



OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION

External Opinion # EX-2008-1002

To: Alexander Beattie, II
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DNA – People’s Legal Services, Inc.
P.O. Box 116
Crownpoint, N.M. 87313

Date: April 17, 2008

Subject: Attorneys’ Fees in Social Security Cases

This opinion is in response to your e-mail message dated February 15, 2008. You inquired as to whether a recipient is permitted to accept attorneys’ fees in Social Security Income or Disability appeal cases.

Brief Answer

The answer to your question is no. It is well settled that LSC grantees are not permitted to accept attorneys’ fees in Social Security Income or Disability appeal cases.

Background

In your request to us, you note that you had successfully represented a claimant in a Social Security Income appeal and that the Administrative Law Judge in the case automatically awarded attorneys’ fees, which were mailed to you after the hearing. You point out that you returned the fees to the court, on the belief that you were not entitled to retain them. Since then, you have successfully represented four additional claimants. You also explained that the Social Security Administration has requested that you either submit a fee agreement or in the alternative a fee petition; or submit a written waiver of fees. You noted that the payments to the clients are being processed and that the Social Security Administration requires an answer before they issue those payments.

Analysis

Section 206 of the Social Security Act provides that a court may, as part of its judgment, award an attorney who successfully represents a claimant in an appeals case a

reasonable fee, not to exceed 25% of the total past-due benefits.¹ This award of attorneys' fees is deducted from the total award.

Section 504(a)(13) of LSC's 1996 appropriations act prohibits any LSC recipient from claiming or collecting and retaining attorneys' fees.² This restriction has been incorporated in all subsequent LSC appropriations. LSC revised 45 C.F.R. § 1642 to implement this restriction. Furthermore, 45 C.F.R. § 1610.2(b)(9) includes the collection of attorneys fee as an "activity prohibited by Section 504."

The prohibition on collecting attorneys' fees is found in 45 C.F.R. § 1642.3, which states that "no recipient or employee of a recipient may claim, or collect and retain attorneys' fees in any case undertaken on behalf of a client of the recipient." Attorneys' fees are defined in 45 C.F.R. § 1642.2(a) as "an award to compensate an attorney of the prevailing party made pursuant to common law or Federal or State law permitting or requiring the awarding of such fees as a payment to an attorney from a client's retroactive statutory benefits."

A recipient may not accept attorneys' fees in Social Security appeal cases because such fees are taken from the client's retroactive statutory benefits. The preamble to the revised regulation specifically discusses the Corporation's decision to include social security fees in the definition of attorneys' fees found in 45 C.F.R. § 1642.2.³ After public comment and extensive debate, the Corporation concluded "that it is reasonable to interpret the statutory language [in 504] as including social security fees and that is what Congress intended."⁴

The issue of attorneys' fees in Social Security appeals cases was further discussed in an external opinion issued by this office on July 29, 1997, which specifically states that "recipients may not collect and retain any attorneys' fees, including fees from a client's back statutory Social Security benefits."⁵ Please see also a Program Letter 97-1 dated August 7, 1997, which reinforces this point by stating "unless the case was filed prior to April 26, 1996, the beginning date of the Congressional restriction, attorneys' fees in social security cases may not be collected and retained after the effective date of the final regulation, which was June 11, 1997."⁶

¹ 42 U.S.C. 406 (b)(1)(A).

² Pub. L. 104-134, 110 Stat. 1321 (1996).

³ 62 Fed. Reg. 25862 (May 12, 1997) (codified at 45 C.F.R. § 1642).

⁴ *Id.*

⁵ Letter from Suzanne B. Glasow, Senior Assistant General Counsel, Legal Services Corporation, to Rodger L. McCollister, Executive Director, Kansas Legal Services, Inc. (July 29, 1997)

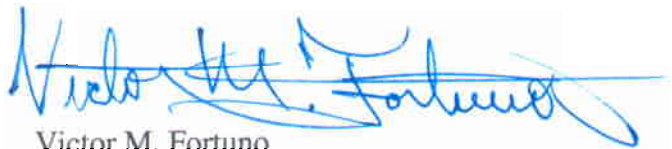
⁶ Program Letter 97-1 from John A. Tull, Director, Office of Program Operations, Legal Services Corporation, to All LSC Program Directors (August 7, 1997) located at http://www.lsc.gov/program/program_letters.php

April 17, 2008

Page 3

If you have any remaining questions, or if we may be of further assistance, please do not hesitate to let me know.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Victor M. Fortuno", is written over a light blue rectangular background.

Victor M. Fortuno

Vice President & General Counsel