ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Social Security Administration Federal Courts Analysis

Committee on Judicial Review

Proposed Recommendation | December 13, 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 delegates authority to the United States Supreme Court (acting initially through the Judicial Conference) to prescribe procedural rules for the lower federal courts.[2] 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.[3] In the case of social security litigation in the federal courts, several factors warrant an additional set of exceptions. These factors include the extraordinary volume of social security 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.[4]

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[1] 42 U.S.C. § 301 *et seq.* (2012).

[2] *See* 28 U.S.C. § 2072(a) (2012).

[3] FED. R. CIV. P. 81(a); *see also* FED. R. CIV. P. 71.1–73 ("Special Proceedings").

[4] 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 Admin. Conf. of the U.S.).

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. 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.[5] In reviewing SSA's decision, the district court's inquiry is typically based on the administrative record developed by the agency.

District courts face exceptional challenges in social security litigation. Although institutionally oriented towards resolving cases in which they serve as the initial adjudicators, the federal district courts act as appellate tribunals in their review of disability decisions. 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.[6] 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. 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. The magnitude of this judicial caseload suggests that a specialized approach in this area could bring about economies of scale that probably could not be achieved in other subject areas.

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

[5] 42 U.S.C. § 405(g) (2012).

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

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. In still other districts, claimants must file motions for summary judgment to have their case adjudicated on the merits,[7] whereas such motions are considered "not appropriate" in others.[8]

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,[9] 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.[10] 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 have an incentive to craft their own. This is precisely what has happened with social security litigation. The Federal Rules do exempt disability cases from the initial disclosure requirements of Rule 26, and limit electronic access of nonparties to filings in social security cases,[11] 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

[7] *See, e.g.*, Order Setting Schedule, Donvan-Terris v. Colvin, Civ. No. 14-5125 (E.D. Wash. April 8, 2015); E.D. Mo. L.R. 56-9.02.

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

[9] 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.

[10] *See* R. GOVERNING § 2254 CASES U.S. DIST. CTS. 1–12; FED. R. BANKR. P. 1001–9037.

[11] FED. R. CIV. P. 26(a)(1)(B)(i); FED. R. CIV. P. 5.2(c).

proliferated. 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. Such local variations have not burgeoned in other subject areas in which district courts serve as appellate tribunals; this fact reflects the district courts' own recognition that social security cases pose distinctive challenges.

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. Some judges employ a related practice whereby the *agency* is required to file the opening brief.[12] Because social security complaints are generally form complaints containing little specificity, courts that employ this practice (known as "affirmative briefing") essentially reverse the positions of the parties, leaving to the agency the task of defining the issues on appeal. 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.

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

[12] *See, e.g.*, Standing Order Gov. Dev. of Soc. Sec. Cases Assigned to Judge Conrad (W.D. Va. Jan. 1, 2005); Briefing Schedule, Barnes v. Colvin, Civ. No 14-482 (S.D. Tex. Sept. 3, 2014), at 1–2.

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.[13] 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.[14] 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 amending the Federal Rules to incorporate provisions pertaining to particular substantive areas of the law. 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. The proposals offered herein have very different purposes. Indeed, the 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

[13] *See, e.g.*, 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, *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); Standing Order for Disp. of Soc. Sec. App. (W.D. La. Sept. 2, 1994); E.D. Mo. L.R. 9.02; D. Ariz. L.R. 16.1; N.D. Oh. L.R. 16.3.1.

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

security disability and related litigation, to the benefit of both claimants and the agency.[15] 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."[16] Rules consistent with these criteria could potentially address a variety of topics, including setting appropriate deadlines for filing petitions for attorneys' fees, or establishing judicial extension practices, or perhaps authorizing the use of telephone, videoconference, or other telecommunication technologies. In developing such rules, the Judicial Conference may wish to consult 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.

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 should be uniform to ensure effective procedural management. At the same time, such rules should not apply to cases that do not fit within the ordinary mold, such as class action disability lawsuits, 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.[17] In this way, the drafters can avoid the promulgation of a special procedural regime that sacrifices flexibility and efficiency for uniformity in certain cases.

[15] 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 90-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed. Reg. 34,213 (June 8, 1990); Recommendation 87-7, A New Role for the Social Security Appeals Council, 52 Fed. Reg. 49,143 (Dec. 30, 1987); Recommendation 78-2, Procedures for Determining Social Security Disability Claims, 43 Fed. Reg. 27,508 (June 26, 1978).

[16] 28 U.S.C. § 2072(b) (2012).

[17] *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.").

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 other actions related to benefits. Because such non-disability appeals do not differ procedurally from disability cases in any meaningful way,[18] it is the Conference's belief that this recommendation should apply to all non-class action 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 that involve claims for benefits arising under Titles II and XVI of the Social Security Act. Class action lawsuits should be excluded from the scope of such rules.
2. Examples of rules that should be promulgated include:
    a. A rule providing that a claimant's complaint filed under 42 U.S.C. § 405(g) be substantially equivalent to a notice of appeal;
    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 or rules requiring the claimant to file an opening merits brief to which the agency would respond, and providing 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 or rules setting deadlines and page limits as appropriate; and

[18] 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.

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.