorneys, an ethical standard should be addressed for all representatives. This is especially important since all representatives are held responsible by the courts in representing claimants fairly, and all fee contracts must be approved by the Social Security Administration. Yet despite these same standards, only attorneys' fees are held by the Administration and the administration of that program is at a yearly cost of $60 million according to the Social Security Administration.

It appears there is clear discrimination between a claimant's representative who is an attorney and one who is not. The Social Security Regulations do not impute this discrimination but by acknowledging that only attorney's fees can be withheld, it is apparent . A standard of ethics for all representatives would place all providers of services on an equal plane to be judged only by their abilities. Additionally, the Federal Government could save $60 million which could be used for the badly needed personnel to assist the backlog in cases.

There are a great number of outstanding organizations that are not attorneys that represent claimants. Claimants gladly pay their fees without the guarantee of fee withholding in SSI cases. One must wonder why, as the attorneys indicate, that claimants would not be able to get the proper representation without this fee guarantee. Contracts approved by the Social Security Administration are binding and insure that claimant's are protected. Private providers, whether attorneys or non-attorneys, should bear their own burden of payment for services especially with a $60 million cost tag attached.

Sincerely,

June Simpson
Director Health Advocates
Mary May
Director Social Security Representatives

1995 JUN -9 AM 9:36
OFFICE OF POLICY, PLANNING & EVALUATION

2203 North Lois Avenue, Suite 816 • Tampa, FL 33607 • (813) 873-0902 • (813) 877-1511 FAX

**NEIL J. SHORT**
*Lawyer*
Suite 120
135 North Ash
Casper, Wyoming 82601

Tel: 307-234-2401
Fax: 307-237-1137

May 30, 1995

Senator Alan K. Simpson
100 East "B" Street
Casper, WY 82601

**RE: Social Security Disability Attorney's Fees**

Dear Senator Simpson:

It is my understanding that the Social Security Administration is proposing legislation which would eliminate the withholding and payment of attorney's fees in disability cases but at the same time maintain their regulatory power over the amount of attorney's fees. Allow me to offer my comments on this proposed legislation. My footing in this matter is that I do a large number of Social Security Disability and SSI cases every year.

Here, then, are my comments:

1. By all means, do it. If eliminating the withholding and payment of attorney's fees will save money and will streamline the process, it should be done and done soon.
2. As a part of this legislation and change in procedure, checks issued by the SSA for past due benefits should be made payable to the Claimant and the Claimant's attorney when the case is handled on a Contingency Fee basis. As you know from your years practicing law, this is the customary way of handling benefit and settlement checks when a Contingency Fee is involved. The check is endorsed by the client and the lawyer, deposited in the lawyer's trust account, and then disbursement checks and a disbursement memorandum are issued. Each state already regulates Contingency Fees.
3. If the SSA does wish to continue regulating Contingency Fee Agreements in disability cases, I have no objection. However, the cap on Contingency Fees should either be eliminated or at least raised to 33⅓%. In addition, the cap on attorney's fees should be raised to $5,000. There is a lot involved in these cases: extensive client interviews, legal research, document search and review, preparation for the Hearing, and quite a bit of counseling and hand-holding with the claimants.

Thank you very much for your time. I am available any time to speak to you personally on this matter, and I am willing and even eager to travel to Washington, D.C., to comment on this legislation before any appropriate committee.

Sincerely,

Neil J. Short

NEIL J. SHORT
NJS:rjd
cc: Ms. Sandra Swirski
Ms. Darlinda Bogle, Staff Assistant to Chief Policy Officer
Social Security Administration, 6401 Security Blvd.
939 Altmeyer Bldg., Baltimore, MD 21235

INFORMATION



## President's Corner

Reengineering or Reinventing Social Security has now expanded its reach to attorney fees. The concern is not the individual effect on legal representatives, but the reduction of options for claimants. As Carl Weisbrod has written, "The Social Security Act's current provision for direct payment of attorney fees compensates for the litigant's inability to contract for attorney representation in Social Security cases, as they would in other cases (i.e. with an assignment of benefits). This evening of the playing field is now threatened, with the most likely result being reduced representation of Social Security claimants.

Commissioner Shirley Chater has stated that authorizing, collecting and paying attorney fees is no longer a sustainable activity and that the Social Security Administration will seek legislative amendment to eliminate direct payment of attorney fees out of Title II claimant's past-due benefits. What she has not explicitly stated to NOSSCR is that the Social Security Administration's proposal provides for a statutory limit on the amount a representative may charge. This means that while the Social Security Administration purports to want out of the attorney fee business they will continue to limit attorney fees, perhaps to the point that claimants can not obtain representation.

Commissioner Chater has told us how to battle this violation of claimants' rights - political action. If the Social Security Administration will seek a legislative amendment we must let our congressional representatives know the effect such an amendment would have upon us and Social Security claimants. NOSSCR is spreading the word as much as possible, but independent action is necessary. It is essential that each of us:

**1) Write our congressional members;**
**2) Set up meetings with our congressional delegation;**
**3) Encourage Bar Associations to submit statements in support of continued 25% withholding or a joint attorney-claimant check; and**
**4) Explain this situation to and request participation from health organizations, support groups, and activist groups for the disabled so that Congress knows that this is not an "attorney issue" only.**

NOSSCR members are not afraid of change, but the Social Security Administration has offered nothing, including a joint attorney-claimant check, to offset the removal of the 25% withholding. We welcome any change that will help streamline the process and still provide Social Security claimants with an open door to legal representation. However, unless Social Security offers a joint attorney-claimant check, the legislature should be strongly encouraged to send the Social Security Administration back to the drawing board.

*Marcia W. Margolius*
*President of NOSSCR*

## SENATE
## Committee on Finance
## Subcommittee on Social Security and Family Policy

**Majority members**

Alan K. Simpson (WY), Chair
Bob Dole (KS)
John H. Chafee (RI)
Don Nickles (OK)

**Minority members**

John B. Breaux (LA), Ranking
Daniel P. Moynihan (NY)
Max Baucus (MT)
Carol Moseley-Braun (IL)

## HOUSE OF REPRESENTATIVES
## Committee on Ways and Means
## Subcommittee on Social Security

| | District Offices |
|---|---|
| **Majority members** | |
| John Bunning (KY), Chair | Ft. Wright, Ashland, LaGrange |
| Sam Johnson (TX) | Dallas, Plano |
| Mac Collins (GA0 | Jonesboro, Columbus |
| Rob Portman (OH) | Cincinnati, Batavia |
| Phillip S. English (PA) | Erie, Meadville, Sharon, Butler |
| Jon Christensen (NE) | Omaha |
| Mel Hancock (MO) | Springfield, Joplin |
| **Minority members** | |
| Andy Jacobs (IN) | Indianapolis |
| Barbara Kennelly (CT) | Hartford |
| L.F. Payne (VA) | Charlottesville, Danville, Farmville |
| Richard Neal (MA) | Springfield, Milford |

# Table 4. Attorneys and Non–Attorney Representatives in Total Dispo[illegible]

## National Data

## Fiscal Year 1994

| Type of Disposition by Program | Percentage Distribution: Attorney | Percentage Distribution: Non–Attorney 1/ |
|---|---|---|
| **Dismissals** | | |
| Retirement and Survivors Insurance | 13.1% | 4.1% |
| Disabled Worker/Child/Widow/Widower | 38.0% | 5.0% |
| Health Insurance | 7.0% | 5.0% |
| Black Lung | - | - |
| Supplemental Security Income | 19.4% | 8.7% |
| Concurrent Title II/Title XVI | 29.3% | 7.3% |
| Combined | 25.1% | 7.0% |
| **Unfavorable Decisions** | | |
| Retirement and Survivors Insurance | 31.9% | 11.8% |
| Disabled/Worker/Child/Widow/Widower | 71.7% | 11.1% |
| Health Insurance | 19.6% | 21.3% |
| Black Lung | - | - |
| Supplemental Security Income | 50.5% | 22.0% |
| Concurrent Title II/Title XVI | 66.0% | 15.9% |
| Combined | 59.0% | 17.2% |
| **Favorable Decisions** | | |
| Retirement and Survivors Insurance | 40.4% | 13.1% |
| Disabled/Worker/Child/Widow/Widower | 65.8% | 8.3% |
| Health Insurance | 16.6% | 26.3% |
| Black Lung | 50.0% | - |
| Supplemental Security Income | 49.4% | 18.4% |
| Concurrent Title II/Title XVI | 63.2% | 13.7% |
| Combined | 58.2% | 13.6% |
| **All Types** | | |
| Retirement and Survivors Insurance | 31.3% | 10.7% |
| Disabled/Worker/Child/Widow/Widower | 64.4% | 8.5% |
| Health Insurance | 14.7% | 20.4% |
| Black Lung | 20.0% | - |
| Supplemental Security Income | 45.7% | 18.1% |
| Concurrent Title II/Title XVI | 60.4% | 13.5% |
| Combined | 54.6% | 13.7% |

1/ Non–Attorney representative includes legal aide, social worker, etc.

NOTE: Medicare Part B cases are included beginning August 1989.

SOURCE OF DATA: OHA Case Control System.

01/11/95

EXECUTIVE OFFICE OF THE PRESIDENT

04-Aug-1995 05:44pm

TO: Carol H. Rasco

FROM: Diana M. Fortuna
Domestic Policy Council

CC: Molly Brostrom

SUBJECT: SSA Rego2 plan to eliminate payment of attorney fees

Back in April, SSA released its Rego 2 proposal that would eliminate a current feature of the SSDI program. This feature requires SSA to directly pay attorneys who represent SSDI clients. At the time the VP was debating this, we all agreed that the lawyers' groups would oppose it, which didn't worry us, but that some disability groups probably would as well. We decided to go ahead carefully because it seems like the right thing to do and it saves money. (I should note that the SSI program doesn't include direct payment of attorney's fees.)

Elaine Kamarck and Sally Katzen got a letter from Len Rubenstein of the Bazelon Center in June opposing this provision. In addition, you got a letter from Allen Gordon, Arkansas State Senator, arguing against this. Molly Brostrom is preparing the response. And OMB is trying to finalize the legislative proposal by Wednesday of next week.

My instinct is that there is no reason to back down on this proposal, because it is currently administration policy publicly and it does seem like good policy. Some opponents have argued that SSDI clients will be denied access to lawyers as a result, but SSA points out that 73% of SSDI claimants are represented by lawyers, while 64% of those on SSI had lawyers, suggesting that the direct payment provision in SSDI doesn't make that big a difference. (On the other hand, I suppose you could argue that people never make a claim without a lawyer to help them.) Bazelon is pushing the alternative of doing a two-party check, but SSA says that won't save them any money.

Are you interested in re-examining this? If you'd like to see either of these letters, I would ask Molly to forward them to you.

Molly, please amplify or correct anything I've said if appropriate.

I will check e-mail and voice-mail once a day, so I should be able to check in on any response to this.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

06-Aug-1995 03:05pm

TO: Diana M. Fortuna

FROM: Carol H. Rasco
Economic and Domestic Policy

CC: Molly Brostrom

SUBJECT: RE: SSA Rego2 plan to eliminate payment of attorney fees

Molly, I am assuming that an indigent person would have access to Legal Services attorneys, etc., right?

I really don't see reason to review the policy, still makes sense to me. I'll be eager to review the draft letters.
Thanks.

## REGO II INITIATIVE TO ELIMINATE REPRESENTATIVE'S FEES PROGRAM:

## EFFECT ON CLAIMANT ACCESS TO LEGAL REPRESENTATION

Q: It appears that SSA's withdrawal from the process of authorizing, withholding and paying attorney fees will restrict claimants' access to legal representation, and therefore may discourage many of them from filing claims.

A. Although we cannot assess behavior or predict how the private bar will respond to this legislative change, we would hope and expect that attorneys who have provided capable and compassionate representation for our claimants will continue to do so. We know that some attorneys devote their entire practice to Social Security representation, and we would not expect them to begin turning claimants away on the sole basis that they would not get their fees directly from SSA. In fact, there is data indicating that attorneys presently accept Supplemental Security Income cases despite the absence of any direct payment mechanism for such cases, and that these attorneys are in fact collecting their fees from the claimants. Moreover, non-attorney representatives, who do not receive direct payment of their fee from SSA, nevertheless maintain a full and active livelihood representing claimants before this Agency.

We do not believe that eliminating the withholding and direct payment provisions for attorneys will discourage claimants from filing their Social Security claims. The vast majority of Social Security claimants presently file their initial claims without assistance from representatives. Of course, as we implement our disability redesign plan, we hope to see earlier involvement by representatives in assisting claimants with the development of their claims. We believe that the proposed legislation, if it provides only for a flat maximum fee, will accomplish that objective. We also believe that the proposal will simplify the representative's fees process for claimants, who now will know up front what they will owe their representatives at the conclusion of their case.

In sum, we see the legislative proposal as shifting to the parties (i.e., representative and claimant) the freedom and responsibility to execute their own fee contracts, just as they would for other legal services, without SSA involvement. At the same time, claimants are afforded reasonable protection through retention of SSA authority to bring sanctions against representatives who charge more than the maximum allowable fee.

Q. What will SSA do to ensure claimants' access to representation?

A. Our plans are not yet finalized, but at a minimum they will include a general public information campaign to educate claimants about the scope and effect of this legislative change.

SSA [Ora Brown Tillman] 703/305-0212

Sent a pkge to Commissioner ⇒ (did not include 2-party check prop)

later-comp wkgroup - $4500 any rep.

staff asked for add'l info.
• decided on statutory cap that ~~the to~~ can change during admin process
- court level → reasonable fee, def'd by court

1-other proposal → user fees (~~NA~~ SocSecReps)

- 2-party check considered; but wouldn't ~~get~~ gain 880M cost savings

RECO II Impl wkgGp met with them

Response to Bazelon → they assume reps don't pay - SSA doesn't agree
→ contractual agt - when funds avail
other arrgmts → can have them pay into escrow arrgmt

Nat'l Assoc of SocSec Reps ⇒ attys who represent
- want 2-party check

Supporters ⇒ Health Advocates, Inc & SocSec, Inc (think non-atty)

Sen. Daschle opposed -
Schroeder

Elim Atty Fees Susan Daniels

Office of Hrgs and Appeals - Rita Geyer 703/305-0200

- mtg has been held w/ legal reps → compromise

⇒ 2-party track

* Ora Brown Tillman 703/305-~~0123~~ 0212 $80M

REGO II

- Atty will have to deal w/ client in dealing

- In time of govt cuts, - only services essential to mission

nice service

SSA: helps pple apply for benefits

- even @ hrg level, al judge often helps

→ not nec'y

1980's Continuing Disab Review Scandal - wH req'd ~~reviewed~~ reviewed most costly - turned out to be kids w/ mental

- diff. context

SSA only agency that does this (not VA...)

---

OAA → Naomi Tinklepaugh

→ ↑ in match ⇒ 18-20M

$40M ⇒

AoA needs to work w/ them → Ken had asked DOL to draft lang to accomplish ~~abt~~ move - DOL → 1st draft, then NPR & AoA will w/ o

→ Andrea Wooten - use move as a chit in negotiations w/ Hill

NPR: credit → will take later

testimony → 1) OAA: perf p'ships ⇒ T.I } nod to REGO

→ 2) move:

- NPR thinks timing great

= Clinton + Gore asked agst in past

- note to Steve / Bob

Mtg w/ Beryl Anthony, Len Rubenstein

89-90 OBRA streamlined fee
Fix: inst'd fee agt → has resulted in savings
15% → ind'ly set — 85% of cases use — not labor-intensive
- cap @ $4,000

- SSA hasn't demonstr'd savings - won't provide it
- no response to Katzen / Kovacik / It
? SS Act prevents contingency fees: ⇒ can't have a lien agst a stream
Lawyer
Assignment of Benefits
SSI / SSDI
- Most SSI claimants free
- 1/3 SSI concurrent claimants
- 19 states have enacted w/holding

Wkrs Comp ⇒ "

= User fees

SSA: $25 M
5,000 man hours

? SSAct prohibits transfer or asst of bens

savings
cap → $2500 slightly higher than avge amt fees SSA paid in 94
SSI/SSDI comparison

10/5

Richard Green

SSI/SSDI

To determine medical disability · State disab review – if turned down →
ALJ → if turned down, → Bd of Appeals →
then, District Court

Get lawyer somewhere along the way
$4,000 ~~and~~ or 25% of payment → set in law
* cost < (SSDI → direct payment to attys)
SSA has to approve fee 170,000 auths < 120k agt / 50K petition
* Another cost
All fed'l employees → lawyer can petition for more → sig't #'s (appeal to ALJ)

SSA Proposal
– get out of reviewing approving ~~that~~

**BRIEFING PACKAGE**
**OCTOBER 6, 1995**
**WHITE HOUSE BRIEFING ON REGO II PROPOSAL**
**TO ELIMINATE REPRESENTATIVES' FEE PROGRAM**

# Clinton Presidential Records
# Digital Records Marker



Divider Title: **A**

# TAB A

October 5, 1995

# TALKING POINTS
# OCTOBER 6, 1995
# BRIEFING FOR WHITE HOUSE ON REGO II LEGISLATIVE PROPOSAL TO ELIMINATE REPRESENTATIVE'S FEE PROGRAM

## ■ DESCRIPTION

■Proposal eliminates the requirement that SSA authorize representative's fees, and removes the Agency from the process of withholding and paying fees directly to attorneys.

■Also (presently) sets a standard maximum fee--a cap--of $2500 per case for services performed before SSA, and removes the current cap on fees awarded at the judicial level.

■Retains an enforcement provision that would suspend or disqualify representatives who charge a fee in excess of the statutory limit or, in court cases, the amount approved by the presiding judge.

## ■ RATIONALE

■SSA can no longer justify present level of involvement in representative's fee process because NPR has asked that we:

- ■ streamline processes by eliminating inappropriate functions
- ■ improve customer service
- ■ maximize administrative cost savings

■From outset, budget considerations have been the principal driver, i.e., specific goal under REGO II to achieve $80 million in administrative savings in next five years.

- SSA now faces additional challenge: budget submitted by President presumed highest amount of savings for this and many other REGO II proposals. Now, Congress is looking to cut more in next budget year.

  - If current appropriation figures hold, they will be insufficient to fund all necessary operations.

  - To illustrate: House appropriation bill is $299 million less than President requested; Senate committee recommendation is $364 million less. Some examples of how it will affect SSA:

    - House bill and Senate recommendations for major cut in Disability Investment Fund will result in higher-than-projected end-of-year pending levels for initial disability claims and hearings in FY 1996. This will seriously affect efforts to bring backlogs under control.

    - Reduced funding for automation would only permit SSA to provide new equipment--for which there is a critical need--to half its offices.

    - Senate recommendation puts additional squeeze on already tight funding for salaries and expenses, which would significantly affect SSA's ability to allocate resources as needed.

    - Adding to budgetary uncertainty are: (1) continuing resolution (which fund Agency at level considerably below what is needed); and (2) impending battle surrounding debt ceiling (which if unresolved could force Agency to operate at continuing resolution levels for extended period, and potentially force a furlough to meet Agency's operating costs.)

- Bottom line: it's more imperative than ever that we discontinue any activity not essential to our core mission, and redirect increasingly scarce resources to our highest priority functions.

- Although the REGO II proposal may not represent the optimum solution from every vantage point, the process we have today is not ideal, either:

  - Two different processes, which are cumbersome to administer and often confusing to claimants

  - Contains built-in incentives for delay due to link to past-due benefits

  - Contains no provisions for compensating attorneys who accept cases that do not produce past-due benefits awards

- Point is, we are looking for a way to save money. We believe the current proposal goes farthest toward that end; we have thoroughly considered many alternatives based on suggestions from both within and outside the Agency. If there are additional suggestions, we are open to discuss.

- <u>WHAT'S GOOD ABOUT THIS PROPOSAL</u>: IT DIRECTLY AND FULLY SATISFIES REGO II MANDATE TO STREAMLINE PROCESSES, IMPROVE SERVICE, AND SAVE THE MAXIMUM AMOUNT OF MONEY

- In the short term (within the next five years), eliminating the labor-intensive representatives' fee program would save $80 million and could free up as many as 1,600 to 1,800 workyears to handle critical workloads, such as adjudicating disability claims. As a result of increased attention to processing these claims, claimants could receive more accurate decisions earlier in process, and receive right amount of benefits sooner.

- In the longer term, combined with other initiatives underway, it could help strengthen SSA's ability to handle workloads that will be generated by retiring baby boom generation--workloads that SSA will begin to confront early in the next century. (More savings and better service)

- Gets SSA out of private contractual matters between claimants and attorneys; allows them to execute own fee contracts, just as they would for other legal services.

- Protects claimants by imposing a statutory cap of $2500 per case. Rationale for setting cap at this level:

  - Current experience shows tendency to charge maximum fee. For small claims, could result in claimants paying representatives most if not all (or even more than) retroactive benefits amount.

  - Cap consistent with average pay-out of $2400 per case (based on 1994 figures). About 54 percent of all fees awarded are for less than $2500. With cap of $2500, (slightly higher than average fee), overall amount of program funds available for fee awards would be slightly higher than under current process.

  - $2500 cap also represents a reasonable limit in redesigned disability claims process environment. Process will be simpler and could produce quicker decisions. Under the current fee process, quicker decisions would drive down the amount of a claimant's retroactive benefits award, which in turn would reduce the average representative's fee. So $2500 cap more in line with expected results from disability redesign.

- Amount of cap subject to further discussion; challenge is to strike fair balance between protecting claimants and providing adequate compensation to attorneys.

- Also protects claimants by retaining enforcement provision, under which SSA could suspend or disqualify representatives who charge more than the maximum fee.

- Representatives gain, too, i.e., they stand to receive their fees more quickly--about 45 days sooner than under the current process--since funds formerly withheld for payment of fees would be paid to claimants along with the rest of their past-due benefits.

- Removing tie to past-due benefits promotes representative's expeditious action in the case.

## CONCERN ABOUT CLAIMANT ACCESS TO LAWYERS

We believe Title II claimants will be able to obtain lawyers because:

- SSI claimants are represented now, despite lack of direct payment of fees for attorneys: 64% of SSI claimants had representatives at the hearings level in Fiscal Year 1994; 72% of representatives were attorneys. Compares with a 73% representation rate (88% attorneys) for Title II claimants.

  - We realize that some attorneys in SSI cases are from Legal Aid or participate in State programs that feature direct payment mechanisms. However, we have seen no data indicating the degree or effect of these sources of representation.

■ Non-attorney representation is growing business, even though non-attorneys do not get direct pay under any circumstance. (in FY 1994, non-attorney reps made up 28% of SSI representation and 12% of Title II representation at hearings level). We could expect even greater participation by this group with the introduction of competition.

■ About $323 million in fees were withheld for attorneys in FY 1994. Attorneys are unlikely to walk away from this money simply because SSA no longer involved in fee approval.

■ Lower representation rates for SSI claimants not solely due to question of fee payment. SSI claimants as group have undesirable image, i.e., many are homeless, destitute or may be suffering from mental impairments or alcoholism.

■ But where payment is a concern, Title II claimants are more likely to have economic resources that would make them attractive clients: more apt to have assets, have had a connection to the work force, and be concerned about adverse consequences to their credit ratings. So attorneys handling Title II claims could reasonably expect to be paid, even without SSA involvement.

# Clinton Presidential Records
# Digital Records Marker



Divider Title: **B**

# TAB B

SOCIAL SECURITY ADMINISTRATION
REGO II LEGISLATIVE PROPOSAL

Representative Fees

Eliminate Representative Fee Authorization Process and Direct Payment of Fees to Attorneys

Current Law: The Commissioner of Social Security, using one of two processes, authorizes the fee that may be charged by an attorney or non-attorney to represent a claimant for Social Security, Supplemental Security Income (SSI), or Part B Black Lung benefits in administrative proceedings.

Under the fee petition process, the representative must request the Commissioner's authorization of fees, but there is no limit on the amount of the fee that may be authorized except that it must be "reasonable." Each fee petition requires an individual evaluation and determination by an Administrative Law Judge (ALJ) or other authorized personnel. Adjudicators, in authorizing a fee, consider factors such as the complexity of the case, the time spent in rendering services, the skills needed, and the results achieved.

Under the fee agreement process, if the representative and claimant have signed and submitted a written agreement as to the amount of the fee, the agreement usually will be approved by the Commissioner if the specified fee does not exceed the lesser of 25 percent of the claimant's past-due benefits or $4,000. The Commissioner then issues a notice of the maximum fee the representative can charge based on the approved agreement.

Social Security regulations provide that a representative may not charge or collect, directly or indirectly, a fee in any amount not authorized by the Social Security Administration (SSA) or a Federal court. The statute and regulations provide that SSA may suspend or disqualify from further practice before SSA a representative who breaks the rules governing representatives.

Under programs other than SSI, in favorable decisions in which the claimant is represented by an attorney, the Commissioner must withhold and pay to the attorney, out of the claimant's past-due benefits, the smaller of: (1) 25 percent of past-due benefits, or (2) the fee authorized by the Commissioner under either the fee petition or fee agreement process. This payment provision does not apply to SSI, because the

Congress decided it would not be appropriate under a means-tested program to reduce a claimant's benefits in order to pay an attorney.

In addition, whenever a court renders a favorable decision under any of the programs (except SSI), the court may allow an attorney a reasonable fee, but not more than 25 percent of past-due benefits, for his or her service before the court, and the Commissioner may pay the authorized fee to the attorney from the 25 percent withheld from past-due benefits.

Proposal: Eliminate--

- the fee petition process by which the Commissioner authorizes the amount of the fee that may be charged by a claimant's representative to represent the claimant in administrative proceedings;

- the fee agreement process by which the Commissioner approves or disapproves the written agreement that the claimant and representative have previously filed, notifies the claimant and representative of the amount of the fee payable under a fee agreement, and reviews the fee upon request of any of the parties involved;

- the requirement that the Commissioner withhold 25 percent of the claimant's past-due Social Security or black lung benefits for direct payment to an attorney who represents a claimant in an administrative or judicial proceeding; and

- the statutory limitation of 25 percent of past-due benefits on the amount a federal court can award.

Impose a statutory limit on the total amount of the fee a representative or representatives may receive for all services provided in representing a claimant in administrative proceedings involving Social Security, SSI, and/or Part B Black Lung benefit programs. The statutory limit shall be $ 2,500 (to be adjusted periodically by the Commissioner).

Allow a court rendering a judgement in the case of a represented claimant to determine a reasonable fee for such judicial representation and, if a court determines such a fee, require the attorney to inform the court whether he or she will charge a fee for representation at the administrative level, or if the claimant had other representatives at the administrative level.

Claimants and their representatives would continue to receive written notification of decisions and the statutory limit on fees for administrative proceedings. Enforcement would occur as a result of a complaint that the representative has charged a fee in excess of the statutory limit. Under statutory provisions already in force, SSA could suspend or disqualify a representative from representing Social Security claimants before the Agency.

Rationale: The proposal would reinforce claimants' rights to contract for Social Security representation as they do for other legal services without SSA involvement. By limiting its involvement to enforcement activities, SSA would also realize savings in administrative costs and free up additional staff to handle priority workloads, such as initial disability claims.

Retention of an administrative statutory fee cap would protect claimants against excessive fees and permit representatives to charge up to $2,500, which is slightly higher than the average amount of fees SSA paid in 1994 from claimants past-due Social Security disability benefits. Thus, the overall amount of program funds available to representatives would be slightly higher than under the current process. (In 1994, 54 percent of the fees paid were for less than $2,500.) In addition, SSA could release past-due benefits previously withheld to beneficiaries sooner. In turn, as beneficiaries receive all benefits due them sooner, they could pay their representatives sooner.

Opposition to this proposal could be expected on the grounds that some attorneys might not be willing to take on Social Security cases if they are no longer assured of direct payment by SSA. Nonetheless, in FY 1994, 64 percent of the SSI claimants at the hearing level were represented--72 percent of these claimants were represented by attorneys, 28 percent by non-attorneys--without benefit of direct payment of fees. Representative opposition may also be expected to imposing a statutory cap on administrative-level fees, that is less than the current $4,000 cap. This is particularly true for claims in which adjudication takes a long time and could yield higher representatives' fees under the current fee agreement and fee petition processes. (In 1994, almost 46 percent of the fees paid from claimants' past-due Social Security disability benefits were for more than $2,500.)

Effect on Beneficiaries: Under this proposal, claimants could continue to hire private attorney or non-attorney representatives directly and to engage legal aid services and representatives whose fees are paid by third parties (e.g., insurance companies), a growing source of representation before SSA. In addition, with a statutory cap at the administrative level claimants would be aware of the maximum amount representatives could charge for services rendered at such level prior to contracting their services, and would pay less representative fees on average than under the current process when the decision on their claim is delayed. In addition, representatives would have less incentives to delay claims in order to get higher fees from past-due benefits.

Moreover, ALJs would no longer have to review fee agreements or authorize fees and could devote more time to hearing and deciding cases. (In 1994, about 30 percent of the fee requests at the hearing level were submitted under the fee petition process.) Under this proposal, past-due benefits previously withheld by SSA--to allow time for fee petition/agreement processing--would be paid to claimants with all other past-due benefits, and thus would be available about 45 days sooner to pay attorney fees.

Federalism Impact: None.

Cost: (millions)

| | FY 1996 | FY 1997 | FY 1998 | FY 1999 | FY 2000 |
|---|---|---|---|---|---|
| Program[1/] | $3 | $33 | $8 | $3 | $3 |
| Administrative | $0 | -$20 | -$20 | -$20 | -$20 |
| Long-range cost/savings | | To be determined | | | |

1/ Although the total amount of OASDI benefit payments would not change, the proposal would result in an "acceleration" of payments. This results in an increase in OASDI benefit payments on a cash-flow basis, most notable in the second year of operation.

Effective Date: Effective for initial claims and appeals--with first-time representation--filed 60 days after enactment.

Contact Person: Judy L. Chesser, (202) 482-7148

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Divider Title: C

# TAB C

- Withholding [illegible]
- Calc of 25%
- W/holding
- Checks to Atty/Payees
- (correspondence)
- Fee authorization

## THE NUMBERS

## WORKYEAR & DOLLAR SAVINGS ON REGO II PROPOSAL

Estimates indicate that approximately 1,600 to 1,800 workyears would be saved over 5 years, resulting in administrative savings of about $80 million over the same period. Note that the savings do not begin to show until after the first full year, to allow time for enactment and implementation. Thus, the total annual figures reflect savings of about 400 - 450 workyears and about $20 million in each of Fiscal Years (FY) 1997 - 2000.

Following is the estimated breakdown of the annual savings (stated in ranges, based on FY 1994 data):

| | TOTAL (Agreement & Petition) | FEE AGREEMENT | FEE PETITION |
|---|---|---|---|
| **OHA** (Fee authorization) | | | |
| Workyears | 100 - 120 | 40 - 50 | 60 - 70 |
| Dollars (in millions) | $6.8 | $2.9 | $3.9 |
| **ODIO/PSC** (processing Past due benefits calculation of 25%) | | | |
| Workyears | 300 - 330 | 30 | 270 - 300 |
| Dollars (in millions) | $13.5 | $1.4 | $12.1 |
| | ~20M/yr | | |

## WORKLOAD & DOLLAR FIGURES ON REPRESENTATIVE'S FEES
(Based on FY 1994 data)

TOTAL FEE REQUESTS AT HEARING LEVEL: 167,065 (48,626 via fee petition, 118,439 via fee agreement)

(Total fee requests defined as number of fee petitions processed plus fee agreements approved.)

### FEES AUTHORIZED AT HEARING LEVEL:

| | Attorney | Non-attorney | Total |
|---|---|---|---|
| Fee petitions: | 46,778 | 1,466 | 48,244 |
| Fee agreements: | 108,053 | 10,386 | 118,439 |

### FEES WITHHELD BY SSA (ALL LEVELS):

| | |
|---|---|
| Dollar amount: | $323 million |
| # of cases: | 142, 362 |

### REPRESENTATION DATA (AT HEARING LEVEL):

| Claim Type | Attorney | Non-Attorney | Total |
|---|---|---|---|
| Title II - DIB | 64.4% | 8.5% | 72.9% |
| - RSI | 31.3% | 10.7% | 42.0% |
| Title XVI | 45.7% | 18.1% | 63.8% |
| Concurrent | 60.4% | 13.5% | 73.9% |
| All Claims | 54.6% | 13.7% | 68.3% |

Table 6--Number of primary beneficiaries with an attorney fee, by type of benefit and amount, 1994

| | Amount of fee | | Total | Disabled Workers 1/ | Other |
|---|---|---|---|---|---|
| | Total | | 142362 | 138207 | 4155 |
| 13,316 | $499 OR less | 9.4 % | 13316 | 12637 | 679 |
| 29,489 | $500-999 | 20.7 % | 16173 | 15522 | 651 |
| 47,143 | $1000-1499 | 33.1 % | 17654 | 17079 | 575 |
| 63,197 | $1500-1999 | 44.4 % | 16054 | 15538 | 516 |
| 77,424 | $2000-2499 | 54.4 % | 14227 | 13789 | 438 |
| 89,751 | $2500-2999 | 63.0 % | 12327 | 11983 | 344 |
| 100,349 | $3000-3499 | 70.5 % | 10598 | 10336 | 262 |
| 108,663 | $3500-3999 | 76.3 % | 8314 | 8154 | 160 |
| 137,104 | $4000 | 96.3 % | 28441 | 28044 | 397 |
| 138,187 | $4001-4499 | 97.1 % | 1083 | 1055 | 28 |
| 139,148 | $4500-4999 | 97.7 % | 961 | 935 | 26 |
| 141,188 | $5000-5499 | 99.2 % | 2040 | 2007 | 33 |
| 141 373 | $5500-5999 | 99.3 % | 185 | 180 | 5 |
| 142 362 | $6000 OR more | 100.0 % | 989 | 948 | 41 |

1/ Includes 935 disabled spouses and children of disabled workers, who were primary beneficiaries

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Divider Title: **D**

# TAB D

## OMB ALTERNATIVE NO. 1

Alternative 1 would eliminate attorney fee withholding, and allow the claimant and attorney to determine the fee based on a statutory cap of 25 percent of past-due benefits or $4,000 as indicated in the award letter.

This alternative modifies SSA's current REGO II proposal by increasing the cap to $4,000 and retaining the calculation of past-due benefits.

**Analysis:**

While increasing the cap has no effect on savings, the calculation of past-due benefits is costly and problematic because it:

- Does not promote the representative's expeditious action in the case because the fee increases as past-due benefits accumulate;
- Provides no incentive for representatives to accept cases in which past-due benefits are likely to be small or nonexistent (e.g., a continuing disability review or overpayment case); and
- Maintains about the same level of agency involvement that we now have in defining, calculating and notifying claimants and representatives about past-due benefits in each individual case, and responding to such inquiries.

**Estimated Savings/(Costs): $48 million for the period FY 1997-2000--1,040 WYs**

Savings for this alternative represent the maximum estimated savings and do not include costs to calculate and communicate the new fee derived from subsequent actions (e.g., auxiliaries claims, worker's compensation (WC) offset), and special handling of Drug Addiction and Alcohol (DA&A) cases.

**Assumptions:**

- SSA would no longer issue checks to the attorneys, or review fee agreements or fee petitions;
- About 25 percent fewer inquiries would be received because attorneys would not be requesting payment. However, SSA would experience about a 25 percent increase in inquiries in instances where the past-due benefits are zero, or in cases involving multiple amounts of past-due benefits;
- SSA will not be involved in fee disputes unless the attorney charges the claimant an amount that is more than the statutory cap; and
- Full implementation will occur in FY 1997.

# OMB ALTERNATIVE NO. 2

This alternative is the same as alternative No. 1, except that it caps the attorney fee payment at 30 percent of past-due benefits or $6,000, whichever is less (or whatever percentage and dollar amount seems appropriate to meaningfully minimize the number of cases that would be expected to result in "fee petitions" once the stratification analysis has been completed) and retains the fee petition process.

**Analysis:**

In addition to the problems associated with the retention of calculating past-due benefits as mentioned in alternative 1, this alternative presents at least as many challenges for SSA as our current involvement in two different fee authorization processes.

SSA would still be required to authorize the fee in a fee petition case under this alternative, and so would have to maintain a process (either the current one or some variation) for authorizing fees, notifying parties, and permitting administrative review of fees in these cases.

**Estimated Savings/(Costs): $32 million for the period FY 1997-2000--740 WYs**

Savings for this alternative represent the maximum estimated savings and do not include the costs to calculate and communicate the new fee derived from subsequent actions (e.g., auxiliaries claims, WC offset), and special handling of DA&A cases. In addition these savings may be further reduced because SSA does not have discrete data on the levels of fees requested or approved; the Agency has only aggregate data. Consequently, there is no way of determining a fee which would minimize fee petitions.

**Assumptions:**

Assumptions for estimating the savings on this alternative are the same as those for Alternative 1.

# OMB ALTERNATIVE NO. 3

Alternative No. 3 would automate the attorney fee process in the following way:

- Apply a set formula: multiply the monthly benefit amount by the number of months in the retroactive period. The attorney fee would then be a pre-established amount, i.e.,the lesser of 25 percent of the product or $4,000;

- Determine the fee without regard for any adjustment (except for concurrent entitlement);

- Issue in all award notices an automated paragraph explaining "if you were represented in your claim for benefits, the maximum amount your representative may charge you is ___."

<u>Analysis</u>:

While this alternative appears to avoid some of the pitfalls associated with "past-due benefits" (months of retroactive entitlement are easier to determine than amounts of past-due benefits), it is problematic because it:

- Presents many of the same operational and workload challenges as alternative 1 in that it does not promote expeditious action on the part of the representative, or address the issue of the representative's options for requesting a fee in the case of a zero or very low fee derived under the formula; and

- Could disadvantage the claimant by double charging them for the same legal services (e.g., if a claimant was represented by the same attorney for both WC and Disability benefits, the claimant could end up paying the attorney twice). This, in turn could result in additional inquiries.

<u>Estimated Savings/(Costs)</u>: **$48 million for the period FY 1997-2000--1,040 WYs**

Savings for this alternative represent the <u>maximum</u> estimated savings and do not include the costs to calculate and communicate the new fee derived from subsequent actions (e.g., auxiliaries claims, WC offset), and special handling of DA&A cases.

<u>Assumptions</u>:

- All assumptions shown for Alternative 1;

- SSA would still calculate a percentage of some pre-established benefits amount, prepare notices to the attorneys, respond to inquiries, etc.; and

- Despite automation, the number of manual calculations for this alternative would be the same as are currently required for past-due benefits calculations.

## OMB ALTERNATIVE NO. 4

This alternative would allow for 25 percent of each back payment check to be made payable jointly to the recipient and the attorney (two-party check alternative).

**Analysis:**

Although none of the alternatives get SSA out of calculating representative fees this alternative is least within the context of the REGO II mandate because, in addition to calculating the fee, and notifying claimants and their representatives of the fee, we must continue to pay the representative. The systems and operations impact of providing a two-party check would be significant. In addition, this alternative would:

- Directly contravene another of SSA's REGO II goals, i.e., to pay all benefits through direct electronic deposit, and would retain SSA's involvement in all aspects of paper check processing, e.g., lost or stolen checks and address changes; and

- Raise many of the same serious concerns expressed by several members of Congress in rejecting our 1988 proposal to adopt this approach, such as misappropriation of claimants' funds by unscrupulous attorneys and delays in payment, since each party would be required to be present in order to endorse and negotiate the check.

**Estimated Savings/(Costs): ($10 million) for the period FY 1997-2000--(440 WYs)**

Estimated costs for this alternative do not include the costs to calculate and communicate the new fee derived from subsequent actions (e.g., auxiliaries claims, WC offset); special handling of DA&A cases; or the impact that our continued involvement in a paper check process would have on the Treasury Department's move toward a direct deposit environment.

**Assumptions:**

- SSA would still have to calculate past-due benefits, prepare notices to the attorneys, respond to inquiries, etc. ;

- About 35 percent more inquiries would be received for cases involving multiple amounts of accrued past-due benefits;

- SSA would no longer withhold 25% of past-due benefits or review fee agreements or fee petitions;

- SSA will not be involved in fee disputes unless the attorney charges the claimant an amount that is more than the statutory cap; and

- All two-party checks would require manual processing. (We are working to determine whether any of the two-party checks can be automated. If automation can be done, any savings from it would come late in the process and would probably be offset by the additional costs entailed by manual processing.)

# APPENDIX

# ATTORNEY FEE PROCESS

| FEE PETITIONS | | FEE AGREEMENTS |
|---|---|---|
| ATTORNEY IS APPOINTED BY CLAIMANT PRIOR TO HEARING | APPOINTMENT | ATTORNEY IS APPOINTED BY CLAIMANT PRIOR TO HEARING AND FEE AGREEMENT ENTERED INTO BY CLAIMANT AND ATTORNEY AND SUBMITTED TO SSA. |
| FAVORABLE DECISION ISSUED BY ALJ | DECISION | FAVORABLE DECISION ISSUED BY ALJ |
| AWARD PROCESSED AND 25% OF PAST DUE BENEFITS WITHHELD FOR POSSIBLE PAYMENT TO ATTORNEY | AWARD | AWARD PROCESSED AND 25% OF PAST DUE BENEFITS CALCULATED FOR COMPARISON TO AGREED UPON FEE (SMALLER AMOUNT WILL BE APPROVED FEE) |
| AWARD LETTER RELEASED TO CLAIMANT AND ATTORNEY ADVISING AMOUNT WITHHELD FOR POSSIBLE FEE PAYMENT | NOTICE | AWARD LETTER RELEASED TO CLAIMANT AND ATTORNEY ADVISING AMOUNT OF APPROVED FEE |
| ATTORNEY SUBMITS FEE PETITION TO ALJ FOR APPROVAL OF FEE AMOUNT<br><br>ALJ APPROVES A FEE AMOUNT<br><br>FEE PETITION AND FEE APPROVAL FORWARDED TO ODIO FOR PAYMENT TO ATTORNEY<br><br>ATTORNEY FEE PAID | PAYMENT OF FEE | FOLDER HELD FOR 30 DAYS TO ALLOW FOR PROTEST BY EITHER ATTORNEY, ALJ OR CLAIMANT, IF NO PROTEST, FEE IS PAID. ANY EXCESS WITHHELD BENEFITS ARE RETURNED TO CLAIMANT. |