

Just the Facts

Regulations and Tips for BPA&O and PABSS Staff by Ray Cebula

Title: **When are SSDI/SSI Benefits Paid Pending Appeal?**

A proposed benefits termination is tremendously trying for any recipient. The threat of a lost stream of income and health care benefits can place extreme stress on anyone. Protecting both cash and health benefits during the appeal process is a critical part of representation in the post-entitlement setting.

SHELLEY'S CASE

Shelley has received SSDI benefits for the past 7 years. On January 10, 2005, she received a notice from SSA indicating that her disability will cease, based upon medical improvement, effective March 1, 2005. She has contacted your office on January 12th for assistance and tells you that she believes she is still disabled and that she cannot survive without her monthly benefits and medical coverage. How do you advise Shelley?

HOW TO REQUEST BENEFITS PENDING APPEAL

Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) recipients face the prospect of filing numerous appeals during the course of their receipt of benefits. Many times, benefits may continue to be paid pending the appeal steps at both Reconsideration and Request for Hearing. Whenever benefits can be paid pending appeal, the recipient must request the appeal **and** elect continuing payment within 10 days of recipient of the notice being appealed.¹ A separate election to continue benefits **must** be made at each step in the appeal process when the election is available.²

So, what does it mean?

How this regulation applies to you.

Both PABSS and BPAO clients contact our offices at various stages during the receipt of benefits, particularly when they become involved with return to work efforts. After initially establishing a relationship with a PABSS advocate or Benefits Planner it is highly likely that new contact from the recipient will be initiated upon the receipt of an adverse notice from SSA. Recipients are not always aware that filing a request for appeal within 10 days and electing continuing payments will allow SSA to continue their stream of income.

Our ability to respond immediately and provide accurate and timely information to ensure that the recipient's stream of income will not be interrupted during review process will go far in maintaining our client's lives and well-being.

When are SSDI/SSI Benefits Paid Pending Appeal?

The “election” is simply a statement by the recipient indicating an affirmative decision to have benefits continued pending the appeal process. The SSA appeal forms provide a small space allowing the recipient to state the reasons for appeal. It is in this space that the recipient makes the “election” to continue payments pending the appeal. A simple statement, such as, “please continue to pay my benefits in full during this appeal,” will suffice. A letter accompanying the appeal form requesting that benefits be paid while the appeal is being considered will also do the trick.

The local SSA Claims Representative should inform the appealing recipient that there is a potential overpayment be created, or increased, by the election to receive benefits pending appeal. This information however should not be given in such a manner as to dissuade the recipient from making the election if needed or desired.

It is important to remember that “good cause”³ for late appeals will also apply to the 10 benefits continuation provision as well as does the 5 day mailing period⁴ rule.

PRACTICE NOTE The determination of “good cause” is made by SSA. Whenever a close question concerning good cause exists it is always best to file the request and allow SSA to make a determination.

Finally, the routine 60 day appeal period still applies to all SSA appeals. Should a recipient have missed the benefits continuation deadlines, the recipient is not prohibited from filing an appeal during the 60 day period.

Unfortunately, benefits will not be paid during an appeal filed in this manner absent good cause as discussed above.

SHELLEY’S CASE

Shelley has fortunately contacted you in plenty of time to file an appeal and request that benefits be paid pending SSA’s determination. Her appeal must be filed by January 20th and she must affirmatively elect to receive benefits pending the appeal by indicating this desire on the appeal form or in an accompanying letter.

Types of Appeals and Benefits Pending Potential —

1. Medical Cessations

In the event that a recipient receives a notice informing her that her medical condition has improved and is no longer considered disabling, benefits continuation is available in both the SSI⁵ and SSDI programs. In order to receive benefits pending appeal, the appeal document(s) must be filed within 10 days (good cause applies) and the election to continue benefits must be made. However, the regular appeal period of 60 days applies to this, as with other types of appeals. As noted above, good cause for late filing provisions will apply to this special 10 day filing period. Please remember to consider the recipient’s medical condition and other circumstances at the time of receipt of the notice when considering whether good cause for late filing and election is available.

The provision allowing benefits to be paid pending appeal will also be applicable to children who are facing an “Age 18 Review.” Benefits may be paid to the child pending this eligibility review. It is also clear that any overpayment incurred as a result of this appeal, if made in “good faith” will likely be waived.⁶

2. Substantial Gainful Activity Cessations

The **major exception** to the general rule of paying benefits pending appeals involves those appeals concerning determinations that the recipient is involved in substantial gainful activity⁷ (SGA). Even though the recipient may be directly challenging the SGA determination by asserting that impairment related work expenses (IRWEs) and/or subsidies need to be applied in order to reduce income, SSA is prohibited from paying benefits pending this type of review.

As a result, it behooves the recipient to move fast to file the appeal and to collect the necessary documentation supporting the IRWE and subsidy allegations. While SSA will attempt to develop the recipient's allegations concerning both subsidy and IRWEs self-help will most often lead to a correct and faster decisions. Both the recipient and advocate/representative should develop all subsidy and IRWE allegations as soon as possible and provide that information to the local SSA office.

Remember that the recipient need not wait until the documentation is gathered before filing that appeal! In this instance the normal 60 day appeal period rule will apply.

3. Payment Reduction Appeals

Many SSI recipients receive a "Notice of Planned Action" indicating that their benefits level will increase or decrease. Each year a notice is sent concerning the annual cost of living increase provided to all recipients. More problematic is a notice indicating a reduction in payment. For example, a change in living arrangement may dictate a change in the monthly SSI payment. Marriage, a new roommate, or the recipient of other public benefits may all cause a change in the SSI payment level. Should the recipient choose to challenge the SSI benefits reduction, full

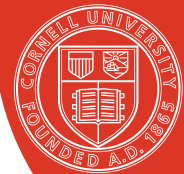
benefits (the rate paid prior to the Notice of Planned Action) can be paid pending review.⁸

In this type of case, the recipient should be carefully counseled concerning the election of benefits pending appeal. If, for instance, a marriage did occur and was not reported to SSA, the change in living arrangement and accompanying reduction in monthly payment may be appropriate. As a result, the election to receive a full payment pending appeal is very likely to increase any existing overpayment.

On the other hand, an appeal concerning a determination that the recipient has changed living arrangements and is now in "shared living" may be more amendable to the election to receive full benefits pending appeal. If the advocate/representative can piece together evidence to indicate that a "living alone" SSI rate should be paid, the election to receive benefits during the appeal process will not likely cause more harm.

The decision to elect benefits pending appeal should be carefully made with close examination of all of the surrounding facts and available documentation. While this election can ease the pain associated with appeal proceeding, electing for the sake of receiving benefits that are not likely owed will only result in further proceedings concerning overpayment!

**A Note Concerning Goldberg Kelly* Goldberg v. Kelly was a very significant court decision that required that needs based benefits continue to be paid until the recipient has received the opportunity for a face-to-face hearing. SSI recipients may be electing Goldberg Kelly (GK) benefits continuation in certain instances. In most cases, they will not know this and it is really not important provided benefits are actually paid pending the appeal! For example, all adverse SSI notices*



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must contain GK rights to benefits pending appeal except for medical cessation cases. In this type of cessation the SSI recipient must elect statutory benefits continuation. Same result. . .different method. GK right are simply another means by which an SSI recipient can assert the right to receive benefits during certain types of appeals.

Overpayment Potential

When a recipient challenges a cessation determination and elects benefits pending appeal, the benefits paid during the appeal process will be considered an overpayment should the appeal of the cessation be unsuccessful. It is very important that the recipient be aware that any benefits paid pending an appeal may become an overpayment. In fact, the forms signed by the recipient during the appeal process notify the recipient of this potential for overpayment. Despite the language of these forms, the recipient will have all rights to appeal and waiver of this type of overpayment as is the case with all other overpayments. Further, "good faith" appeals should result in a determination of "no fault" during the overpayment waiver process.

End Notes

- ¹ POMS DI 12027.010(A)(1)(a).
- ² POMS DI 12027.010(A)(3)(a).
- ³ POMS DI 12027.010(A)(4).
- ⁴ POMS DI 12027.010(A)(1)(a).
- ⁵ POMS DI 12027.015(2), SI 02301.310.
- ⁶ POMS SI 02260.007(2)(a).
- ⁷ POMS DI 12027.015(1)(3).
- ⁸ POMS SI 02301.310.