



# Due Process Protections in Supplemental Security Income ("SSI") Non-Disability Appeals

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## Presenter - Gerald McIntyre

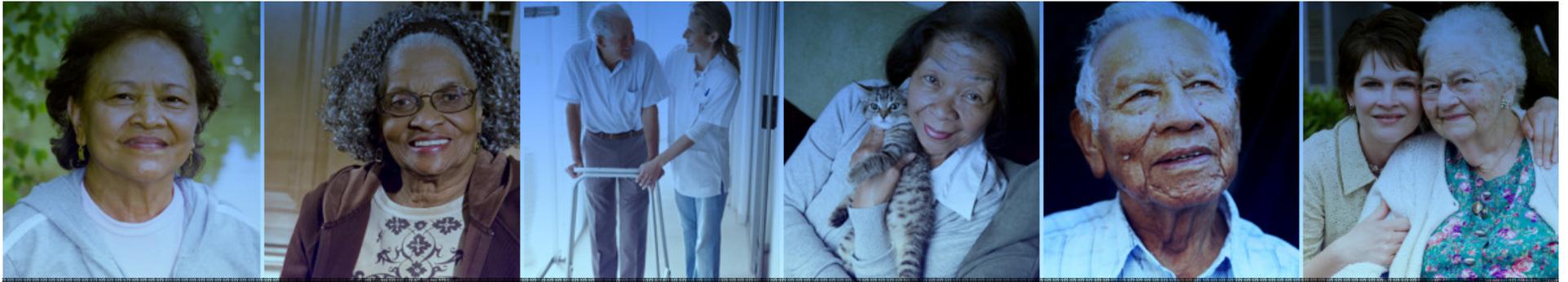
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- Specializes in Social Security and Supplemental Security Income (SSI) issues at the National Senior Citizens Law Center in Los Angeles, CA.
- He began his legal career at Bronx Legal Services in Bronx, NY.
- He also worked as Project Director for the Flood Disaster Relief Project in Corning, NY, as Executive Director of Southern Tier Legal Services in Bath, NY and as Visiting Lecturer at Cornell Law School.

## Presenter – Rachel Frazier

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- A Borchard Foundation legal fellow at the National Senior Citizens Law Center in Washington, DC.
- She graduated in May 2010 with a J.D. from Harvard Law School and a Masters in Public Health from the Harvard School of Public Health.
- While in school, she interned at the Wilmer Hale Legal Services Center and Greater Boston Legal Services. Her work focuses on Social Security and Supplemental Security Income (SSI).



# NSCLC



**National Senior Citizens Law Center**

Protecting the Rights of Low-Income Older Adults



**National Senior Citizens Law Center is the only national organization whose principal mission is to protect the rights of low income older adults. Through advocacy, litigation, and the education and counseling of local advocates, we make the law work to ensure their health, economic security and continued access to the courts.**

# SSA Non-Disability Appeals and Waivers

- This webinar focuses on reconsideration and waiver requests for suspension and reduction actions that occur because of reasons other than disability status.
- Intended audience: attorneys and paralegals who work on non-disability appeals



# Goldberg and the Social Security Administration

“The fundamental requisite of due process of law is the opportunity to be heard.”  
Goldberg v. Kelly, 297 US 254, 267 (1970)



# Goldberg v. Kelly, 397 US 254 (1970)

- Timely and adequate notice of proposed suspension of benefits
- Evidentiary hearing or conference
  - Oral testimony
  - Cross-examination
  - Representation
  - Impartial Decision-maker



# Goldberg v. Kelly, 397 US 254 (1970)

- Determination
  - States reasons and evidence used
  - Limited to evidence at the hearing or conference
- Benefit continuation until determination made at the first level of appeal.



# Goldberg and SSI

“Since [the welfare recipient] lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare establishment.” 397 U.S. 254, 264



# Poll Question # 1

- Does your office provide representation at the reconsideration stage in SSI non-disability appeals? Yes No



# Non-Disability Appeals and Waivers

## A) Notices

## B) Appeals (SSI)

- Benefit continuation
- Scheduling case reviews and conferences
- Conducting case reviews and conferences

## C) Waiver (SSI and Title II)

- Benefit continuation
- Conducting case reviews and conferences



# A) SSI Notice Requirements

- Claimants must receive notice of adverse determinations and decisions. 42 U.S.C. 1383(c)
- Notices must be clear and simple, and explain the reasoning behind adverse determinations and decisions. 20 CFR § 416.1404



# Ford v. Shalala, 87 F.Supp. 2d 163 (E.D.N.Y. 1999)

- Nationwide class action on notices involving SSI financial eligibility
- To comply with due process, notices must:
  - Explain the formula used in benefit calculations;
  - Identify underlying facts upon which the calculation is based;
  - Include a month-by-month break-down of sums; and
  - Inform recipient of the right to a case file review.



# Notice Requirements: Overpayments

- When SSA seeks adjustment or recovery of the overpayment, notification should include
    - Overpayment amount
    - When overpayment occurred (monthly breakdown)
    - Proposed adjustment
    - Right to appeal fact or amount of overpayment
    - Right to request waiver of recovery of overpayment
- 20 CFR 416.558(a)



# SSI Notices: What actually happens...



## B) SSI Administrative Appeals: Timing

- Appeal within 10 plus 5 days from receipt date to get benefit continuation. Else, appeal within 60 plus 5 days. 20 C.F.R. § 416.1336
- Receipt date presumed to be 5 days after the date on the face of notice. 20 CFR § 416.1401



# SSI Administrative Appeals: Timing

- May extend the 10-day and the 60-day deadline to appeal if show good cause for late filing.

20 C.F.R. § 416.1336

- Examples of when good cause may be found:
  - Misled by SSA
  - Needed more time to gather documentation
  - Any cognitive, educational, or linguistic barriers to understanding

20 C.F.R. § 416.1411



# SSI Administrative Appeals: Review Options

- Three reconsideration review options are used for non-disability appeals of suspension or reduction in benefits:
  - 1) case review;
  - 2) informal conference; and
  - 3) formal conference.

20 CFR § 416.1413



# Poll Question #2

(For advocates who file requests for reconsideration):

Do you ever request a formal conference?

Yes No



# Poll Question #3

Which of the three review options do you request most frequently?

- Case Review
- Informal Conference
- Formal Conference



# Impartial Decision-maker

- Under all three review options, the person conducting the reconsideration must not have made the initial determination. 20 CFR § 416.1420



# 1) SSI Case Review

- During the time that SSA is conducting a case review, claimants should have the opportunity to:
  - review the evidence in SSA's files
  - present oral evidence
  - present written evidence.

20 CFR § 416.1413(a)



# 1) SSI Case Review

- SSA's case review for Title XVI should be conducted within five workdays after all the evidence or information is submitted by the claimant.

POMS § SI 04020.040(C)(4).



# Scheduling 2) Informal and 3) Formal Conferences

- **As soon** as the SSA receives a request for a formal or informal conference, SSA should set the time, date, and place for the conference.

20 CFR § 416.1413c(a)

- A notice to the claimant should be sent at **least 10 days before** the conference.

20 CFR § 416.1413c(b)

- Conference should be scheduled within 15 days after request but can be delayed at agency discretion or at claimant's request.

20 CFR 416.1413c(c).



## Poll Question #4

Has it been your general experience that when you request a formal or informal conference, the conference is scheduled for a date within 15 days of your request?    Yes    No



# Poll Question #5

Have you experienced more than three months between the time that you filed the Request for Reconsideration and the time that you were notified of a scheduled conference?    Yes    No



# Conducting 2) Informal and 3) Formal Conferences

- The conference should be held at the **claimant's choice** of a Social Security office or over the telephone, or another location if the claimant shows that it is reasonably necessary.

20 CFR § 416.1413c(d)

- A summary of the conference will become part of the case record.

20 CFR § 416.1413(a), (b)

- The official who conducts the conference will make the determination.

20 CFR § 416.1413(a), (b)



## 2) Informal Conferences

- Parties are given the chance to:
    - Review case files and
    - Present witnesses
- 20 CFR 416.1413(b)



## 3) Formal Conferences

- Parties may
  - review case files;
  - present witnesses;
  - cross-examine adverse witnesses;
  - ask SSA to subpoena adverse witnesses; and
  - ask SSA to subpoena relevant documents.

20 CFR 416.1413(c)



# SSI Reconsideration Determinations

- In making the reconsideration determination, the SSA must consider all the information supplied to the SSA.

20 CFR § 416.1420

- A determination will be based on the preponderance of the evidence.

20 CFR § 416.1420



# SSI Administrative Appeals: What actually happens...



## C) Waiver of Adjustment or Recovery

- Requesting a waiver of adjustment
  - When a waiver is filed without an appeal, there is implied assent that overpayment is correct in fact and in amount. 20 CFR 416.551



# Poll Question #6

Have you ever had a request for reconsideration processed like a waiver request? Yes No



# Interaction Between Appeal and Waiver Requests

When both a Reconsideration and a Waiver case are filed for the same proposed adverse action, SSA personnel are instructed to consider the appeal request first. -SSA Emergency Message (EM-10092 12/22/2010)



# Yamasaki v. Califano, 442 US 682 (1979)

- If an individual requested a waiver of adjustment or recovery on a Title II overpayment, he or she is statutorily entitled to the opportunity for an oral hearing before adjustment or recovery may begin.

42 U.S.C. § 404(b)



# Yamasaki v. Califano, 442 US 682 (1979)

- Hearing
  - Submit oral and written evidence
  - Cross-examine witnesses
  - Representation
  - Impartial hearing officer
- Decision
  - Written decision



# Waiver: Timing

- A waiver may be requested at any time.  
20 CFR 404.506(b); POMS SI 02260.001
- Requesting a waiver halts recovery until a decision on the waiver request is made.  
20 CFR 404.506(b); POMS SI 02260.001
- Request a waiver of adjustment or recovery for Title II benefits within 30 days of notice receipt, and no recoupment action should occur.  
20 C.F.R. 404.506(b)



# Waiver

- If the request cannot be granted based on the written record, SSA must provide for a case file review and a personal conference.

20 CFR 404.506(c); 20 C.F.R. § 416.557

- Notice should be sent to inform the individual of the date, place, and time of the file review and personal conference.

20 CFR 404.506(c); 20 CFR 416.557



# Waiver: File Review

- A file review should be offered at least five days before the personal conference.

20 CFR 404.506(c); 20 CFR 416.557(a)

- At the file review, the individual and the individual's representative have the right to review the claims file, applicable law, and regulations with an SSA representative who is prepared to answer questions.

20 CFR 404.506(d); 20 CFR 416.557(b)



# Waiver: Personal Conference

- A personal conference will occur with the individual's choice of face-to-face, video, or telephone conference.

20 CFR 404.506(c); 20 CFR 416.557(a)

- The decision-maker should not have been involved in the initial determination.

20 CFR 404.506(f)(1); 20 CFR 416.557(d)(1)



# Waiver: Personal Conference

- At the personal conference the individual is given the opportunity to
    - appear personally;
    - testify;
    - cross-examine any witnesses;
    - make arguments;
    - be represented by an attorney or other representative; and
    - submit documents.
- 20 CFR 404.506(e); 20 CFR 416.557(c)



# Waiver: Determination

- After the personal conference, SSA issues a written decision to the individual
  - specifying the findings of fact;
  - stating conclusions in support of the decision to approve or deny waiver; and
  - advising of the individual's right to appeal the decision.

20 CFR 404.506(g); 20 CFR 416.557(e)



# Waiver: What actually happens...



# Why do these problems exist for non-disability determinations?

- Staffing
- Low priority of non-disability appeals
- Lack of serious reporting procedures
- Cut-off of benefits is an automatic process, but logging a request is a manual process.



# What is being done?

- NSCLC is working with advocates across the country to improve the situation.
- With other advocates, we are communicating concerns to SSA and analyzing proposed solutions.
- We are looking for examples and stories to use in this advocacy.



# For Further Information, please contact

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