

From: Patty Barksdale
To: RulesCommittee Secretary
Cc: Julie Wilson
Subject: Suggestion for Social Security Supplement Rules
Date: Monday, April 24, 2023 8:54:08 AM

23-CV-L

Hello, Ms. Wilson.

I hope this email finds you well.

I present for consideration an addition to the new social security supplemental rules on the timing of a motion for attorney's fees under 42 U.S.C. § 406(b).

As background, for representation during court proceedings, 42 U.S.C. § 406(b) (disability insurance benefits) and 42 U.S.C. § 1383(d)(2) (supplemental security income) provide that an attorney who obtains remand may petition for attorney's fees incurred during the court proceeding, and the court, as part of its judgment under 42 U.S.C. § 405(g) or 42 U.S.C. § 1383(c)(3), may allow reasonable fees not exceeding 25 percent of past-due benefits. *Bergen v. Comm'r of Soc. Sec.*, 454 F.3d 1273, 1275–77 (11th Cir. 2006). The fee statutes do not displace contingency-fee agreements within the statutory ceiling. *Gisbrecht v. Barnhart*, 535 U.S. 789, 793 (2002).

Federal Rule of Civil Procedure 54(d)(2)(B) requires a party to move for attorney's fees no later than 14 days after the entry of judgment.

In *Bergen*, the Eleventh Circuit held the 14-day deadline in Rule 54(d)(2)(B) applies to motions for attorney's fees under § 406(b) and § 1383(d)(2). But recognizing that the amount of fees under a contingency arrangement is not established until long after remand (once the amount of past-due benefits is determined), the Eleventh Circuit suggested a "best practice"; specifically, for a plaintiff to request, and a district court to include in the remand judgment, a statement that attorney's fees may be applied for within a specified time after the Commissioner's determination of past-due benefits. *Bergen*, 454 F.3d at 1278 n.2.

The Eleventh Circuit later acknowledged that "best practice" was not a "universally workable solution" and suggested another solution:

Perhaps another vehicle for creating some much needed certainty in this area of the law is for the district courts to fashion a general order or a local rule permitting district-wide application of a universal process for seeking fees under these unique circumstance. It is our hope the district courts, in doing so, will keep in mind Congress's intent behind § 406(b), to encourage attorneys to represent Social Security claimants.

Blich v. Astrue, 261 F. App'x 241, 242 n.1 (11th Cir. 2008). From there, disparate local rules or administrative orders attempted to create a best practice. Other circuits have similarly struggled with the issue.

Now that supplemental rules for social security cases are in place, a universal rule regarding the timing of a § 406(b) fee motion appears warranted. Making the timing universal would accord with the reasoning behind the new supplemental rules for social security cases. No reason for local variations is apparent.

The Middle District of Florida is working on revisions to its local rules, and in the absence of a rule in the supplemental rules, is considering the following local rule to address the issue.

(e) ATTORNEY'S FEE IN A SOCIAL SECURITY CASE AFTER REMAND. No later than fourteen days after receipt of a "close-out" letter, a lawyer requesting an attorney's fee, payable from withheld benefits, must move for the fee and include in the motion:

- (1) the agency letter specifying the withheld benefits,
- (2) any contingency fee agreement, and
- (3) proof that the proposed fee is reasonable.

Thank you for considering this issue.

Patricia D. Barksdale

United States Magistrate Judge

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