

## From the Editor

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# *From the Editor*

**S**ocial Security has been the no-sweat successful program for all who come to receive its benefits. With only 40 quarters—a mere 10 years—as a worker, anyone with an employer who pays the employer share and takes the paycheck deductions required by law is fully insured. That is, that worker can receive all the benefits of a pension that at least covers the bare necessities of life. Fully insured status is the key to Medicare health care benefits without extra cost. By paying higher premiums, even latecomers or occasional workers with less than 40 quarters can benefit from this social insurance safety net.

Many younger Americans seem to accept Social Security as a reasonable bargain for themselves and society, judging from the 20-something students I regularly ask. Though many think they will not receive their retirement benefits because of a bankrupt trust fund, they are willing to pay in for the good that Social Security benefits do today. They report they are glad to see the older people they know receive benefits on which to live in retirement. Most of these Generation Xers report they plan to retire at ages varying from 55 to 70. Their plans for retirement income are, of course, vague.

Social Security retirement is so simple that it only occasionally calls for advocacy. We don't run a column and seldom see an article.

One important reason for the uncontentious predictability of Social Security is the use of the simplest device to determine eligibility: date of birth. The Social Security Administration (SSA) will accept the best evidence you've got. There are no extended hearings with expert evidence to determine need or eligibility or the level of benefits due. The evidence consists of the birth date, which determines that the applicant for benefits has reached the age of retirement, and the government's records that payments have been made to the individual's retirement account. The nation's accounting has not been seriously challenged, although employers' claims of payments made have been investigated.

In fact, in the year 2000 the SSA will send you and every worker a report on his or her individual account and the amount of benefits due at early and standard retirement, and the benefits due if disability strikes now.

Yet, issues do exist for planners and litigators, and good representation may be critical to success in administrative proceedings and the courts. Thus, one important matter for the professional

representative is how to get paid for the work. As might be expected, special rules govern the representative's responsibilities and the fees payable in Social Security cases, including retirement, disability, and Medicare claims.

There is a right to representation in Social Security cases. A beneficiary can designate any qualified person to serve as a representative to the SSA. One cannot, however, appoint a firm or corporation. The SSA requires only written notice, which may be provided on a form (Form SSA-1696-U4). If the representative is not an attorney, he or she must also write to indicate acceptance of the appointment.

Once appointed, the representative can get information about the principal's account, give written evidence, and request and appear in administrative proceedings with the principal or on his or her behalf. The SSA will send a copy of any decisions to the representative.

The SSA must approve the amount of fees paid to a representative. For approval, the case must result in a decision to pay past-due benefits. The only circumstances in which SSA approval is not required is when a nonprofit or government agency will pay the fee out of government funds. The representative must provide a statement that the beneficiary will not have to pay any fee or expenses.

The SSA typically will approve any reasonable fee agreement signed by the principal and representative up to 25 percent of the past-due benefits, or \$4,000, whichever is less. If the representative is an attorney, the SSA will withhold 25 percent of the benefits so the fee is covered upon the attorney's petition. The petition must detail the time spent on each service provided, and can be filed anytime before the claim is decided. If the fees are less than the withholding, the SSA sends the balance to the principal.

If the SSA has not withheld enough to cover the approved fee, the principal must pay the representative the balance due.

An alternative source of fees is the Equal Access to Justice Act (EAJA), which provides for payment when the government's position has not been substantially justified. In practical terms, if not by letter of the law, the government is "not substantially justified" only when the denial of benefits is reversed. According to case law, the representative

must litigate in court in order to qualify for EAJA payment. Thus, the EAJA is useful only to an attorney representative. Once the administrative process is exhausted and the case is in the courts, however, the attorney can request payment of fees for all the work done, including work for the administrative proceedings. Unlike SSA fees, there are no explicit limits on the amount that can be awarded. Rather, the amount due is based on hourly records of services.

Note that proving that the government has not been "substantially justified" is a steep hill to climb. For example, in one 1986 case (*Hurley v. Bowen*, MMG 36,283 and 36,284), a Medicare beneficiary received certain services in an extended stay in the hospital. Coverage was denied after a certain date, since the government had provided the patient notice of the date that coverage would be ended. The patient successfully appealed for benefits, because written notice is required and the government had sent the notice to the patient's home, where he lived alone. However, the EAJA claim for fees was not approved, because the administration *was* substantially justified in assuming that the patient would have someone to get his mail.

The SSA and EAJA fees are mutually exclusive. It is a good hedge for attorneys to include both in many Social Security appeals petitions. The representative should get a retainer contract for 25 percent of the unpaid benefits as a basis for SSA approval. He or she should keep a detailed log of services on an hourly basis for both SSA and EAJA.

The constraints on fees in Social Security are based on concern that beneficiaries will be exploited when they seek benefits they mistakenly believe are due. Deprived initially of expected income, they might then be deprived of savings or assets in pursuit of an impossible objective. On the other hand, the rate of reversal in Social Security cases is very high, with many at the very first tier of administrative hearing.

In the late 1980s, there was much discussion by elder law attorneys of "doing well by doing good." Representing SSA claimants has the potential to do both.

*Alison McChrystal Barnes*  
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