SOCIAL SECURITY
Office of the General Counsel

November 29, 2018

The Honorable Sara Lioi
Chair, Social Security Review Subcommittee
Advisory Committee on Civil Rules
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Suite 7-240
Washington, D.C. 20544

Dear Judge Lioi and Subcommittee Members:

Thank you for the opportunity to comment on the Social Security Review Subcommittee's Report to the Advisory Committee on Civil Rules, as well as on the most recent draft rules. Below, we provide our perspective on the concerns and questions noted in the report and at the November 1 meeting of the Advisory Committee.

National rules will increase efficiency

Both the Subcommittee and the Advisory Committee have asked whether the agency would prefer a "set of short and rather simple rules" or to continue with the current state of diverse district practices. We continue to enthusiastically support the Subcommittee's efforts to develop a national set of procedural rules and stress our continued interest in working with the Subcommittee and the other stakeholders to develop national rules that facilitate the efficient administration of our cases.

Uniform rules would improve productivity and efficiency for the courts, plaintiffs, and the agency, consistent with our mission and that of the government as a whole. Chief Justice Roberts, in his 2015 year-end report on the Federal judiciary, discussed the Rules Enabling Act and encouraged judges and lawyers to "engineer a change in our legal culture that places a premium on the public's interest in speedy, fair, and efficient justice." Chief Justice Roberts emphasized the "obligation of judges and lawyers to work cooperatively in controlling the expense and time demands of litigation." The Administrative Conference found that the current procedures governing Social Security litigation in the Federal courts are neither speedy nor efficient because of a lack of uniformity and because "[a]s appeals," Social Security cases "do not fit the Federal Rules' one-size-fits-all mold, crafted with ordinary civil actions as the model." ACUS, *A Study of Social Security Litigation in the Federal Courts*, July 28, 2016, p.128. The intent of the proposal for a uniform set of rules is to create a process that is speedier, more efficient, and less expensive for the thousands of claimants each year who seek judicial review of Social Security's final decision on a claim for benefits, where time is of the essence for the claimant.

We see value in the pared back set of rules that the Subcommittee is currently considering. By recognizing the appellate nature of Social Security litigation, the rules provide the appropriate context for these cases, which assists the parties in crafting their arguments and the courts in reviewing them. By setting out streamlined procedures for case initiation and the agency's initial response, the Subcommittee's draft eliminates unnecessary hurdles and saves time and money for all involved. The rules providing for responsive briefing would do the same. These draft rules, if adopted, would have a significant and positive effect.

We also appreciate the Subcommittee's concern about the need for deep familiarity with the substantive law governing this workload. To this end, we strongly support the Subcommittee's efforts to engage the stakeholders involved. The Subcommittee may find some comfort in the fact that the draft rules we put forward were modeled, in large part, on local rules developed by Federal district courts seeking to address concerns relating to Social Security litigation. None of these rules has disrupted plaintiffs' ability to challenge the agency's decisions or the agency's ability to defend those decisions.

We urge the Subcommittee to continue this effort.

Briefing: 60-day briefing deadlines and an express statement relating to joint statements of fact

The agency's original proposal included a great deal of detail because more guidance will lead to more expeditious—and focused—briefing, which will save money and facilitate the court's review. At the same time, we appreciate the balance that must be struck between this goal and preserving each judge's ability to manage his or her docket. We understand the view that including detail on topics like page limits, though suggested by ACUS as an area that would benefit from nationwide consistency, may be a bridge too far. Still, if these cases are to be viewed as appeals (as they should be), it seems appropriate to look to the Federal Rules of Appellate Procedure for guidance. Those rules, of course, include a great deal of detail on both the form and content of briefing. *See, e.g.,* Fed. R. App. P. 28 (setting out, for example, the manner in which arguments must be articulated and the ways in which a party may refer to the record), 32(a) (dictating page or word limits, typeface options, and even the color of a brief's cover). Our cases, too, would benefit from clear—and specific—rules on such issues.

In its report to the Advisory Committee, the Subcommittee noted the agency's preference for rules expressly eliminating the inefficient practices of joint statements of fact, joint briefs, and simultaneous briefing. We are heartened that the Subcommittee sees joint briefs and simultaneous briefing as inconsistent with the proposed rules. We are less confident that joint statements of fact—though inefficient and inconsistent with the spirit of this adversarial litigation—would necessarily be foreclosed by the Subcommittee's current draft. We urge the Subcommittee to consider express disapproval of the inefficient practice. In our experience, the absence of specifics can lead to supplemental orders that thwart the intent of a general rule. To take one example: the District of South Dakota has a jurisdiction-wide standing order setting out responsive briefing deadlines similar to those included in draft Rule 76. *See* Standing Order, *In the Matter of Social Security Appeals* (D.S.D., Dec. 5, 2000). Yet judges in the district routinely issue a briefing order in each Social Security case requiring the plaintiff and the Commissioner to jointly develop a "Joint Statement of Material Facts," describing, among other things, "all

facts pertinent to the decision of the case." The cumbersome procedure increases the cost to the parties and causes real delays of more than a month to complete the briefing process.

We also again urge the Subcommittee to adopt the agency's proposal for 60-day briefing deadlines. This is currently the rule in many jurisdictions,[1] and we have concerns about reducing the timeline. Given Social Security's massive claims and litigation workload, the agency is under significant stress, and reduced timelines likely will result in the agency's attorneys having to file more requests for extensions of time, a pointless and inefficient exercise for all concerned.

Scope: one small change

We agree that these rules should apply to the typical Social Security case litigated in Federal district court, which is nearly every one of the approximately 18,000 cases filed each year. We think the phrasing in the Subcommittee's most recent draft[2] captures this typical case, though we recommend that the rule omit the phrase "on the administrative record" to eliminate the possibility of confusion. The court's review is indeed based on the administrative record, but the Social Security Act also contemplates that a plaintiff may bring forward records that were not presented to the agency and therefore not included in the administrative record. *See* sentence six of 42 U.S.C. § 405(g). When this happens, the court may remand the case if the evidence is both new and material and there was good cause for the plaintiff's failure to incorporate it into the record in a prior proceeding. Each element requires the court to consider the nature of the new evidence, which is outside the administrative record. This process does not expand the court's role beyond that of appellate reviewer; if the evidence meets the necessary criteria, the court may only order the additional evidence be taken by the agency. These practices are well-understood and handled by the courts on a regular basis. New procedural rules would not alter them. But we see at least a possibility that the phrase "on the administrative record" might be seen by some as suggesting that the rules would not apply if a plaintiff presents additional evidence to the district court.

Plaintiff's complaint and agency's answer: response to Subcommittee's questions and concerns

The Subcommittee has raised a number of questions as to the appropriate form and content of both the plaintiff's initial filing and the Commissioner's answer. We believe that

[1] *See, e.g.*, Standing Scheduling Order – Social Security Cases III(a), IV(a) (D. Conn.); L.R. 9(a)(2) (D. Vt.); Administrative Order 2015-05 (E.D.N.Y.); Standing Order M10-468 (S.D.N.Y.); L.R.Civ.P. 5.5(b) (W.D.N.Y.). In addition, the District of Maryland, the Eastern, Middle, and Western Districts of North Carolina, the Middle District of Louisiana, and districts within the Eastern District of Texas provide for a 60-day deadline by scheduling order. Other jurisdictions—including the District of New Jersey, the Western District of Louisiana, the Eastern and Western Districts of Kentucky, the Northern District of Illinois, and the Districts of Minnesota and Montana—allow 60 days for at least one of the parties. If these examples are not to be followed, perhaps the Subcommittee would consider 45-day briefing deadlines as a compromise.

[2] "[This rule applies] [Rules 74,75, and 76 apply] to an action in which the only claim is made by an individual or personal representative for review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g)."

simplified procedures for serving the initial filing (as reflected in draft Rule 75(b)) should be accompanied by simplified initial and responsive filings.

Complaint

As with appeals to Federal circuit courts, plaintiffs in our cases need not plead a multitude of specific facts to identify the legal issues and set the stage for the court's review. Rather, it is sufficient for the plaintiff to include identifying information and statements setting out the date and finality of the administrative decision at issue. The Subcommittee asked whether there could "be advantages in allowing a claimant to detail the deficiencies in the complaint, particularly in assisting the Commissioner to make a prompt decision whether to seek a voluntary remand, a very common practice." While voluntary remands are, in fact, common at the *briefing* stage, they are not common at the complaint/answer stage. Plaintiffs' attorneys and *pro se* plaintiffs are not always in a position to plead specific facts and allege specific errors at the complaint stage. Moreover, the substantial caseload that agency attorneys carry means that an exhaustive substantive review of the record before answering is rarely feasible. We would not necessarily oppose leaving plaintiffs an option to include specific allegations as long as the Commissioner is not required to respond to each factual allegation.

The Subcommittee also asked about the necessity of including sensitive information in the complaint. Both the agency and the courts require information as to the plaintiff's residence to establish that venue is proper in a court. But we do not need, and have not advocated for, a specific street address unless the plaintiff is proceeding *pro se*, in which case the address would be necessary for service purposes only. As to name and social security number, the agency must definitively identify the individual whose claim is the subject of the challenge. This is typically the person bringing the suit, but in some cases will be someone else. If the plaintiff brings the suit on behalf of someone else (for example, a minor), the agency must identify that other person. Likewise, if a plaintiff seeks benefits on the basis of a relationship to someone else who is entitled to benefits (for example, a spouse), the agency must identify that person, too. While it is not essential that the full social security number and name appear on the complaint or the court's docket sheet, the agency does require enough information to proceed with preparing the administrative record. Including the full name and the last four digits of the social security number seems, to us, the most efficient way to proceed. We take the privacy interests involved here very seriously, and we note that Civil Rule 5.2(a) contemplates using the last four digits of a social security number when necessary and Civil Rule 5.2(c) limits remote access to the electronic case file, including the complaint and the administrative record, to the parties and their attorneys. Other persons have remote electronic access only to the court's opinion, order, judgment, or other disposition.

The Subcommittee asked about the rationale for requiring a plaintiff to identify the implicated titles of the Social Security Act, noting that 42 U.S.C. §§ 1009(b), 1383(c)(3), and 1395w-114(a)(3)(B)(iv)(III) explicitly provide for review under § 405(g) and are therefore included within the scope of these rules. We recommend identifying the implicated title because a claimant may seek benefits at the administrative level under multiple titles (that is, title II for disability insurance benefits and title XVI for supplemental security income), but then abandon one of those claims at the Federal court level. This requirement is separate from the requirement that plaintiff assert that the court has jurisdiction under 42 U.S.C § 405(g), which should also be included.

We agree that the plaintiff should be required to state the basis for the claim—namely, that the agency's final decision is not supported by substantial evidence or that there is some other error of law (or both). For the same reasons that we advocate omitting lengthy factual allegations from the complaint, we do not believe it is necessary—or a good use of time—to require the plaintiff to explain more in the complaint (for example, that the agency's final decision is not supported by substantial evidence *because the ALJ did not properly consider the limiting effects of the claimant's alleged pain*).

As to whom within SSA should be served, the agency would consider itself notified of the action if the court transmits notice of the filing of the complaint to the appropriate office within the agency's Office of the General Counsel. (We currently publish a list of the appropriate OGC office in the Federal Register, *see*, 82 Fed. Reg. 11494 (Feb. 23, 2017), and if the CM/ECF system is capable of transmitting such notice in both *pro se* and represented cases, it seems that service by traditional mail would no longer be used in either situation.) It is unnecessary to require that both "the Commissioner" and "the appropriate regional office" within OGC receive the notice. *See* Rule 75(b).

Answer

We appreciate the Subcommittee's concern about the potential for unintended consequences if the Commissioner is not required to file an answer to the complaint. In the vast majority of cases, the action can proceed from the complaint to the filing of the administrative record without any complication. Sometimes, the agency will challenge the propriety of the court hearing the case—most frequently because the plaintiff did not obtain a final decision from the agency or did not timely file the complaint in court—and we do so via a motion to dismiss pursuant to Civil Rule 12(b), which is contemplated in draft Rule 75(c)(2)(A). If the agency sees a need to voluntarily remand the matter prior to briefing, we will do so via a motion to voluntarily remand as contemplated in draft Rule 75(c)(2)(B). As a practical matter, the Commissioner will pursue one of these three courses of action—proceed to briefing, move to dismiss, or seek voluntary remand—in just about every single case. The case that necessitates an answer to assert an affirmative defense pursuant to Civil Rule 8(c) is truly extraordinary (though not necessarily unprecedented). Accordingly, we appreciate that the Subcommittee's draft preserves the option, however rarely it may be taken, while also relieving the Commissioner of Civil Rule 8(b)'s obligation to formally answer each assertion included in the complaint. We favor clarity in the text on this point. If the agency may "treat the administrative record as the sole answer" unless it also files a statement of affirmative defenses (as note 11 to Rule 75(c)(1)(A) states), the rule text should specifically state that.

The Subcommittee's draft provides, in Rule 75(c)(2)(C), for a default 14-day deadline to answer if a motion under Civil Rule 12 motion is denied. The Subcommittee notes that, "it does not seem appropriate to subject social security plaintiffs to delays greater than plaintiffs in other actions." We understand the position, yet we have a practical concern. In order to save time and expense, the agency checks to see whether a motion to dismiss is warranted—for example, due to timeliness or to lack of finality—*before* preparing the administrative record. If a motion to dismiss is warranted, the agency prepares and files a declaration with the information the court needs to rule on the motion. Though it is rare that such a motion is denied, if it is, the 14-day deadline to prepare, certify, and file the administrative record will be difficult to meet. The queue for preparing the administrative record in nearly every one of the 18,000 cases filed every year is long; it is feasible to meet the 60-day deadline in Civil Rule 12(a)(2) (and draft Rule

75(c)(1)(B)), but reducing the deadline to 14 days will likely make extension requests the norm rather than the exception. We initially proposed a default deadline of 60 days, here, and while we appreciate that the draft rule includes language permitting the court to "set[] a different time," we propose a compromise of 30 days to reduce the need for extensions.

Fee petitions under 42 U.S.C. §§ 406(b) and 1383(d)(2): uniformity is recommended; simplified proposal

The Subcommittee acknowledges that the attorney fee procedures in Civil Rule 54(d)(2) "may not be adequate for § 406(b)" petitions and that there are "serious problems" with the lack of guidance on the timing of such petitions. We agree. In the annotated version of our proposed rules, we detailed the wide range of deadlines that courts currently impose for this task. Attorneys with regional and national practices may find that they have missed their window in one jurisdiction even though they would be well within the prescribed time in another. For example, an attorney who practices in both the Western and Eastern Districts of Michigan has 35 days to file a petition in the former but only 14 in the latter. *See* W.D. Mich. LCivR 54.2(b)(ii); E.D. Mich. LR 54.2(a). An attorney in the Eastern District of North Carolina, meanwhile, has 65 days. *See* Local Civil Rule 7.1(d) (E.D.N.C.). These fee petitions are neither small—they often run in the tens of thousands of dollars—nor infrequent—according to our records, more than 1,600 section 406(b) fee petitions were filed in Fiscal Year 2018. For these reasons, we understand that some members of the plaintiffs' bar support standardization.

But the risk of forfeiting a fee is not the only cost. The uncertainty surrounding the issue can lead to unnecessary litigation. In a thorough—and, no doubt, time-consuming—analysis, the Honorable Elizabeth Wolford of the Western District of New York recently surveyed the varying approaches of numerous circuit and district courts on the "unsettled" question of the appropriate benchmark for a timely section 406(b) motion and discussed the practical and theoretical problems created by the various approaches that courts have taken. *Sinkler v. Berryhill*, 305 F. Supp. 3d 448, 452–57 (W.D.N.Y. 2018), *appeal docketed*, No. 18-2044 (2d Cir. July 12, 2018).

We recognize that the agency's proposal included a significant amount of detail. We thought it advisable to specify the contents of these petitions to make filing, and reviewing, them more expedient. We are not alone in this view; several Federal district courts have local rules related to section 406(b) fees that include a similar level of detail. *See, e.g.*, Local Civ. Rule 83.VII.07(B) (D.S.C.); W.D. Mich. LCivR 54.2(b); E.D. Mich. LR 54.2. That said, it would be simple enough to forego some of the details, and include a more limited rule that sets out a deadline and a requirement that plaintiff's attorney serve the petition on the plaintiff, which is an appropriate requirement because section 406(b) fees are paid by the plaintiff.[3]

[3] As previously noted, the agency's proposed rule does not address the amount of section 406(b) fees and, hence, would not be affected by the outcome of the case currently pending before the Supreme Court exploring the impact of section 406(b)'s 25% cap on attorney's fees. *See Wood v. Comm'r of Soc. Sec.*, 861 F.3d 1197, 1200 (11th Cir. 2017), *cert. granted sub nom. Culbertson v. Berryhill*, No. 17-773, 2018 WL 2292460 (U.S. May 21, 2018).

Appropriate placement of the rules: we defer to the Subcommittee

The Subcommittee has recommended that any set of new rules be located within the present body of the Civil Rules. We take no position on this and defer to the Subcommittee's expertise. So long as the rules are clear and serve the purpose of promoting efficiency, they will provide a significant benefit to the parties and the courts.

SSA is heartened by the seriousness, thoughtfulness, and swiftness of the Subcommittee's efforts. We appreciate the opportunity to comment and are available to provide further thoughts as the Subcommittee deems necessary.

Sincerely,

Asheesh Agarwal
General Counsel

Attachment: Redline version of Subcommittee's 11-1-18 draft

SSA proposes the following changes to the Subcommittee's November 1, 2018 draft in response to the Subcommittee's interest in brevity. We continue to advocate for the more comprehensive set of rules that we initially proposed.

Rule 74. Scope

(a) SECTION 405 (g). [This rule applies] [Rules 74,75, and 76 apply] to an action in which the only claim is made by an individual or personal representative for review ~~[on the administrative record]~~ of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g).

(b) FEDERAL RULES OF CIVIL PROCEDURE. The Federal Rules of Civil Procedure also apply to a proceeding under [this rule] [Rules 74, 75, and 76], except to the extent that they are inconsistent with [this rule] [these Rules].

COMMITTEE NOTE

This rule establishes a simplified procedure that recognizes the essentially appellate character of claims to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). An action is brought under § 405(g) for this purpose if it is brought under another statute that explicitly provides for review under § 405(g). *See*[, for example,] 42 U.S.C. §§ 1009(b), 1383(c)(3), and 1395w-114(a)(3)(B)(iv)(III).

Most actions under § 405(g) are brought by a single plaintiff against the Commissioner as the sole defendant and seek only review on the administrative record as provided by § 405(g). This rule governs only these actions, and is supplemented by the general provisions of the Civil Rules that are not inconsistent with this rule.

Some [– apparently very few –] actions, however, may plead a claim for review under § 405(g) but also join more than one plaintiff, or add a claim or defendant for relief beyond review on the administrative record. Such actions fall outside this rule and are governed by the other Civil Rules alone. [But pleading the § 405(g) review parts of such actions may properly rely on the model provided by Rule [2].]

Rule 75. Initiating the Action; Complaint; Service; Answer

(a) THE COMPLAINT. The complaint in an action for review under § 405(g) must:

(1) Identify the plaintiff by name~~, address,~~ and the last four digits of the social security numbers of the plaintiff and any~~the~~ person on whose behalf – or on whose wage record – the plaintiff brings the action;

(2) Identify the titles of the Social Security Act under which the claims are brought;

(3) Name the Commissioner of Social Security as the defendant;

(4) State ~~[~~generally ~~]~~and without reference to the record~~]]~~ that the final administrative decision is not supported by substantial evidence or ~~[~~must be reversed for errors of law~~]~~; and

(5) State the relief requested.

(b) SERVING THE COMPLAINT. The court must[, through its Case Management and Electronic Case Files system,] notify the Commissioner [of Social Security] of the commencement of the action by transmitting a notice of filing~~Notice of Electronic Filing~~ [with a link to the complaint] ~~[to the Commissioner,]~~ to the [appropriate] regional office of the Social Security Administration, and to the United States Attorney for the district. The plaintiff need not serve a summons and complaint under Rule 4.

Commented [DM1]: This edit may be unnecessary, but we were unsure if "Notice of Electronic Filing" would be the proper term if a *pro se* plaintiff filed a paper copy of the complaint (and thereby triggered notice to SSA and the USAO). We defer to the Subcommittee on the terminology and precise procedures that would be necessary.

(c) THE ANSWER; MOTION; VOLUNTARY REMAND; TIME.

(1)(A) ~~[Alternative 1] The answer must include a certified copy of the administrative record and any affirmative defenses under Rule 8(c). Rule 8(b) does not apply.~~

~~[Alternative 2]~~ A certified copy of the administrative record ~~and a statement of affirmative defenses [under Rule 8(c)]~~ suffices as an answer unless a statement of affirmative defenses under Rule 8(c) is necessary. Rule 8(b) does not apply.

(B) The answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 75(b) unless a later time is provided by Rule 75(c)(2)(C).

(2)(A) A motion under Rule 12 must be made within 60 days after notice of the action is given under Rule 75(b).

(B) The Commissioner may move~~A motion~~ to voluntarily remand the case to the Commissioner ~~may be made~~ at any time.

(C) If the court denies a motion under ~~Unless the court sets a different time or a later time is provided by~~ Rule 75(c)(2)(A), the answer must be served on the plaintiff within 30 days of the denial~~serving a motion under Rule 75(c)(2)(A) or (B) alters the time to answer as provided by Rule 12(a)(4)~~.

COMMITTEE NOTE

Section 405(g) provides for review of a final decision "by a civil action." Rule 3 directs that a civil action is commenced by filing a complaint. In an action that seeks only review on the administrative record, however, the complaint is similar to a notice of appeal. The elements specified in Supplemental Rule 75(a) satisfy Rule 8(a). Jurisdiction is pleaded by identifying the action as one brought under § 405(g). A bare assertion that the Commissioner's decision is not supported by substantial evidence suffices to state a claim – the facts are developed in the administrative record and, along with the law, are known to the Commissioner. Stating the relief requested provides the proper focus.

Rule 75(b) provides a means for giving notice of the action that supersedes Rule 4(i)(2). The Notice of Electronic Filing sent by the court suffices. The plaintiff need not serve a summons and complaint under Rule 4.

Rule 75(c)(1)(A) builds from this part of § 405(g): "As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are made." The record suffices as an answer unless the Commissioner wishes to plead any affirmative defenses. Rule 8(b) does not apply, but the Commissioner is free to answer any allegations that the Commissioner may wish to address in the pleadings.

The time to answer is set at 60 days after notice of the action is given under Rule 75(b) unless a later time is provided under Rule 75(c)(2)(C). The time to file a motion under Rule 12 is set at 60 days after notice of the action is given under Rule 75(b). If a timely motion is made under Rule 12, the time to answer is governed by Rule 12(a)(4) unless the court sets a different time.

The Commissioner at times seeks a voluntary remand for further administrative proceedings before the action is framed for resolution by the court on the administrative record. Rule 75(c)(2)(B) recognizes that the Commissioner may move to remand before or after filing and serving the record.

Rule 76 Plaintiff's Motion for Relief; Briefs

(a) PLAINTIFF'S MOTION FOR RELIEF AND BRIEF. The plaintiff must serve on the Commissioner a motion for the relief requested in the complaint and a [supporting] brief within ~~30~~60 days after the answer is filed or ~~30~~60 days after the court disposes of all motions filed under Rule 75(c)(2)(A) or (B), whichever is later. The brief must support arguments of fact by citations to the [parts of the] record [on which the plaintiff relies].

(b) DEFENDANT'S ~~[~~RESPONSE~~]~~ BRIEF. The defendant must serve a response brief on the plaintiff within ~~30~~60 days after service of the plaintiff's motion and brief. The brief must support arguments of fact by citations to the [parts of the] record [on which the defendant relies].

(c) REPLY BRIEF~~[S]~~. The plaintiff may, within 14 days of service of the defendant's brief, serve a reply brief on the defendant.

(d) JOINT SUBMISSIONS. The parties shall not be required to prepare any joint submissions as to the facts or on the merits of the case.

COMMITTEE NOTE

Rule 76 addresses the procedure for bringing on for decision a § 405(g) review action that has not been remanded to the Commissioner before review on the record. The plaintiff serves a motion for the relief requested in the complaint or any amended complaint. The motion need not be lengthy; it is supported by a brief that is similar to a brief supporting a motion for

summary judgment, citing to the parts of the administrative record that support the argument that the final decision is not supported by substantial evidence. The Commissioner responds in like form. A reply brief is allowed. The times set for these briefs may be revised by the court when appropriate.

Rule 76a Petitions for Attorney's Fees Under 42 U.S.C. §§ 406(b) and 1383(d)(2)

(a) TIMING AND CONTENTS OF PETITION. Plaintiff's counsel may file a petition for attorney's fees under 42 U.S.C. §§ 406(b) and 1383(d)(2) no later than 60 days after the date of the final notice of award sent by Defendant to Plaintiff's counsel stating the amount withheld for attorney's fees. The petition must include a copy of the final notice of award, an itemization of the time expended by counsel in Federal court, and any other information the court would reasonably need to assess the petition.

(b) SERVICE OF PETITION. Plaintiff's counsel must serve the petition on Defendant and must attest that counsel has informed Plaintiff of the request.

(c) RESPONSE. Defendant may file a response within 30 days of service of the petition, but such response is not required.