ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Special Procedural Rules for Social Security Litigation in District Court

Committee on Judicial Review

Draft Recommendation | October 26, 2016

The Administrative Conference recommends that the Judicial Conference of the United States develop special procedural rules for social security litigation commenced in federal court involving claims for benefits arising under Titles II and XVI of the Social Security Act.[1] The Rules Enabling Act[2] delegates authority to the United States Supreme Court (acting initially through the Judicial Conference)[3] to prescribe procedural rules for the lower federal courts.[4] The Act does not require that procedural rules be trans-substantive (that is, be the same for all types of cases), although the Federal Rules of Civil Procedure (Federal Rules) have generally been so drafted. Rule 81 of the Federal Rules excepts certain specialized proceedings from the Rules' general procedural governing scheme.[5] In the case of social security litigation in the federal courts, the extraordinary volume of the litigation, the Federal Rules' failure to account for numerous procedural issues that arise due to the appellate nature of the litigation, and the costs imposed on parties by the various local rules fashioned to fill those procedural gaps warrant an additional set of exceptions.[6]

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[1] 42 U.S.C. § 301 *et seq.*

[2] ~~28 U.S.C. § 2072.~~

[3] ~~The Judicial Conference is led by the Chief Justice of the Supreme Court and composed of the Chief Justice, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit. 28 U.S.C. § 331. It is charged with "carry[ing] on a continuous study of the operation and effect of the general rules of practice and procedure" of the lower federal courts, and recommending to the Supreme Court "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expenses and delay . . . ." *Id.*~~

[4] *See* 28 U.S.C. § 2072(a).

[5] FED. R. CIV. P. 81(a). *See also* FED. R. CIV. P. 71.1–73 ("Special Proceedings").

[6] This recommendation is based on a portion of the extensive report prepared for the Administrative Conference by its independent consultants, Jonah Gelbach of the University of Pennsylvania Law School and David Marcus of the University of Arizona Rogers College of Law. *See* JONAH GELBACH & DAVID MARCUS, A STUDY OF SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS 127-42, 148-59 (July 28, 2016) (report to the Administrative Conference of the United States).

The Social Security Administration (SSA) administers the Social Security Disability Insurance program and the Supplemental Security Income program, two of the largest disability programs in the United States.[7] An individual who fails to obtain disability benefits under either of these programs, after proceeding through SSA's extensive administrative adjudication system, may appeal the agency's decision to a federal district court.[8] In reviewing SSA's decision, the district court's inquiry is based solely on the administrative record developed by the agency.[9]

District courts face exceptional challenges in social security litigation. Although institutionally oriented towards resolving cases of first impression, when reviewing disability decisions the federal district courts act as appellate tribunals. That fact alone does not make these cases unique; appeals of agency actions generally go to district courts unless a statute expressly provides for direct review of an agency's actions by a court of appeals.[10] However, social security appeals comprise approximately seven percent of district courts' dockets, generating substantially more litigation for district courts than any other type of appeal from a federal administrative agency.[11] The high volume of social security cases in federal court is in no small part a result of the enormous magnitude of the social security disability program. The program, which is administered nationally, annually receives millions of applications for benefits.[12] The magnitude of this judicial caseload suggests that a specialized regime in this area could bring about economies of scale that probably could not be achieved in other subject areas.

[7] Office of Policy, *Trends in Social Security and Supplemental Security Income Disability Programs, Overview and Background*, SOC. SEC. ADMIN., https://www.ssa.gov/policy/docs/chartbooks/disability_trends/overview.html (last visited August 5, 2016).

[8] 42 U.S.C. § 405(g).

[9] Frank S. Bloch, Jeffrey S. Lubbers, & Paul R. Verkuil, *Developing a Full and Fair Evidentiary Record in a Nonadversary Setting: Two Proposals for Improving Social Security Disability Adjudications*, 25 CARDOZO L. REV. 1, 35 (2003).

[10] *See* Watts v. Sec. & Exch. Comm'n, 482 F.3d 501, 505 (D.C. Cir. 2007).

[11] The JONAH GELBACH & DAVID MARCUS, A STUDY OF SOCIAL SECURITY LITIGATION IN THE FEDERAL COURTS 9-10 (July 28, 2016) (report to the Administrative Conference of the United States).

[12] *See* OFFICE OF RESEARCH, EVALUATION, & STATISTICS, SOC. SEC. ADMIN., SSI ANNUAL STATISTICAL REPORT, 2014, Table 69, Oct. 2015, at 141. In 2015 alone, claimants filed 2.7 million benefits applications. SOC. SEC. ADMIN., FY 2017 BUDGET OVERVIEW 11 (Feb. 2016). Administrative law judges (ALJs) hear roughly 800,000 disability and old-age and survivor hearings a year. *See* OFFICE OF RESEARCH, EVALUATION, & STATISTICS, SOC. SEC. ADMIN., ANNUAL STATISTICAL SUPPLEMENT TO THE SOCIAL SECURITY BULLETIN, 2015, at 2.81. During the twelve months that ended on September 30, 2014, the federal district courts reviewed 19,146 social security appeals. Table C-2A, U.S. District Courts–Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 4.

The Federal Rules were designed for cases litigated in the first instance, not for those reviewing, on an appellate basis, agency adjudicative decisions. Consequently, the Federal Rules fail to account for a variety of procedural issues that arise when a disability case is appealed to district court. For example, the Rules require the parties to file a complaint and an answer. Because a social security case is in substance an appellate proceeding, the case could more sensibly be initiated through a simple document akin to a notice of appeal or a petition for review. Moreover, although 42 U.S.C. § 405(g) provides that the certified record should be filed as "part of" the government's answer, there is no functional need at that stage for the government to file anything more than the record. In addition, the lack of congruence between the structure of the Rules and the nature of the proceeding has led to uncertainty about the type of motions that litigants should file in order to get their cases resolved on the merits. In some districts, for instance, the agency files the certified transcript of administrative proceedings instead of an answer, whereas other districts require the agency to file an answer.[~~13~~] In still other districts, claimants must file motions for summary judgment to have their case adjudicated on the merits,[14] while such motions are considered "not appropriate" in others.[15]

Social security disability litigation is not the only type of specialized litigation district courts regularly review in an appellate capacity. District courts entertain an equivalent number of habeas corpus petitions,[16] as well as numerous appeals from bankruptcy courts. But habeas and bankruptcy appeals are governed by specially crafted, national rules that address those cases' specific issues.[17] No particularized set of rules, however, accounts for the procedural gaps left by the Federal Rules in social security appeals.

When specialized litigation with unique procedural needs lacks a tailored set of national procedural rules for its governance, districts and even individual judges ~~tend~~ have an incentive to

~~[13] GELBACH & MARCUS, *supra* note 10, at 129.~~

[14] *See, e.g.*, Order Setting Schedule, Donvan-Terris v. Colvin, Civ. No. 14-5125 (E.D. Wash., April 8, 2015).

[15] *See, e.g.*, S.D. Iowa Local R. 56(i).

[16] During the twelve months that ended on September 30, 2014, the district courts received 19,185 "general" habeas corpus petitions and 19,146 social security appeals. Table C-2A, U.S. District Courts–Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 3-4.

[17] *See* R. GOVERNING § 2254 CASES U.S. DIST. CTS. 1–12; FED. R. BANKR. P. 1001–9037. ~~The Federal Rules merely provide a baseline of procedural governance in bankruptcy and habeas proceedings. FED. R. CIV. P. 81(a)(2) (bankruptcy proceedings); FED. R. CIV. P. 81(a)(4) (habeas proceedings).~~

craft their own.[18] This is precisely what has happened with social security litigation.[19] The Federal Rules do exempt disability cases from the initial disclosure requirements of Rule 26,[20] and limit electronic access of nonparties to filings in social security cases,[21] but, otherwise, they include no specialized procedures. As a result, numerous local rules, district-wide orders, and individual case management orders, addressing a multitude of issues at every stage in a social security case, have proliferated.[22] Whether the agency must answer a complaint, what sort of merits briefs the parties are required to file, whether oral arguments are held, and the answers to a host of other questions differ considerably from district to district and, sometimes, judge to judge.

Many of the local rules and orders fashioned to fill the procedural gaps left by the Federal Rules generate inefficiencies and impose costs on claimants and SSA. For example, simultaneous briefing—the practice in some districts that requires both parties to file cross motions for resolution of the merits and to respond to each other's briefs in simultaneously filed responses—effectively doubles the number of briefs the parties must file.[23] Some judges employ a related practice whereby the *agency* is required to file the opening brief.[24] Because social security complaints are generally form complaints containing little specificity, courts that employ the practice of "affirmative briefing" essentially reverse the positions of the parties, leaving to the agency the task of defining the issues on appeal.[25] The questionable nature of some of these local variations may be attributable in part to the fact that they can be imposed without observance of procedures that would assure sufficient deliberation and opportunities for public feedback. Proposed amendments to the Federal Rules must go through several steps, each of which requires public input. So-called "general orders" and judge-specific orders, on the other hand, can be issued by a district or individual judge with very little process. [26]

[18] *See, e.g.*, Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L. J. 63, 86-92 (2015) (discussing the proliferation of local and individual rules for patent litigation).
[19] Morton Denlow, *Substantial Evidence Review in Social Security Cases as an Issue of Fact*, 2 FED. CTS. L. REV. 99, 106-07 (2007) (providing examples of procedural divergences among districts in social security litigation).
[20] FED. R. CIV. P. 26(a)(1)(B)(i).
[21] FED. R. CIV. P. 26(a)(1)(B)(i); FED. R. CIV. P. 5.2(c).
[22] *See* Denlow, *supra* note 18, at 106-07.
[23] *See, e.g.*, Order, McCord v. Colvin, Civ. No. 14-208 (S.D. Tex. June 9, 2014).
[24] *See, e.g.*, Briefing Schedule, Barnes v. Colvin, Civ. No 14-482 (S.D. Tex. Sept. 3, 2014), at 1-2l; Standing Order Gov. Dev. of Soc. Sec. Cases Assigned to Judge Conrad (W.D. Jan. 1, 2005).
[25] Hamilton v. Dept. of Health & Human Servs., 961 F.2d 1495, 1501 (10th Cir. 1992) (Kane, J., concurring).
[26] GELBACH & MARCUS, *supra* note 10, at 135-36.

The disability program is a national program that is intended to be administered in a uniform fashion; yet, procedural localism raises the possibility that like cases will not be treated alike. Burdensome procedures adopted by some districts or judges, such as simultaneous briefing schedules, can increase delays and litigation costs for some claimants, while leaving other similarly situated claimants free from bearing those costs. Further, many of the attorneys who litigate social security cases—agency lawyers and claimants' representatives alike—maintain regional or even national practices. Localism, however, makes it difficult for those lawyers to economize their resources by, for instance, forcing them to refashion even successful arguments in order to fit several different courts' unique page-limits or formatting requirements.

Procedural variation can thus impose a substantial burden on SSA as it attempts to administer a national program, and can result in arbitrary delays and uneven costs for disability claimants appealing benefit denials. SSA and claimants would benefit from a set of uniform rules that recognize the appellate nature of disability cases. Indeed, several districts already treat disability cases as appeals.[27] Many of these districts provide, for example, for the use of merits briefs instead of motions or for the filing of the certified administrative record in lieu of an answer.

The Supreme Court has recognized that the exercise of rulemaking power to craft specialized procedural rules for particular areas of litigation can be appropriate under the Rules Enabling Act.[28] Yet, in recommending the creation of special procedural rules for social security disability and related litigation, the Administrative Conference is cognizant that the Judicial Conference has in the past been hesitant about incorporating substance-specific provisions into the Federal Rules. That hesitation has been driven, at least in part, by reluctance to recommend changes that would give rise to the appearance, or even the reality, of using the Federal Rules to advance substantive ends, such as heightened pleading standards that would disfavor litigants in particular subject areas.[29] The proposals offered herein have very different purposes. Indeed, the

[27] *See, e.g.*, Standing Order, *In re* Actions Seek. Rev. of the Comm'r of Soc. Sec.'s Final Decs. Denying Soc. Sec. Benefits (W.D. NY Sept. 5, 2013); General Order 05-15, *In re* Soc. Sec. Cases, Actions Seeking Rev. of the Comm'r of Soc. Sec.'s Final Dec. Denying an App. for Benefits (W.D. Wash. June 1, 2015); Standing Order for Disp. of Soc. Sec. App. (W.D. La. Sept. 2, 1994); E.D. Mo. L.R. 9.02; D. Ariz. LRCiv 16.1; N.D. Oh. LR 16.3.1.

[28] *See* Harris v. Nelson, 394 U.S. 286, 300 n.7 (1969) (inviting the Advisory Committee on Civil Rules to draft a set of procedural rules for habeas corpus litigation).

[29] *See* David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 413-15 (2010).

Administrative Conference believes that rules promulgated pursuant to this recommendation should not favor one class of litigants over another or otherwise bear on substantive rights. Instead, this recommendation endorses the adoption of rules that would promote efficiency and uniformity in the procedural management of social security disability and related litigation, to the benefit of both claimants and the agency.[30] Such a commitment to neutrality would also serve to dampen any apprehensions that the proposed rules would violate the Rules Enabling Act's proscription of rules that would "abridge, enlarge, or modify any substantive right."[31] Rules developed consistently with these criteria could potentially encompass many types of rules, including rules setting appropriate deadlines for filing petitions for attorneys' fees,[32] or rules ~~concerning~~ regarding judicial extension practices,~~.~~[33] or perhaps rules authorizing the use of telephone, videoconference, or other telecommunication technologies. In developing such rules, the Judicial Conference may wish to consult~~, among other sources,~~ existing appellate procedural schemes, such as the Federal Rules of Appellate Procedure and the Rules of Practice and Procedure of the United States Court of Appeals for Veterans Claims.[34]

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[30] This recommendation is the latest in a line of Conference recommendations focused on improving the procedures used in social security cases. *See, e.g.*, Recommendation 78-2, *Procedures for Determining Social Security Disability Claims*, 43 Fed. Reg. 27,508 (June 26, 1978)~~, 1 C.F.R. § 305.78-2 (1993) (recommending various improvements to the agency's hearing and appeals processes, including the continued use of ALJs and development of the evidentiary record at the prehearing stage when feasible and useful)~~; Recommendation 87-7, *A New Role for the Social Security Appeals Council*, 52 Fed. Reg. 49,143 (Dec. 30, 1987)~~, 1 C.F.R. § 305.87-7 (1993) (recommending that the agency lessen the case load of its Appeals Council and restructure the tribunal so that it contributes more significantly to agency policymaking)~~; Recommendation 90-4, *Social Security Disability Program Appeals Process: Supplementary Recommendation*, 55 Fed. Reg. 34,213 (June 8, 1990)~~, 1 C.F.R. § 305.90-4 (1993) (recommending an array of improvements to the administrative appeals process)~~.

[31] 28 U.S.C. § 2072(b).

~~[32] Attorneys representing prevailing claimants may obtain reasonable attorneys' fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, as well as under 42 U.S.C. § 406(b). For an award of fees under EAJA, attorneys must file an application within thirty days of the entry of the court's judgment. 28 U.S.C. § 2412(d)(1)(B). Section 406(b), however, does not stipulate a deadline for filing fee applications under that statute. In the absence of a specified timeframe, courts have specified various ones of their own. *See* Matthew Albansese, Essay, *Reasonably Untimely: The Difficulty of Knowing When to File a Claim for Attorney's Fee's in Social Security Disability Cases, and an Administrative Solution*, 78 GEO. WASH. L. REV. 1014, 1017-26 (2010).~~

~~[33] *See* GELBACH & MARCUS, *supra* note 10, at 134 (discussing the impacts on parties and lawyers by idiosyncratic extension practices). The Judicial Conference may also wish to consider drafting rules authorizing the use of telephone, videoconference, or other telecommunication technologies in disability and related social security litigation. The Conference has issued recommendations on the use of such technologies in the administrative hearings context. *See* Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011); Recommendation 2014-7, *Best Practices for Using Video Teleconferencing for Hearings*, 79 Fed. Reg. 75,119 (Dec. 17, 2014).~~

~~[34] *E.g.*, FEDERAL RULES OF APPELLATE PROCEDURE; UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS RULES OF PRACTICE AND PROCEDURE.~~

The Administrative Conference believes that a special set of procedural rules could bring much needed uniformity to social security disability and related litigation. In routine cases, page limits, deadlines, briefing schedules, and other procedural requirements must be uniform to ensure effective procedural management. At the same time, such rules should allow latitude for cases that do not fit within the ordinary mold, such as class action disability lawsuits,[35] in which, for example, the usual page limits and deadlines would be too confining. More generally, the new rules should be drafted to displace the Federal Rules *only* to the extent that the distinctive nature of social security litigation justifies such separate treatment.[36] In this way, the drafters can avoid the promulgation of a special procedural regime that sacrifices flexibility and efficiency for uniformity in certain cases.

The research that served as the foundation for this report focused on social security disability litigation commenced under 42 U.S.C. § 405(g). Section 405(g) also authorizes district court review of SSA old age and survivors benefits decisions, as well as actions related to benefits. Because such non-disability appeals do not differ procedurally from disability cases in any meaningful way,[37] it is the Conference's belief that this recommendation should apply to all social security cases commenced in federal court arising under Titles II and XVI of the Social Security Act.

RECOMMENDATION

1. The Judicial Conference, in consultation with Congress as appropriate, should develop for the Supreme Court's consideration a uniform set of procedural rules for social security cases commenced in federal court involving claims for benefits arising under Titles II and XVI of the Social Security Act.
2. Examples of rules that should be promulgated include:

[35] ~~*See, e.g.*, Califano v. Yamasaki, 442 U.S. 682 (1979) (holding that class certification is permissible in Social Security Act litigation); *see also* Sullivan v. Zebley, 492 U.S. 521 (1990).~~

[36] *See* FED. R. CIV. P. 81(a)(6) ("[The Federal Rules], to the extent applicable, govern proceedings under [certain designated] laws, except as those laws provide other procedures.").

[37] Further, they only constitute about four percent of total social security cases appealed to district courts annually. *See* Table C-2A, U.S. District Courts–Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 4.

a. a rule requiring the claimant to file a notice of appeal, in accordance with the requirements of 42 U.S.C. § 405(g), instead of a complaint;

b. a rule requiring the agency to file a certified copy of the administrative record as the main component of its answer;

c. a rule requiring the claimant to file an opening merits brief to which the agency would respond, and for the filing of appropriate subsequent responses consistent with 42 U.S.C. § 405(g) and the appellate nature of the proceedings;

d. a rule setting appropriate deadlines and page limits; and

e. other rules that may promote efficiency and uniformity in social security disability and related litigation, without favoring one class of litigants over another or impacting substantive rights.