



## EAJA Payee Discussion Board

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### [How do attorneys get paid in Social Security cases?](#)

 by [cmartin](#) on Wed Oct 31, 2007 8:22 pm

Attorneys fees in Social Security cases is an extremely complex subject, one for which there is no comprehensive source of information. It would take at least 600 pages to do it justice, but the market would be too small to justify anyone writing such a resource. I have the leading treatise on court-awarded attorneys fees, and it has only a few dozen pages on Social Security fees. Since some visitors may not know the "big picture," I thought it might be helpful to give a summary of attorneys fees in Social Security cases.

The Social Security Act regulates attorney's fees more than any other law I know. It is a crime for anyone to charge a fee which has not been approved by either the Social Security Administration or a court. There are separate provisions for representation before the Social Security Administration and before the court.

#### **Administrative fees**

Administrative fees must be approved by the Social Security Administration, through one of two processes.

- 1). The fee agreement process. The fee agreement process will automatically approve fees if there is a fee agreement which provides for fees not greater than the lesser of 25% of the past-due benefits or \$5,300.
- 2). The fee petition process. The other process requires a petition with detailed time records, which must be reviewed and evaluated by a Social Security Administration Administrative Law Judge, or some other official. This "petition" process does not have a limit on the amount except that it must be reasonable.

### **Court fees**

Court fees must be approved by a federal court. They are limited to a maximum of 25% of the past-due benefits, and the court must determine that they are reasonable.

The Administrative and Court fees are both paid out of a 25% withholding from the claimant's past-due benefit award. Of course the implication is that only claimants who win, and are awarded past-due benefits, will have anything to withhold 25% from. Benefits must be awarded before court fees can be approved. In the vast majority of cases, the benefits will be awarded years after the court proceedings are completed, if ever. So in almost all Social Security cases, there is no way fees could be charged until long after all court proceedings are completed, and maybe not even then.

### **Equal Access to Justice Act fees**

There is also an independent law called the Equal Access to Justice Act which provides for courts to award fees to most people and small companies if they win litigation against unreasonable actions of the federal government. While these fees do not come out of the claimant's past-due benefits, and are not guaranteed even when a claimant wins. If EAJA fees are awarded, the Social Security Act has a special provision that the claimant is entitled to a refund of the lower fee if there is both a court fee from past-due benefits and an EAJA fee. EAJA fees are limited to no more than \$125/hour, adjusted for inflation, or market rate if lower (my hourly rate is higher).

In cases where a claimant obtains a right to a new hearing by winning a court appeal, but is not awarded benefits in the administrative proceedings, the EAJA fee is the only fee available. This can happen if a claimant for Supplemental Security Income benefits under the Social Security Act dies before benefits are awarded, which happens not infrequently, and for many other reasons. In these cases, it would be a crime for an attorney to charge the client any fee. So if the attorney is to receive any fee, it would have to be from the Government through the Equal Access to Justice Act.

There are a relatively small number of attorneys nationwide whose practice is almost exclusively devoted to federal court appeals of Social Security claims. They are paid initially through EAJA fees. Unless benefits are eventually awarded, they will get no other fee. They cannot charge the client any fees, because the Social Security Act makes it a crime to do so. If benefits are eventually awarded, they may seek fees up to 25% of the past-due benefits. The client gets a refund of the lower of the Social Security Act fee or the EAJA fee, if there are any Social Security Act fees. Because the fees are contingent, some cases lead to no fees, some very small fees, some very large, with most in-between.

The final result of the EAJA-Payee dispute discussed on this Board is actively being litigated. The Government is arguing that the EAJA fees "belong" to the claimant, even though Congress created the EAJA to pay attorney's fees, the Court ordered payment of attorneys fees, and the attorney cannot charge the client any fees, so there is no other way for the attorney to be paid than to receive the EAJA fee. We believe the right result would be for the fees to be paid as the EAJA intended before any attempt to recover federally-collectable debts.

Overall, this Government initiative hurts claimants more than the attorneys who represent them. Attorneys who specialize in Social Security appeals get most of their income from the claimant's past-due benefits, so the EAJA fees benefit the claimant by the refund they receive. So the claimants are getting hurt, not the attorneys. Social Security claimants also are going to face greater difficulty obtaining an attorney for a court appeal if the Government wins this battle, though.

Most federal court appeals are filed by attorneys who represent claimants at administrative hearings, not by attorneys who specialize in court appeals. Already heard that some attorneys who don't specialize in court appeals have decided they no longer willing to do court appeals because they may not get EAJA fees when they are earned. Their clients may have difficulty getting another attorney. Most attorneys will not appeal cases to federal court which they did not handle at the hearing level. There are not enough specialists in court appeals to handle them all, so some of these people will not appeal their wrongful denials.

While the EAJA-Payee issue is a major problem for disabled people who may have trouble finding an attorney to appeal their cases, it is a complex problem that is difficult to communicate with a "sound bite." On the surface, it seems like it's all about whether attorneys get paid. The press and general public have little interest in problems that affect only lawyers, and they don't have the experience or detailed knowledge to see that the poor and disabled are the ones most harmed by the Government's new policies. We don't expect any political solution, and certainly not before the circuit courts have spoken. Probably not even then.

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