



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
AO-2014-001

SUBJECT: Collection of Attorneys' Fees in Social Security Disability Cases

DATE: January 8, 2014

QUESTION PRESENTED

Whether an LSC recipient may collect attorneys' fees from statutory benefits awards in Supplemental Security Income (SSI) and Social Security Disability Insurance (SSDI) cases.

BRIEF ANSWER

Yes. LSC does not prohibit collecting attorneys' fees from statutory benefits awards in SSI/SSDI cases handled by LSC recipients with LSC funds or with non-LSC funds. This was not always the case. Prior to 1996, LSC policy prohibited collecting SSI/SSDI fees in LSC-funded cases and some non-LSC funded cases. LSC suspended that policy in 1996. From 1996 through 2010, Congress and LSC prohibited LSC recipients from collecting statutory attorneys' fees in all cases, including SSI/SSDI cases. Congress and LSC lifted that prohibition in 2010. Thereafter, LSC has had no prohibition on collecting fees from benefits awards in SSI/SSDI cases.

ANALYSIS

Current Policy

LSC does not prohibit LSC recipients from collecting attorneys' fees from benefits awards in SSI/SSDI cases.¹ The only LSC regulation regarding fee-generating cases is 45 C.F.R. Part 1609, which does not prohibit recipients from claiming or collecting attorneys' fees. Rather, Part 1609 provides that "a recipient may not use [LSC] funds to provide legal assistance in a fee-generating case unless" the recipient has first taken steps to determine that private attorneys are not available to accept the case. 45 C.F.R. § 1609.3. This restriction also applies to recipients' provision of legal assistance using private funds and some public and tribal funds. *See* 45 C.F.R. §§ 1610.2–4 (discussing when different LSC restrictions apply to the use of different categories of non-LSC funds). Part 1609 does not apply to public or tribal funds that were provided for fee-generating cases. *Id.*

¹ Sections 206(b) and 1631(d)(2) of the Social Security Act authorize a Federal court to award an attorney a reasonable fee for services in SSI/SSDI cases, which may not exceed 25 percent of the past-due benefits. 42 U.S.C. §§ 406(b) and 1383(d)(2).

However, the procedural requirements in Part 1609 do not apply to SSI/SSDI cases, which are explicitly exempted from the Part 1609 requirements by 45 C.F.R. § 1609.3(b)(1):

(b) A recipient may provide legal assistance in a fee-generating case without first attempting to refer the case pursuant to paragraph (a) of this section only when:

(1) An eligible client is seeking benefits under Subchapter II of the Social Security Act, 42 U.S.C. 401 *et seq.*, as amended, Federal Old Age, Survivors, and Disability Insurance Benefits; or Subchapter XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.*, as amended, Supplemental Security Income for Aged, Blind, and Disabled

LSC Policy Prior to 1997

Prior to 1997, LSC had a longstanding policy, memorialized in numerous opinion letters from LSC's Office of General Counsel, that prohibited the collection of statutory attorneys' fees from benefits awards in SSI/SSDI cases that were LSC funded.² LSC suspended that policy in 1996. *See December 14, 1996, Transcript of the LSC Board of Directors Operations and Regulations Committee*, at 191. To be clear, there is currently no LSC regulation prohibiting attorneys' fees in SSI/SSDI cases, nor any LSC "policy" creating such a prohibition. All prior statements of that policy are hereby superseded.³

Statutory and Regulatory Attorneys' Fees Restrictions 1996–2009

From 1996 to 2009, Congress prohibited LSC recipients from claiming, collecting, or retaining statutory attorneys' fees. *Omnibus Consolidated Rescissions and Appropriations Act of 1996*, Pub. L. 104-134, Title V, § 504(a)(13), 110 Stat. 1321, 1321-55 (1996).⁴ LSC implemented that restriction through adoption of 45 C.F.R. Part 1642 and conforming changes to 45 C.F.R. Part 1609. 62 Fed. Reg. 19398 (April 21, 1997) (Part 1609—Final Rule) and 62 Fed.

² See Office of General Counsel (OGC) Letter to the Pine Tree Legal Assistance Association (April 30, 1981); OGC Letter to the Legal Aid Society (Sept. 4, 1981); OGC Letter to Judicare of Mississippi, Inc. (June 10, 1985); OGC Letter to the Office of Policy & Procedures, HHS (Oct. 11, 1985); OGC Letter to Legal Services of Middle Tennessee (Dec. 9, 1985). OGC Letter to the Legal Aid Bureau of Southwestern Michigan, Inc. (July 23, 1993). OGC Letter to Northwest Minnesota Legal Services (March 25, 1987) (applying the prohibition to Part 1614 PAI cases); OGC letter re Senior Legal Services of the Legal Aid Society of Marin County (March 24, 1987); OGC Letter to Pikes Peak Legal Services (Aug. 27, 1993).

³ See OGC letters referenced in footnote 2, *supra*.

⁴ The LSC FY 1996 appropriation restrictions are incorporated in the LSC FY 1998 appropriation, which has been incorporated in every subsequent LSC appropriation. *E.g., Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998*, Pub. L. 105-119, Title V, 111 Stat. 2440, 2510 (1997), incorporated by reference in *Consolidated and Further Continuing Appropriations Act, 2013*, Pub. L. 113-6, Div. B, Title IV, 127 Stat. 198, 268 (2013).

Reg. 25862 (May 12, 1997) (Part 1642—Final Rule). Part 1642 prohibited recipients from claiming or collecting fees from benefits awards in SSI/SSDI cases. *Id.* at 25863 (discussing Congressional intent to prohibit fees in those cases).

Congress rescinded the statutory prohibition on December 16, 2009, in LSC’s Fiscal Year 2010 Appropriation. *Consolidated Appropriations Act, 2010*, Pub. L. 111-117, Div. B, Title V, § 533, 123 Stat. 3034, 3157 (2009). In the conference report, Congress stated that rescinding the prohibition would “level the playing field between legal aid attorneys and their counterparts in the private sector and provide a potentially crucial source of additional revenue to legal aid providers in a year in which State and private funding sources are decreasing.” H.R. Rep. No. 111-366, at 769 (2009) (Conf. Rep.). In light of this change, LSC repealed Part 1642 and adopted conforming amendments to Part 1609. 75 Fed. Reg. 21506 (April 26, 2010) (Parts 1609 and 1642—Final Rules).

CONCLUSION

LSC recipients may collect attorneys’ fees from statutory benefit awards in SSI/SSDI cases funded with LSC or non-LSC funds. No statutory or regulatory provision prohibits the collection of such fees.

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