

**NATIONAL ORGANIZATION OF
SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES
(NOSSCR)**

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The Honorable Sara Lioi
Social Security Review Subcommittee, Advisory Committee on Civil Rules
Judicial Conference of the United States
Via email

November 20, 2018

Dear Judge Lioi,

Thank you for the opportunity to submit comments about the possibility of uniform procedural rules in federal district court cases about Social Security benefits, and about the draft rules the Subcommittee is considering.

These comments are submitted on behalf of the National Organization of Social Security Claimants' Representatives (NOSSCR). NOSSCR is a specialized bar association for attorneys and advocates who represent Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) claimants throughout the adjudicative process. Since 1979, NOSSCR has been providing continuing legal education to its thousands of members and public policy advocacy on behalf of its members and the people with disabilities they represent.

Are Uniform Procedural Rules Necessary?

NOSSCR members do not believe that national uniform procedural rules for Social Security cases in federal district court are necessary. Although Social Security cases are numerous, representing approximately 7% of the federal docket,¹ there is no compelling reason for them to be treated as lesser or different than the other 93% of cases. The existing Federal Rules of Civil Procedure (FRCP) plus local rules or standing orders can accommodate Social Security cases without the inflexibility of uniform national rules for specific case types. Standing orders, tailored to the particular circumstances of each District, are preferable because they can be changed more easily to address the needs of the particular Court. Although NOSSCR members prefer the rules in some districts to others, they are not eager to trade local flexibility for

¹ http://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf#page=209

standardization, and oppose amending the FRCP in a way that sets Social Security cases apart from other federal cases.

Having different rules in different districts or circuits is no more onerous than having different precedent in different districts or circuits. Most NOSSCR members who represent claimants in federal court do so only in a limited geographic area, so learning local rules is not particularly daunting. Even members with nationwide practices often associate with local counsel or are able to learn the rules of different courts.

NOSSCR shares the skepticism of several Advisory Committee members that uniform procedural rules would save SSA's attorneys two hours per case. As Joshua Gardner of the Department of Justice noted during the November 1, 2018 meeting of the Advisory Committee on Civil Rules (the "Committee Meeting"), assigning Assistant United States Attorneys or other litigators to Social Security cases in specific districts or circuits is another way to handle differences in local rule without prescribing uniform nationwide procedural rules.

NOSSCR agrees with the comments made by Advisory Committee members noting that most of the delays in adjudicating Social Security disability claims occur within the agency. The average time to receive an ALJ decision, for example, exceeds 500 days, and SSA is currently planning to re-introduce an additional step before claimants can request ALJ hearings (the "reconsideration" phase) in ten states that had eliminated it for decades. Although prompt adjudication of federal court cases is an important goal, NOSSCR notes that SSA could do more to ensure policy-compliant adjudication of claims before the Commissioner, so that fewer appeals to federal court are necessary.

General Principles for Any Specialized Procedural Rules

If the Subcommittee does choose to recommend specialized procedural rules, such rules must be flexible, outcome-neutral, and reflective of best practices. Such rules should be as limited in scope as possible and focus only on procedure rather than the substantive issues raised in Social Security cases.

The most important goal of adjudicating Social Security cases in federal court is to reach the correct decision. Different judges, and cases with different issues, often require procedural flexibility to reach this goal. For example, some Social Security cases have more, or more complex, issues than others; administrative records can range in length from a few hundred to many thousands of pages; and judges have varying levels of familiarity with Social Security law and regulations. Any rules would need to accommodate this variety. As discussed in greater detail in the "Briefs" section *infra*, this means that NOSSCR opposes rules that would impose strict page limits on filings. NOSSCR also rejects restrictions on oral arguments or ADR practices like "meet and confer": if a judge believes such practices would be useful, they should not be banned or discouraged.

Procedural rules must balance the interests and needs of claimants and the Commissioner. NOSSCR appreciates the Subcommittee's efforts to listen to attorneys from both sides when developing its recommendations. The Subcommittee should also consider the needs of self-

represented litigants, both in terms of how any rules would affect those who proceed pro se, and in terms of when appointment of counsel might be appropriate to help the courts make prompt and accurate decisions. Additionally, the Subcommittee should consider how any rules it proposes will function when the plaintiff requests to proceed in forma pauperis (IFP), as this is a common situation in Social Security cases. District courts currently have a variety of different practices regarding when and how IFP motions should be filed, which may have consequences for other rules.

The percentage of cases remanded—which is a substantive outcome—should never be considered as a measure of whether procedural rules are working well. There is much that SSA could do, in terms of education and oversight of its ALJ corps and how the Appeals Council functions, to reduce the number of cases that it improperly denies. But once the claim is in federal court, a remand (either for further proceedings or solely for the calculation and award of benefits) is often the correct outcome. In more than half of the Social Security disability cases decided in Fiscal Year 2015, federal judges decided it was the proper outcome (49% remanded, 2% awarded). And in about 2/3 of those remanded cases, SSA ultimately awarded benefits.² It is worth noting that federal court appeals were only filed in 14% of cases eligible for them in Fiscal Years 2010-2018.³ There are likely many claims that would have been awarded or remanded by federal district courts had the claimants appealed.

Procedural rules must also balance efficiency and accuracy. The whole process of applying for Social Security disability benefits includes delays. The average processing time from request for ALJ hearing to the issuance of a decision is currently more than 500 days. Adding on the other phases before and after the ALJ decision, it would not be unusual for a person to have pursued a disability benefits claim for three or more years before their federal court case is even filed—and some cases district court judges hear have already been remanded one or more times by the courts. This long process can leave claimants in perilous straits, so receiving a prompt federal court decision is clearly important. But decisions must also be fair. There may be ways to improve efficiency without harming accuracy, and examining best practices among local rules from around the country could be a useful way to find them.

If the Subcommittee recommends rules, NOSSCR takes no position on whether they should be supplemental to or included in the FRCP itself, nor whether the rules are all placed in Rule 74 versus being spread across Rules 74-76.

Scope of Rules

If the Subcommittee recommends special procedural rules for Social Security cases, the rules should be limited to cases brought by a single plaintiff against the Commissioner or Acting Commissioner of Social Security and filed pursuant to 42 U.S.C. § 405(g). Class actions and other multiparty litigation could use any Social Security-specific procedural rules for guidance,

² Krent, Harold J. and Morris, Scott B., *Inconsistency and Angst in District Court Resolution of Social Security Disability Appeals* (November 24, 2014), at fn 69. Chicago-Kent College of Law Research Paper No. 2014-30. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2530158.

³ https://www.ssa.gov/appeals/DataSets/AC04_NCC_Filed_Appealable.html.

but should be free to deviate from them as appropriate. The Subcommittee should consider how cases that include procedural due process arguments or mandamus claims should be handled.

At the Committee meeting, Professor Cooper was asked whether cases under 405(g) were frequently consolidated. As he said, such a situation is rare. However, it is possible: for example, a claimant can file a new application for benefits while the appeal is pending in federal court. If the new claim proceeds through the agency and is also appealed to federal court while the first claim is still pending there, the two claims might be consolidated. A different example is if multiple auxiliary beneficiaries (for example, the spouse and the child of a disabled or deceased worker) each file claims for benefits and appeal their denials to federal court; such claims could potentially be consolidated.

Complaints

NOSSCR members support the use of the term “complaint” rather than “petition for review” or “notice of appeal.”

NOSSCR members support the ACUS recommendation of a simplified form complaint, but do not believe that developing a form requires amending the FRCP. Use of the form should be optional rather than required. A form could be useful in many cases, especially those filed by pro se litigants, but some cases have complex facts or issues. But allowing plaintiffs to include more details in their complaints alerts the Commissioner to potential issues, could identify cases where a motion for voluntary remand is appropriate, and allows for flexibility when the circumstances of a case do not fit the options available in a form complaint.

If the Subcommittee recommends a form complaint be developed for nationwide use, NOSSCR suggests that a working group including attorneys who represent claimants, attorneys from SSA’s Office of General Counsel and the Department of Justice, district court judges, and court staff be convened to design the form. A full discussion of a form complaint would significantly increase the length of these comments; however, among the suggestions NOSSCR members made for items to include in such a form are:

- A request to proceed IFP
- Language for claims about retirement and survivors’ benefits; disabled adult child benefits; and the suspension, termination, or request for repayment of benefits
- Options for cases appealed without written exceptions to the Appeals Council when the case has already been remanded once by a federal court
- Request for EAJA fees

Although a form could be useful in some cases, procedural rules should not be overly prescriptive about the information required in a complaint. Omitting the title or titles under which the claim is brought, failing to name the Commissioner of Social Security as the defendant,⁴ or leaving out a boilerplate statement that the final administrative decision is not

⁴ Any rule referring to the Commissioner should indicate that it applies to an Acting Commissioner as well; SSA has not had a confirmed Commissioner since 2013. Furthermore, some plaintiffs, especially pro se ones, name the Social Security Administration itself as defendant. Claimants may not know that the Commissioner or Acting

supported by substantial evidence or must be reversed for errors of law should not be grounds for dismissal. At most, plaintiffs should be given leave to amend their complaints.

Any rules about complaints should require enough information for the Commissioner to identify the plaintiff and the claim being appealed, while still guarding the plaintiff's privacy as much as possible. The plaintiff's address should not be required in situations where electronic service is available (see "Service" section, *infra*) because there will be no need to contact the plaintiff by mail. In terms of whether the Social Security Number (SSN) should be required to be included on the complaint, NOSSCR members distinguish between cases filed and served electronically and those where the complaint is completed on paper and/or served by mail. In the former situation, NOSSCR members have fewer concerns about including the SSN on complaints, given that only the counsel of record would have access to the complaint. In the latter case, NOSSCR members believe that no part of the SSN should be included on the complaint. The attorney representing the Commissioner can contact the plaintiff (through counsel, when represented) to obtain the SSN.

At the Committee Meeting, there was discussion of whether the plaintiff should be required to submit a copy of the decision being appealed, so that SSA could use it to locate the claim. This should not be a requirement: the plaintiff may have lost or damaged the notice of decision, and the decision will be included in the certified administrative record filed by the Commissioner. However, plaintiffs who wish to submit the decision as an attachment to the complaint should not be prohibited from doing so.

At the Committee Meeting, several committee members questioned whether the proposed rule text stating that a complaint should include "the last four digits of the social security numbers of the plaintiff and the person on whose behalf—or on whose wage record—the plaintiff brings the action" could be reworded. The concept of "on whose behalf" is distinct from "on whose wage record." A parent or guardian may bring suit on behalf of a child or an adult who lacks competency to bring his or her own suit; a personal representative may bring suit on behalf of the estate of a claimant who is now deceased. This is a different concept than the wage record: a spouse, parent, child, or other person who relied on the income of a worker who is now disabled, retired, or deceased may apply for benefits on the wage record of the worker and may appeal the denial of such benefits. In some situations, both concepts may apply: for example, a parent may file suit on behalf of a child, on the wage record of the child's other parent. If the procedural rules dictate that a complaint should include information about "on whose behalf" and "on whose wage record" the two concepts should not be conflated. Furthermore, while the SSN of the person on whose wage record a claim is filed (often, but not always, the plaintiff) may be necessary for SSA to locate the file, SSA should not need and the Subcommittee should not suggest complaints include the SSNs of the plaintiff when his or her wage record is not at issue. For example, if an attorney working as personal representative files suit on behalf of an estate, the personal representative's SSN should be irrelevant.

Service

Commissioner is the proper defendant for suits under 405(g), or they may be unsure of who is leading the Social Security Administration.

NOSSCR members are generally supportive of removing the need for a summons to be issued and of allowing filing of a complaint to fulfill service requirements. However, if this is to become a uniform national rule, it should include an explicit statement that the FRCP's other service rules are waived if CM/ECF is used for this purpose.

NOSSCR takes no position on whether the appropriate recipient of electronic service would be the Commissioner or another person or office the Commissioner authorizes to accept service, such as SSA's regional offices or Assistant United States Attorneys serving each district.

Answers

NOSSCR members support a rule allowing the Commissioner to submit the certified administrative record and any affirmative defenses as part of an answer. But the Commissioner should be required to respond to all claims and allegations in the complaint as well. If a nationwide form complaint is designed (see "Complaints" section, *supra*) it may simplify the Commissioner's process of responding to such allegations. The Commissioner can also use general denials to simplify the process of writing an answer. NOSSCR members feel that if the complaint and answer process is appropriate for other cases adjudicated using the FRCP, it is also appropriate for Social Security cases.

When the Commissioner submits the certified administrative record, it should include not just what is sometimes called the "transcript" but the full record, including evidence proffered to the Appeals Council, evidence excluded under the "five-day" rule, documents in the C section of the file that are not included in exhibits, and items in the "Case Documents" section of the electronic file that were not exhibited. The issue of whether SSA's refusal to consider evidence was well-founded is raised in many Social Security cases and a complete certified administrative record is required for the court to accurately rule on it.

Although NOSSCR members are generally supportive of the idea that a motion for voluntary remand can be made at any time during a case, they believe that the certified administrative record should be filed with such a motion if the record has not been filed already.⁵ This rule, along with a requirement that the Commissioner provide notice before filing a motion to remand, will ensure that claimants have the information and opportunity to consent to voluntary remands when it is in the claimant's interest to do so.

Discovery

Few cases filed pursuant to 42 U.S.C. § 405(g) require discovery. However, any special procedural rules should still allow discovery when the judge believes it is appropriate. In addition to important class actions on Social Security matters where discovery was necessary, cases that could involve discovery include those alleging ALJ bias, or cases where claimants believe that the administrative record filed by the Commissioner is incomplete (for example, where the Commissioner excluded evidence based on its interpretation of its "five-day rule" and

⁵ The one exception is when the Commissioner is filing a Sentence 6 motion to remand the case because the certified administrative record cannot be found. In such cases it would obviously be impossible for the Commissioner to file the record with the motion.

the claimant argues the evidence was timely filed and should have been considered). As the Subcommittee discussed in its April 24, 2018 conference call, there are circumstances where discovery might be appropriate and the rules should not bar it.

Briefs

NOSSCR members oppose page or word limits on briefs. As Joshua Gardner of the Department of Justice noted during the Committee Meeting, it would be unusual for the FRCP to prescribe page limits. Social Security cases may involve several different arguments and a certified administrative record that can be thousands of pages long. The Commissioner has the opportunity to argue via citation to Administrative Law Judge and Appeals Council decisions, while the claimant requires space to explain why these decisions were not supported by substantial evidence or included errors of law.

Similarly, NOSSCR opposes amending the FRCP to dictate fonts, margins, or other stylistic concerns only in Social Security cases.

NOSSCR members believe that parties should be required to file motions along with their briefs. As FRCP 7 notes, “A request for a court order must be made by motion”. If this rule is important for alerting a court to the need to issue an order in other district court cases it is important for the adjudication of Social Security cases as well. NOSSCR members do not find the practice of drafting motions overly taxing; however, the Subcommittee could convene a working group (similar to or the same as the one discussed in the “Complaint” section *supra*) to develop a form motion that litigants could choose to use. Developing such a form would not require amending the FRCP.

NOSSCR supports the plaintiff’s right to submit a reply brief. Providing the opportunity for a reply brief allows the plaintiff the opportunity to inform the court about law or facts, address any post hoc rationalizations suggested by the Commissioner, and create a full record judges can use to issue accurate decisions.

NOSSCR members recommend that if the Subcommittee chooses to impose deadlines for the submission of plaintiff’s motion for relief and brief, defendant’s response brief, and plaintiff’s reply brief, the deadlines should be 60, 60, and 21 days, respectively. Shorter deadlines will merely result in the court receiving numerous requests for additional time. Some NOSSCR members support a practice of automatic extensions being available to litigants, though they differ on whether one or two such extensions are appropriate; others recommend that automatic extensions only be allowed when both parties consent, or that court clerks be allowed to grant a first extension.

Fees

NOSSCR supports the Subcommittee’s consensus, as described in the notes from its October 1, 2018 conference call, not to create procedural rules regarding 406(b) fees. It would be challenging for the Subcommittee to craft procedural rules that would be practicable nationwide. As the notes from the Subcommittee’s August 17, 2018 conference call state, the complicated

timing of fee award motions “is a mess, but it originates primarily outside the Civil Rules. Attempts to clean it up would be difficult and might make matters worse.”

Representative fees are a substantively complex area of the law, with considerable variation across circuits; the Supreme Court is currently considering *Culbertson v. Berryhill*, a case involving a circuit split on a substantive issue regarding 406(b) fees. In a January 2018 survey about the Subcommittee’s previous discussion draft rules, dozens of NOSSCR members expressed concern about the proposed rule on fees. Claimants and their representatives often do not receive a final notice of award and proving non-receipt can be difficult. The notices are often inaccurate or incomplete: they may fail to include benefits awarded to a claimant’s dependents (known as “auxiliary benefits”) or separate notices are issued when claimants have been awarded benefits under both Title II and Title XVI. The Commissioner often issues corrected notices months or years after federal court litigation has concluded. These challenges are compounded when the claimant had a different representative before the Commissioner than in federal court. The discussion draft’s proposal that attorneys provide information about 406(a) fees is similarly impracticable, especially given that determinations about fees for work in federal court are supposed to be separate from determination of fees for work performed representing an individual before the Commissioner.

The concerns above are a small sample of the negative responses NOSSCR received to the fee rule SSA proposed. Given that the Subcommittee does not seem inclined to pursue rules on fees, we have chosen to go into less detail than would be needed for a full discussion of the proposed rule. If the Subcommittee changes course and begins to consider rules on fees, we ask that you set aside time for a group of NOSSCR staff and members to provide information about fee issues in federal court and a detailed discussion of any proposed rule on the topic.

Conclusion

Federal courts are the guarantors of due process for disability claimants. The current FRCP combined with local rules are an effective way for Social Security litigants to have their cases heard in federal court. There is no need to impose uniform rules for Social Security cases that differ from rules applied in other types of cases. Social Security cases need the same balances between efficiency and accuracy, and between parties, as any other cases adjudicated in federal courts. Although the courts hear thousands of Social Security cases each year, federal court litigation is a once-in-a-lifetime experience for most Social Security claimants whose cases are heard in federal court. Quality federal court adjudication is of the utmost importance to their finances, their health, their families, and their lives.

Thank you again for the opportunity to comment on the Subcommittee’s work. NOSSCR staff are glad to discuss these comments with you and to organize opportunities for you to speak with attorneys who regularly represent Social Security claimants in federal court.

Sincerely,

Barbara Silverstone
Executive Director