

# FEDERAL COURT PRACTICE SOCIAL SECURITY DISABILITY -THE BASICS-

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# Federal Court Practice-The Basics

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## I. Preparations for Appeal

### A. Exhaustion of Administrative Remedies

1. A prerequisite to filing suit in federal court is the exhaustion of administrative remedies. 42 U.S.C. §405(g) provides that an individual may appeal any “final decision of the Secretary after a hearing to which he was a party” by filing a civil action “within sixty days after the mailing to him of such notice of such decision . . . .” The notice of decision referred to is the final action of the Appeals Council on a Request for Review of the Hearing Decision or Order.
2. Keep in mind that the appeal to the federal court is an action seeking review of the final decision of the Commissioner to determine if the decision is supported by substantial evidence. Therefore, during the administrative hearing before the ALJ, it is critical to the case that the attorney look ahead and create a proper record for appeal in the event the claim is denied. The hearing is the claimant’s primary opportunity to present his/her case. If the claim is denied before the ALJ, a request for review of the hearing decision filed with the Appeals Council should raise the legal and factual errors and provide good cause for any new and material evidence submitted which was not previously submitted to the ALJ. It is preferred that the submission to the Appeals Council be in the form of a letter brief focusing on specific legal errors citing Social Security regulations, rulings, HALLEX, and other internal policies.

### B. Basis for Federal Court Appeals

1. Standard of review—substantial evidence.
2. Be very selective in appealing cases. Look for specific deficiencies in the ALJ’s decision which warrant appeal, such as the failure to discuss evidence (including State agency non-examining physician evidence), or a finding that an impairment is not severe, when the evidence demonstrates

otherwise. A case with a well-reasoned ALJ decision is much harder to win on appeal than one where the ALJ ignores evidence of record, or fails to provide adequate reasons (or provides no reasons) for rejecting evidence.

3. Make certain that the case has legal merit and that you have the ability to vigorously pursue the appeal. If you are not comfortable with appeals, refer the case out. Never appeal a case without merit, as you risk the issuance of a reported bad decision which could adversely impact other disability claims. Additionally, your credibility in future federal court appeals could be eroded.
4. Consider the ultimate result in addition to the ability to prevail on appeal. If you are successful on appeal, will the claim be granted after the new hearing following a remand? If the case is such that there is virtually no chance that the claimant will ever prevail following remand, you may not want to be the one to prolong the inevitable for the claimant and appeal the decision even if it is unsupported by substantial evidence and would be easily overturned.
5. Appeal cases with strong facts. Generally, it is important to select cases where the medical evidence is strong and generally consistent. (exception: Chronic Fatigue Syndrome and fibromyalgia cases, since these impairments are diagnosed by excluding other known causes for the symptoms. Thus, it is not unusual for the evidence to conflict. *See* SSR 99-2p).
6. The evidence of record, when weighed according to proper legal principles, demonstrates the claimant's eligibility for benefits;
7. The evidence of record has not shown that the claimant is disabled, but the Administrative Law Judge had a duty to obtain evidence which could have established eligibility for benefits; or
8. The ALJ made a legal error of law which prevented proper consideration of the claim.

C. Additional steps to take prior to filing

1. Send a FOIA (Freedom of Information Act) request for the Appeals Council file and working papers. These papers can often provide valuable information for use in the federal court appeal and occasionally admit that the case may not be defensible if appealed to federal court. At the very least, the papers will give you insight into the likelihood of whether or not the Commissioner will move to remand the case.
2. Interview the client and update the file.
3. Is there new and material evidence that needs to be considered? Is there good cause for why this evidence was not obtained or considered earlier?
4. Check on the status of any subsequent applications for benefits. If the claim has been allowed on a subsequent filing -- why? Does the new decision provide evidence that supports your arguments?
5. Assuming that this has not already been done, file a new application for benefits (if appropriate based on the particulars of the case).

6. Provide support and comfort to your client. After the long wait for the Appeals Council denial the claimant may be losing faith and confidence in the process and perhaps in the attorney just as the attorney is doing his/her best for the client.

## II. Federal Court Procedures

### A. The Complaint

#### 1. Deadlines

- a. The complaint must be filed in federal district court within 60 days of the receipt of the Action of the Appeals Council on the request for review. 42 U.S.C. § 405(g) provides that an individual may appeal any “final decision of the Secretary after a hearing to which he was a party” by filing a civil action “within sixty days after the mailing to him of notice of such decision....” SSA regulations interpret “mailing” as the date the individual receives the Appeals Council notice. The date of receipt is presumed to be five days after the date of such notice unless there is a reasonable showing to the contrary.
- b. The Appeals Council can extend the deadline to file a civil action for good cause, upon the filing of a timely request in writing setting forth the reasons for the requested extension.
- c. The 60 day time limit is not jurisdictional and can be waived.
- d. Jurisdictions vary as to whether an action is filed in the district court for statute of limitation purposes when the complaint is in the “actual or constructive possession of the clerk,” regardless of the untimely payment of the required filing fee. Therefore, try to make certain that the filing fees are paid within the original time for the filing of the complaint if the IFP petition is denied. *See e.g., Jarrett v. US Sprint Communications Co.*, 22 F.3d 256 (10th Cir. 1994) (*formal filing of employment discrimination complaint did not relate back to date complaint was presented to court clerk; refusing to follow Rodgers*). *But see, Rodgers v. Bowen*, 790 F.2d 1550, 1551 (11<sup>TH</sup> Cir. 1986) (reversing dismissal of case where the filing fee was paid slightly more than one month after the IFP petition was denied).

#### 2. Content of the Complaint.

- a. The complaint can be very brief and very general merely alleging that the Commissioner’s decision is not based on substantial evidence as required by 42 U.S.C. §405(g). However, more detailed allegations, citing specific errors of law, will put the government on notice of the strength of your case. While most attorneys use a short, standard form complaint, do be cautious of the standard form complaint and make certain to draft the complaint to fit the facts of the particular case. For example, if the AC granted an extension of time to appeal make certain that this is not

overlooked in the complaint.

3. Filing Fees and Application to proceed In Forma Pauperis.
  - a. If the claimant is indigent, the complaint can be filed without the payment of the filing fee and without the payment of fees for service of process by US Marshall. Every court has its own form for an IFP application. Obtain the proper form to be completed and signed by the claimant and attached to a motion to proceed In Forma Pauperis.
4. Service of Process
  - a. Service of the Summons and Complaint. When serving a case against the Social Security Administration, you must also serve the Attorney General of the United States and United States Attorney for the district in which you file your action along with the Commissioner of Social Security. Service upon the United States, and its Agencies, Corporations or Officers must be in accordance with Federal Rule of Civil Procedure 4(I). Therefore, you must serve by registered or certified mail:
    - (1) United States Attorney General
    - (2) Office of the Regional Chief Counsel
    - (3) Local Office of the US Attorney

Remember that if the IFP is denied the Marshall's will not be effectuating service and you must arrange for alternate service of process within the appropriate time frame—do not wait for the failure to show cause order as to why service was not effectuated with 120 as required from the district court judge. Also if the IFP is denied be aware that the law in your jurisdiction may determined that the complaint is not filed even for statute of limitations purposes until the filing fees are paid.

A. The Answer

1. Time to answer
  - a. The government will have 100 days to answer the complaint and file a copy of the administrative record. Expect the government to request extensions of this time.
2. Filing of the Administrative Record and the transcript of he hearing
  - a. It is not usual for the record that is filed of the proceedings below to be incomplete. Check the record upon receipt to determine if it is complete.
    - (1) Motion to supplement the transcript
    - (2) Motion to compel the Defendant to file a complete record
    - (3) Motion to show cause why the case should not be remanded for a new hearing because Defendant has not produced a complete record of the administrative proceedings.
3. Motion to remand to search for the transcript
  - a. Ask the court to put a time limitation on how long the Commissioner has to search and attempt to locate the transcript and report back to the federal court. Also ask the Court to specify the

remedy—remand for a new hearing, if the transcript cannot be located.

b. Motion to Dismiss

B. The Briefing Schedule

1. Usually set by the Judge after the answer is filed but may be automatic based on the local court rules. In general, the scheduling order allows the Plaintiff 30-60 days for the filing of Plaintiff's brief and gives the Defendant 30 days in which to respond. Do not assume that every scheduling order issued by the same Judge is the same. Be certain to review the order to see if the Judge has changed the normal times for filing pleadings. Be familiar with the local rules. In some courts the time for filing briefs automatically starts with the filing of the answer and some times a scheduling order is never sent.

C. Plaintiff's Brief

1. Look first to issues with controlling Circuit case law. Frame the issues very thoughtfully and carefully, as this can make a considerable difference in the outcome of the case.
2. Rely on other case law, regulations, rulings and HALLEX if no controlling case law. In cases where there is no controlling precedent in the Circuit, look to issues which can be supported by other highly persuasive case law, Social Security regulations, rulings, and HALLEX.
3. Be careful about raising untested issues without discussing your game plan with other experienced players. As a general rule, it is inadvisable to raise new issues which rely solely on law from other circuits, as the risk is too great that you may make bad law.
4. Include a factual summary in briefs. In federal court briefs, be sure and include a factual summary that paints a sympathetic picture of the claimant, coupled with strong legal arguments. You need to convince the court that this case is different, and warrants special consideration.

D. Defendant's Brief

1. Read the brief with a critical eye and check the facts and case law as stated. The agency commonly mistakes the facts and the law in its brief.
2. Do not let the Commissioner's attorneys attempt to justify - post hoc the administrative decision. It is not a proper role for the reviewing court to engage in fact finding. The Court should reject the Commissioner's post-hoc justification of the administrative decision. *See Newton v. Apfel*, 209 F.3d 448, 454 (11<sup>th</sup> Cir. 2000) (stating that "[t]he ALJ's decision must stand or fall with the reasons set forth in the ALJ's decision, as adopted by the Appeals Council").

E. Plaintiff's Reply Brief

1. If a case is worth pursuing, a reply brief is worth filing. Don't leave the task to compare and contrast the primary briefs to the district court judge. It may be that one of the single greatest mistakes one can ever make is failing to submit a reply brief. One attorney commented to me that whenever he lost in district court the court's opinion would resemble the

Defendant's brief regardless of how obvious the legal errors appeared. The conclusion is that you should respond and point out the obvious errors.

2. If you intend to file a reply and the Judge jumps the gun and issues a decision or a ruling on an issue prior to the expiration of the reply time file a motion to vacate the decision/ruling to allow you your time to reply. In those cases where the decision was unfavorable or partially unfavorable to my client's interest, I have filed a motion for the court to vacate its decision or ruling and allow me the normal reply time from the issuance of the order vacating the decision or ruling to file my reply. I have never had a judge deny such a request and many times I have had judges change their decisions after reading the reply. (This is particularly true in the context of an EAJA dispute. Almost always a failure to file a reply will result in a reduction of hours as requested by Defendants.)

F. Oral Argument/Hearing on Motions

1. Varies by jurisdiction and Judge, but is a routine practice in some jurisdictions by most Judges such as the Northern District of Georgia.
2. Can request an opportunity to present oral argument to the court in cases in which you feel it would be helpful even if the Judge has not ordered it.
3. The transcript from oral argument can be very helpful in later objections to R&Rs or responses to objections to the R&R and in later proceedings.

G. Decision of the Court

1. Magistrates Report and Recommendation
  - a. If the decision is by a Magistrate Judge, you can file objections to Reports and Recommendation from the Magistrate asking the District Court Judge to make different findings.

III. Successful Brief Writing

A. Attention to the Rules

1. Pleading Rules. Know your local rules and check periodically for changes in the rules for time to submit pleadings, briefs and motions. Make certain you comply with the rules on the length and layout of pleadings including those on formatting, font, margins, page numbers, attachments, etc....
  - a. If you're trying to squeeze your text down to meet page limitations, the following info may be helpful. All these comparisons were done in WordPerfect for Windows with 1-inch margins all around:  
A brief that ends on page 20, line 5.67 in Courier New, 12 points:Ends on page 21, line 1 in Book Antiqua, 14 points.Ends on page 19, line 6.27 in Times New Roman, 14 points.Ends on page 19, line 5.68 in Goudy OlSt BT, 14 points.Ends on page 15, line 7.67 in Book Antiqua, 12 points.Ends on page 14, line 6.33 in Times New Roman, 12 points.Ends on page 14, line 5.67 in Goudy OlSt BT, 12 points.
  - b. If you cannot meet the page limitation file a motion to request that you be allowed to submit a brief/pleading in excess of the page limitation (attempt to get the consent of the opposing counsel). If

such a motion is being filed concurrently with the pleading make certain that you have absolutely complied with the font and margin requirements; otherwise, you may find yourself subject to an order that allows you to exceed the page limitation but requires you to re-submit the brief in strict compliance with the font and margin requirements.

- c. Times New Roman 14 point is a standard font and is more appealing to the reader. Here is what Bryan Garner says in “Legal Writing in Plain English”:

“There is a lot more to learn about typography than most lawyers realize. Or want to realize. . . . Yet these matters are anything but trivial. As magazines and book publishers well know, design is critical to a publication’s success. . . . [U]se a readable serifed typeface that resembles what you routinely see in good magazines and books . . . . What you’ll especially want to avoid is the traditional typeface for type-writers: Courier.”

B. Organized Format

- 1. Do not produce a brief that looks unprofessional
- 2. Do not ignore the basics of document design
- 3. List each argument and then make each argument.

c. The Issues

D. Statement of the Case

- 1. This is an important part of the brief and should not be overlooked. The facts can be drafted in a manner which communicates the case and provides the foundation for the arguments. Prepare a clear, concise and accurate statement of the facts with specific references to the record (in fact, never cite to any facts without a reference to the record). This could be the key to winning the case.
- 2. Personalize the claimant in the statement of facts referring to him or her by name rather than Plaintiff or Claimant.
- 3. Use the facts to establish your client’s credibility and the injustice of the denial.
- 4. Use a narrative format. Tell a story. The statement of facts should describe the claimant, the vocational factors and work history, and each significant impairment and the effect on the claimant’s functioning. Cite to the claimant’s testimony and other evidence of record regarding the limitations.

E. The Standard and Scope of Review

F. The Argument and Citation to Authority

- 1. Focus on the specific legal errors committed by the ALJ.
- 2. Set forth the most persuasive arguments focusing on the relevant findings.
- 3. Argue errors which will affect the ultimate outcome of the case—show harmful error.
- 4. Present your strongest argument first.
- 5. Limit the number of arguments.

6. Do not be long winded and present unnecessary arguments.
  7. Avoid weak arguments which are not borne out by the evidence.
  8. Keep each argument simple, direct, and to the point. Avoid or breakdown and simplify complicated arguments. Do not belabor the points.
  9. Do not assume that the Judge knows as much as you about the law.
  10. Be cognizant of the Standard of Review.
  11. Research the law.
  12. Cite the law in your Circuit first and then borrow from other circuits.
  13. Cite to oldies but goodies; however, if there is new law make certain to use it.
  14. Distinguish between evidence submitted to the ALJ and evidence submitted to the AC.
  15. Cite published, binding agency guidance to support your argument. Do not forget the 83 rulings and the process unification rulings.
- G. The Conclusion
1. End with a conclusion stating exactly what you want the Court to do—reverse the decision of the Commissioner and remand with instructions to find the claimant disabled as of a certain date and pay benefits or remand to the Commissioner with instructions to afford proper weight to the opinions of the treating physicians and properly consider the claimant’s complaints of pain, and provide an opportunity for a new hearing, etc...
- H. Writing Techniques/Style
1. Do not ignore the importance of strong legal writing. Bryan A. Garner’s Legal Writing in Plain English and Strunk & White’s The Elements of Style are suggested resources.
  2. Write clearly and concisely.
  3. Do not be too boring or too entertaining.
  4. Personalize the claimant (use his or her name rather than Plaintiff or Claimant at every opportunity).
  5. Use the active not the passive voice.
  6. Organize your arguments in a logical, easy to follow manner.
    - a. Use the IRAC technique: Issue, Rationale, Argument, Conclusion.
    - b. Basically you want to state what you plan to argue, make the argument, and explain the conclusion. Each argument of the brief should essentially begin with a paragraph summarizing the argument, then explain the argument in detail with references to the record and citation to authority, and then conclude with a statement restating the error of law and the main point of the argument.
  7. Know and understand your audience.
  8. Have an outsider read the brief for form and content. (You know what you are trying to say, but can an outsider easily understand and be persuaded by your brief?)
- I. Professionalism and Credibility
1. Value your credibility and provide a basis for the Court to trust your work
    - a. Always write an accurate and complete brief. Be honest about the



evidence into the record of the case. (Make certain that if any evidence or arguments were submitted to the AC that they are listed as considered on the final AC determination—if not ask that a new notice of decision be issued reflecting the submissions).

4. The Standard for Obtaining a Federal Court Remand Based on the Existence of New Evidence

VII. Getting Paid

A. Fees under EAJA

1. Due 30 days from the date of a final, non appealable judgment which was properly entered under Rule 58

B. Fees under 406(b)

1. File immediately or request within 14 days an extension of time to file for attorney fees under 42 U.S.C. 406(b) after the award certificate becomes final.

C. Agency Fees

VIII. Proceedings on Remand

A. You have only 30 days to file exceptions to the new administrative decision following remand. Almost always the wrong face sheet is attached and sent with the new administrative decision which states that you have 60 days to file a request for review with the Appeals Council (which is incorrect!).

B. If the claim is not granted on remand, in general, you must commence a new civil action (if the claim was remanded under sentence four).

IX. Circuit Court Appeals

A. Screen very carefully, as the risk of making bad law is great. Only appeal cases with very strong, compelling facts and good controlling law. It is especially important that it look like the claimant should be awarded benefits. Remember, weak facts make bad law.

X. Attachments on CD ROM

A. Sample Request for Review of Hearing Decision

B. Sample Letter Brief to the Appeals Council

C. Sample Action of Appeals Council on Request for Review

D. Sample Complaint, Summons, Civil Action Cover Sheet

E. Sample IFP Motion and Order on Motion

F. Sample Answer

G. Sample Briefing Schedule

H. Sample Brief for Plaintiff

I. Sample Reply Brief of Plaintiff

J. Sample Motion by Plaintiff

K. Sample Response to Motion to Remand

L. Sample Objections to the Report and Recommendation

M. Sample EAJA Application

N. Sample Response to EAJA Petition

O. Sample Reply to Response to EAJA Petition

P. Listing of common errors in ALJ decisions—excerpt from Bohr’s Social Security Practice Guide—Reprinted with express permission.

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Portions of this outline were based in part on various legal education materials prepared by other practitioners including Sarah H. Bohr and Charles L. Martin as well as the helpful hints and comments of other attorneys handling Social Security cases in the federal courts which have been e-mail to me from time to time. The author of this gratefully acknowledges Ms. Bohr and Mr. Martin's contribution.