

Why SSI Needs an Appeal Process That Works

ISSUE BRIEF • SEPTEMBER 2013

Written By

Kate Lang

Senior Staff Attorney, Justice in Aging¹

Foreword

This paper is the first in a series describing problems faced by Supplemental Security Income (SSI) recipients experiencing incorrectly suspended or reduced payments when they try to pursue an appeal. This first paper provides an overview of how those who have a legitimate basis for challenging the Social Security Administration's decision to stop or decrease their benefits are harmed when they have no effective means of presenting their side of the case. It also contains a summary of the four areas in which due process violations most often occur.

Future papers will focus on each of these areas in-depth, and make recommendations on how to address the flawed appeals process and the widespread due process violations that have resulted.

Acknowledgments

This report was supported by a grant from The Oak Foundation. The Oak Foundation commits its resources to address issues of global, social and environmental concern, particularly those that have a major impact on the lives of the disadvantaged. The author offers her special appreciation to Rachel (Frazier) Gershon who laid the foundation for the information found in this paper during her time as a Borchard Fellow in Law & Aging at Justice in Aging. I would also like to thank my colleagues Gerald McIntyre, Scott Parkin and Kevin Prindiville for their

Table of Contents

Foreword	1
Acknowledgments	1
Executive Summary	2
Introduction	2
Constitutional Due Process and SSI	3
Due Process Violations When Filing Appeals	4
Failure to Process Appeal Requests	5
Failure to Continue Benefits Pending Appeal	5
Failure to Conduct a Conference	6
Failure to Issue an Adequate Written Decision	6
Conclusion	6

insight and support.

This report is available for download online at www.justiceinaging.org.

¹National Senior Citizens Law Center became Justice in Aging on March 2, 2015.

Executive Summary

Rosa Hernandez was an elderly woman living in northern California, her only income from SSI benefits. She received a notice from SSA that her SSI was being suspended because she owned real estate in another country which put her over the resource limit for SSI eligibility. Rosa no longer had control over the property in question and should not have been considered over-resourced. Rosa's advocate filed a Request for Reconsideration one month after she received the notice, providing documentation to show that Rosa was not in control of this property and requesting an informal conference.

Rosa's advocate followed up with numerous phone calls. Staff at the local SSA office claimed that they had never received the Request for Reconsideration. Luckily, the advocate had kept the certified mail receipt. An SSA employee told the advocate that a claims representative would be contacting him with a date for the informal conference, seven months after he had filed the appeal. Many months after the appeal was filed, SSA issued a notice denying the reconsideration without ever holding an informal conference. After being without income for almost a year, Rosa lost her apartment and had to move thousands of miles across the country to live with her daughter.

Problems with the appeals process at SSA are pervasive, and unfortunately, Rosa Hernandez's frustrating story is not unusual. It is repeated on a daily basis all across the country.

For the low-income individuals who depend on SSI benefits to access housing, food, medical care and other necessities, their inability to pursue an appeal effectively can have immediate, severe consequences.

When their income is incorrectly stopped or reduced, these vulnerable individuals face hunger, homelessness and the inability to access vital medications.

The problem is that SSA does not have a system for logging in and tracking the appeals of proposed benefit suspensions and reductions. As a result, these appeals tend to fall off the radar, especially now when SSA's local offices are seriously understaffed.

To make matters worse, while SSA has an automated process for suspending or reducing SSI benefits exactly 15 days after sending a notice of proposed action, the process for continuing the benefits pending a decision on the appeal, as constitutionally required, involves a manual entry in the payment system. Even in that subset of cases in which appeals are processed, the decisions are not usually made in a manner that affords the minimum due process which the Supreme Court in *Goldberg v. Kelly* found is required.

To address these problems, SSA needs a uniform system in place to input and track appeals by SSI recipients, the automatic reduction or suspension of benefits needs to be eliminated, and staff need better training so that they thoroughly understand the requirements and purpose of constitutional due process protections. These widespread procedural breakdowns aggravate the hardships already endured by low income older adults and individuals with disabilities living in poverty. SSA must take action to ameliorate the devastating impact that this flawed appeals process has on some of the most vulnerable members of our communities.

Introduction

Millions of Americans rely on the Social Security Administration ("SSA") for benefits to which they are entitled. One program administered by the SSA, Supplemental Security Income ("SSI"), provides subsistence-level income to extremely poor people who are either over age 65 or living with severe disabilities. The maximum federal benefit is currently set at \$710 per month for the over eight million people currently relying on the SSI program, with recipients getting an average of \$526 per month.²

Justice in Aging advocates on behalf of the elderly poor, including SSI recipients. The SSI program has a complex web of rules governing financial and other eligibility rules.³ In July 2012, the current Acting Commissioner of the Social Security Administration acknowledged in testimony to Congress, "While the SSI program was never simple, it has become

² U.S. Social Security Administration, SSI Monthly Statistics, July 2013.

³ See 42 U.S.C.A. §§1381-1385; 20 CFR §§416.101 – 416.2227. Our focus is on non-disability appeals, i.e., appeals of suspensions and reductions that are based on criteria other than disability.

increasingly complex over the years.”⁴ For example, individuals on SSI cannot own more than \$2,000 in assets,⁵ with most owning nothing, leaving them without resources to fall back on should they have their benefits improperly reduced or suspended due to an incorrect determination made by SSA.

Based on input from advocates nationwide, we have learned that SSI recipients often experience incorrectly suspended or reduced payments without the ability to pursue an appeal of that decision. There are a few factors that contribute to the difficulty that these SSI recipients encounter when they want to appeal a decision from SSA that they are no longer eligible for benefits. First, they have difficulty finding an attorney to represent them in pursuing the appeal, because those representing individuals before SSA generally focus their practice on people applying for disability benefits. These representatives can collect fees from the retroactive benefits awarded to those who are successful in their applications. Since there is no prospect of getting fees from those who appeal a decision to suspend or reduce their benefits, even if they prevail in the appeal, most private attorneys do not provide representation in these cases.

Secondly, while SSA has an effective system in place to track the appeals of adverse disability determinations that enables them to report how many such appeals they have pending in each locality as well as how long they have been pending at each stage of the appeal process, it has no comparable system in place to track the appeals of those recipients who want to challenge the decision that their benefits are going to be suspended or reduced for a reason other than disability. Until such a system is put in place and some accountability is established, it is unlikely that the processing of these appeals will improve significantly.

Finally, SSA has not done an adequate job training local office employees, who are responsible for

reconsideration, and as a result, they are not acting in accordance with the agency’s own regulations. This leads to due process violations for those SSI recipients who challenge erroneous decisions about their eligibility.

Constitutional Due Process and SSI

The Fifth Amendment of the United States Constitution states, in relevant part, that the federal government may not deprive a person of “life, liberty, or property, without due process of law.”⁶ In *Goldberg v. Kelly*, the Supreme Court ruled in 1970 that recipients of means-tested public benefits must be afforded the “opportunity to be heard” before their benefits can be suspended.⁷ By requiring a pre-termination hearing, the Goldberg opinion asserted, the government prevented the claimant from being deprived of the means to survive while appealing the claim:

“... the crucial factor in this context ... is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate.”⁸

SSI benefits, as a means-tested program for extremely low-income recipients, are subject to the same due process protections as in *Goldberg*. These procedural safeguards include:

1. A timely and adequate notice detailing the reasons for a proposed suspension of benefits;
2. Benefits continuing pending a decision on the appeal;
3. “An opportunity to confront and cross-examine the witnesses relied on”;
4. An opportunity to present the recipient’s own arguments and evidence orally;
5. The right to retain an attorney;

⁴ *Use of Technology to Improve the Administration of SSI’s Financial Eligibility Requirement: Hearing before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 112th Cong. 2 (July 25, 2012) (statement of Carolyn Colvin, Deputy Commissioner, Social Security Administration).

⁵ 42 U.S.C.A. § 1382(a)(3)(B)

⁶ U.S. CONST. Amend. V.

⁷ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

⁸ *Id.*

6. An impartial decision-maker who did not participate in making the determination under review;
7. A decision that rests “solely on the legal rules and evidence adduced at the hearing”; and
8. A written notice of the decision that states the reasons for the determination and indicate the evidence relied on.⁹

SSA has promulgated regulations concerning the SSI program that conform to the requirements of *Goldberg* and constitutional due process. Social Security regulations establish an administrative appeal process that, on paper, protects the due process rights of SSI recipients who face a reduction or loss of benefits.¹⁰

According to the regulations, a written notice about the initial determination “will explain in simple and clear language what we have determined and the reasons for and the effect of our determination.”¹¹ The regulations also provide that the SSI recipient will continue receiving benefits “at the previously established payment level” until a decision on the reconsideration is issued, if the individual files an appeal within 10 days of receiving the initial notice, with the date of receipt presumed to be 5 days after the date on the notice.¹²

SSI recipients may choose among three methods of reconsideration at the first level of appeal: case review, informal conference, or formal conference.¹³ Of these, only the formal conference meets the requirements prescribed by *Goldberg* for means-tested public benefits, by giving the opportunity to cross-examine adverse witnesses and request that SSA issue a subpoena for adverse witnesses and relevant documents.

In all three types of proceedings, the person

making the decision on reconsideration must be impartial, having had no prior involvement with the initial determination.¹⁴ The decision must be based on the evidence used in making the initial determination and any new evidence received,¹⁵ and must be issued in writing, stating the specific reasons for the decision made.¹⁶

Despite these comprehensive regulations, advocates regularly report SSI recipients too often face roadblocks at reconsideration, the first stage of the appeal process. The problem comes when the staff at SSA’s local offices fail to follow the agency’s regulations, leading to due process violations that can have dramatically negative effects on SSI recipients seeking to appeal adverse determinations. For low-income individuals who heavily depend on SSI to access housing, food, medical care and other necessities, such abridgment of due process rights can have drastic consequences.

Due Process Violations When Filing Appeals

When SSA makes a determination to suspend or reduce benefits, SSI recipients have a constitutional right to challenge the determination through an appeals process and continue to receive benefits pending a determination on the first level of appeal.¹⁷ Although due process protections are better implemented at the later stages of the appeal process, this is of little or no value if you cannot get beyond the first step or if you are left destitute in the process.

If an individual experiences a suspension or reduction in their SSI benefits, but is unable to challenge the decision effectively at reconsideration, that individual is denied due process of law. He/

⁹ Id. at 267-68, 270-71.

¹⁰ 20 C.F.R. § 416.1400 et seq.

¹¹ 20 C.F.R. § 416.1404; *Ford v. Shalala*, 87 F. Supp. 2d 163 (E.D.N.Y. 1999) judgment entered sub nom. *Ford v. Apfel*, CV-94-2736 (CPS), 2000 WL 281888 (E.D.N.Y. Jan. 13, 2000.)

¹² 20 C.F.R. § 416.1336(b).

¹³ 20 C.F.R. § 416.1413.

¹⁴ 20 C.F.R. § 416.1420.

¹⁵ Id.

¹⁶ 20 C.F.R. § 416.1422.

¹⁷ The three stages of the administrative appeal process are reconsideration, handled at the local SSA office, a hearing before an administrative law judge, and review by the Appeals Council. 20 C.F.R. § 416.1400(a).

she is not helped even if the subsequent stages of the appeals process are functioning properly. Even a slight interruption in benefits for SSI recipients who are awaiting a reconsideration determination can cause hunger and homelessness. Our information gathering has uncovered widespread due process violations at the reconsideration level that had major impacts on SSI recipients.

Failure to Process Appeal Requests

A big contributor to due process violations is the lack of a process for SSA workers to log in these requests upon receipt. As a result, SSA often loses reconsideration requests and supporting material. This appears to occur regularly, even when requests are sent via certified mail and an SSA employee signs the return receipt. We have heard frequent reports from advocates that SSA often did not contact them or their clients for months or even years after a request for reconsideration had been filed. Usually they only receive a response after multiple phone calls, e-mails and faxes.

When a formal or informal conference is requested, SSA's own regulations require them to schedule a conference immediately upon receiving a reconsideration request. It must be scheduled within 15 days of the request being filed.¹⁸ But the conference can be delayed in the agency's discretion or at the individual's request. Staff at SSA offices is required to help recipients file an appeal anytime the recipient disagrees with a determination.¹⁹ However, SSA employees do not always provide that help and sometimes even tell recipients or their advocates that they are not allowed to appeal a determination.

From advocates' reports, front-line staff at SSA district offices seems to be overwhelmed by the caseloads they are expected to handle. In addition, they seem not to have been trained on the due process protections required by SSA's regulations. SSA's own rules are not being followed in local

district offices, resulting in inaccurate decisions and improperly reduced and suspended benefits for too many SSI recipients. As a result, those with the right to appeal are turned away, their claims are simply not processed, and they lose their income and a chance to appeal. District offices' failure to accept, process and respond to reconsideration requests leaves recipients without the subsistence income they rely on to retain housing and obtain food.

Failure to Continue Benefits Pending Appeal

While SSI recipients have a constitutional right to benefit continuation pending a decision on their appeal, SSA regulations state that this protection only applies when an individual appeals within 10 days of receipt of the notice.²⁰ Even when individuals file an appeal within the allotted time period, benefit continuation is not guaranteed.

One reason for this is that when SSA sends a notice that SSI benefits are going to be reduced or suspended, this change is entered into SSA's payment system to take effect automatically 15 days later without the need for any further input. Even if the SSI recipient files a request for reconsideration in time for benefits to continue, as *Goldberg* requires, an SSA employee must manually enter the request into the system.

Our investigations have found that few recipients, who appeal within the ten day period and are thus eligible for benefit continuation, actually receive it. Even when individuals are represented by counsel, their advocates find that getting benefits continued while an appeal is pending is a common problem. Advocates have to repeatedly remind local SSA staff and monitor the situation so that the benefits continue without interruption. We have found many examples of advocates getting their clients' benefits restarted after requesting reconsideration, only to

¹⁸ 20 C.F.R. § 416.1413(c).

¹⁹ POMS §§ GN 03101.120, GN 03101.200.

²⁰ 20 C.F.R. § 416.1336(b).

have to them stopped again for unexplained reasons.

Due to the increasingly common work backlogs in district offices, timely benefit continuation rarely occurs. Failure to continue SSI benefits pending a reconsideration determination not only is illegal, it is particularly harmful to recipients. Since the maximum SSI payment is only \$710 per month in most states, and individuals may not retain more than \$2,000 in savings, even a short interruption in benefits can result in hunger and homelessness for recipients.

Failure to Conduct a Conference

A conference is a claimant's chance to meet face-to-face with an unbiased representative who has the authority to decide the case. An opportunity for a formal conference is constitutionally required for appeals of SSI determinations before benefits may be reduced or suspended. A formal conference must include the opportunity to testify, cross-examine adverse witnesses, and request a subpoena for witnesses and documents. For both informal and formal conferences, a summary of the conference should become part of the case record.²¹ These aspects are important for recipients so that they can adequately dispute a determination before benefits are reduced or suspended.

Even when individuals check "formal conference" on the request for reconsideration form, advocates report that conferences are rarely held. Occasionally, SSA simply issues a decision affirming the initial determination after the appeal is filed, without explaining the evidence relied upon, let alone offering the claimant an opportunity for a conference. When a conference does occur, the person conducting it often is unfamiliar with the SSA rules governing conferences. Advocates report that the decision makers are unprepared to conduct the conference or were involved in earlier determinations on the case.

Failure to Issue an Adequate Written Decision

Once an appeal is processed and a reconsidered determination reached, SSA is required to issue a

written determination that clearly explains the facts and reasoning behind the decision. Unfortunately, advocates report that even when appeals are processed, determinations are often not written. This leaves SSI recipients vulnerable to SSA repeating the same error in the future. SSA may propose to take the same action again at a later date, apparently with no record kept that the previous effort was reversed on appeal. Written notice is an essential safeguard in these situations.

Even when determinations are written, they often omit the facts and law on which the decision is based. Sometimes the written decision does not make sense. For example, in the case of Rosa Hernandez above, the notice she received denying her appeal also stated, in part, "Your Request for Reconsideration is being dismissed because...no decision has been made regarding [the] property..."

The violations of due process protections experienced by elderly people like Rosa and individuals with disabilities living in poverty unfairly leave them vulnerable to homelessness and other negative effects from their loss of SSI benefits.

Conclusion

SSI recipients who have no effective ability to pursue an appeal face a sudden loss of income, and are at risk for homelessness and severe mental distress. SSI recipients with inappropriately reduced incomes must endure conditions that may severely jeopardize their health and well-being.

Even when SSI recipients are able to access legal services, the appeal process may improve, but those who secure representation still encounter a system that all too often remains deeply flawed and frustrating. For every client that a legal services advocate represents in appealing the reduction or suspension of benefits, there are many, many more who remain without access to representation.

To address this fundamental lack of fairness, SSA needs a uniform system in place to input and track appeals by SSI recipients. Also, the automatic reduction and suspension of benefits, without first checking to see if an appeal or waiver request has been filed, needs to

²¹ 20 C.F.R. §§ 416.1413(b) & 416.1413(c).

be eliminated. In additions, staff need better training so that they thoroughly understand the requirements and purpose of constitutional due process protections. These widespread procedural breakdowns aggravate the hardships already endured by these elderly and disabled

individuals who, even with full benefits, live in poverty. SSA must take action to ameliorate the devastating impact that this flawed appeals process has on some of the most vulnerable members of our communities.

JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

WASHINGTON

1444 Eye Street, NW, Suite 1100
Washington, DC 20005
202-289-6976

LOS ANGELES

3660 Wilshire Boulevard, Suite 718
Los Angeles, CA 90010
213-639-0930

OAKLAND

1330 Broadway, Suite 525
Oakland, CA 94612
510-663-1055