

[The following comment was submitted by member Alan Morrison]

I will not be present or available by phone for Friday's meeting, but I did want to give you my input.

First, I found the standing order of WDNY not very helpful and I would surely not hold it out as an idea of what we are proposing. Much too short and it fails to answer many questions.

Second, on the preamble, line 17, I would change "who fails to obtain disability benefits" to "who has been denied disability benefits." There must be an actual denial for the case to go to court.

Third, I think it is important to make clear that the differences in local rules etc is significant because these cases are handled almost entirely by lawyers who work for Social Security (who handle cases in various districts) and not by local AUSA's. This might go near the top of page 4, but I am not wedded to that placement.

Fourth, line 71, page 4: I would not say that standing orders issued by federal judges can be issued "with little or no process". How about "with even less process" than local rules?

Fifth, and this is substantive and I think consistent with our discussion last week, I oppose the recommendation on lines 88-89, page 5, that the Judicial Conference (or anyone else) seek legislation confirming the authority to issue Social Security specific rules. I think that the Supreme Court has that authority, but whether it or the Conference wishes Congress to confirm that authority before a rulemaking process begins is a matter for those entities to decide based on their needs for a smooth continuing relation with Congress. Moreover, there are ways short of asking for legislation that Congress can be informed of this plan and, if no negative response is received, the rules process can go forward with little risk of it being overturned down the road. But once a request for legislation is made, the process would come to an immediate halt until Congress acts.

Sixth, line 94 page 5: the use of the word "exchange" suggests a process that the report argues is not effective: simultaneous exchange of briefs, when SS has no idea what the claimant is alleging. I would say something along the lines of this: "a rule requiring the claimant (plaintiff) to file an opening brief, to which the defendant (agency) would respond, with the plaintiff having the right to reply."

Seventh, the WDNY order references 42 USC 1383(c)(3) in addition to 405(g). 1383 deal with procedures for claims under section 1381-82 which appear to deal with aged, blind and disabled individuals who do not have an eligible spouse. The reference subparagraph (c)(3) provides that "The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in [section 405\(g\)](#) of this title to the same extent as the Commissioner's final determinations under [section 405](#) of this title." I call this to your attention b/c it suggests that there may be other provisions that also bring into play section 405(g) and our recommendation should not be read either to include or exclude these other programs, largely because we do not know enough about them. For this reason, I would include

a recommendation that the Judicial Conference in its charge to the Committee that will draft these rules should examine what other federal programs, like disability benefits, should be covered by the same rules, whether 405(g) is involved or not. The point is that whatever rules are issued should be clear to which agency decisions they apply, so that unless the program is specifically covered, court cases under it use the basic Civil Rules.

Last, within section 405(g) there are several procedural rules that I believe we should note and then state that they would have to be taken into account in any rules issued under our recommendation. These include the following:

"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 based."

"The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security,"

The court "may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding[.]"