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Administrative Finality

When Do SSA's Decisions Become Final and
No Longer Subject to Appeal?

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This is one of a series of articles written for benefits specialists employed by Benefits Planning, Assistance and Outreach projects and attorneys and advocates employed by Protection and Advocacy for Beneficiaries of Social Security programs. Materials contained within this policy brief have been reviewed for accuracy by the Social Security Administration (SSA), Office of Employment Support Programs. However, the thoughts and opinions expressed in these materials are those of the authors and do not necessarily reflect the viewpoints or official policy positions of the SSA. The information, materials and technical assistance are intended solely as information guidance and are neither a determination of legal rights or responsibilities, nor binding on any agency with implementation and/or administrative responsibilities.



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Introduction

The SSI and SSDI programs are governed by a complicated set of laws, regulations, and policies. With several million recipients and beneficiaries getting benefits, inevitably, many recipients and beneficiaries will want to challenge decisions made by the Social Security Administration (SSA). When an individual chooses to appeal an SSA decision, they will face very strict timelines for pursuing the appeal. In all cases, the appeal will be governed by a 60-day time limit that runs from the receipt of the most recent decision.

Unfortunately, many times beneficiaries do not realize that they have a meritorious appeal until weeks, months or even years after the initial decision. Claimants are often harmed unfairly by “administrative finality,” Social Security’s doctrine about cases needing to end. Claimants don’t understand the importance of filing appeals, due either to the misleading nature of SSA’s notices or their own inability to understand notices and the impact of limitations on retroactivity of payments. Sometimes, SSA has denied claims based on illegal policies that were concealed from claimants, who assumed the denials were lawful.

The law values the idea that claimants for benefits should fully exhaust their administrative remedies, thus permitting the agency to correct its errors and diminishing the burden on the courts. Moreover, the recognized value in eventually terminating disputes results in a view that decisions, once final, should not be disturbed. From the SSA’s perspective, adherence to rules establishing an end to cases save administrative costs of redoing decisions, and save the cost of paying out benefits on seemingly abandoned claims.

In general, SSA has a great deal of discretion to decide whether, or not, to make an exception to administrative finality in any individual case. Thus, if SSA decides not to reopen a final decision, or not to process a late appeal from a final decision, it is very difficult, though not impossible, to persuade SSA to change its position, or to convince a court to interfere with SSA’s exercise of its discretion.

This Policy and Practice Brief will explain when SSA’s decisions become final and are no longer subject to appeal. The Brief will discuss how to overcome SSA’s doctrine of administrative finality. Additionally, the Brief will explain the doctrines of reopenings and *re judicata*, how each works and how each may be overcome to ensure that claimants and recipients are not harmed by these doctrines.

The Social Security Appeals Process

Social Security wants to be sure that every decision made about a Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) claim is correct. It carefully considers all the information in a case before it makes any decisions that affect a claimant’s eligibility or a recipient’s benefit amount. When SSA makes a decision on a claim, it will send a letter explaining their decision. If the claimant or recipient does not agree with the decision, he or she can appeal — that is, ask SSA to look at the case again.

If a claimant or recipient wishes to appeal an unfavorable SSA determination, she or he must make the request in writing within 60 days from the date the letter about the determination was received. SSA assumes you receive the letter five days after the date on the letter, unless you can show SSA you received it later. When a claimant or recipient asks for an appeal, SSA will look at the entire decision, even those parts that were in your favor. If SSA's decision was wrong, it will change it.

Generally, there are four levels of appeal. They are reconsideration, hearing by an administrative law judge, and review by the Appeals Council and Federal Court review. A claimant or recipient will meet the appeal deadline at each step in the process if they appeal the decision within 60 days. Benefits specialists and advocates can avoid trying to overcome administrative finality problems if appeals are always filed on time. But what happens when appeals are not timely filed?

The Administrative Finality Doctrine

“Administrative finality is the concept that a determination or decision becomes final and binding when rendered, unless it is timely appealed or later reopened and revised for special reasons.”¹ The issue of whether a decision might be subjected to the administrative finality doctrine depends on whether it is an initial determination. “Initial determinations,” are the class of SSA decisions that SSA considers subject to appeal through the “administrative review process.”² These include: entitlement or continuing entitlement to benefits; reentitlement to benefits; the amount of the recipient's benefit; recomputation of the recipient's benefit; and a reduction of the recipient's benefits on account of work.

Certain agency decisions are excluded from the class of “initial determinations.” These include decisions denying reopening requests and decisions denying requests for extensions of time to file appeals.³ Such decisions are not subject to the administrative review process and not subject to conventional judicial review.⁴ These decisions are technically not “final and binding,” and seldom are altered by SSA.

Once the appeals period has lapsed, and the final decision has become “binding,” SSA will typically dismiss requests for review as untimely, and will also typically reject requests for reopening. The harms caused by “final and binding” adverse decisions are:

- Harm with regard to adjudicated period – An adverse decision deprives the claimant of the benefits sought for the period of time addressed by the denial decision. “Reapplications” have only limited retroactive effect. Social Security Disability Insurance (SSDI) is retroactive for up to one year prior to the date of application; Supplemental Security Income (SSI) is retroactive back to the date of application.
- Harm with regard to future claims – An adverse decision may totally bar future claims. For example, if the adjudicated period covered the claimant's SSDI “date last insured,” the adverse final decision will bar future SSDI claims (since the decision will bar the claimant from establishing disability during the adjudicated period).

¹ Program Operations Manual System (POMS) SI 04070.001.A; POMS GN 04001.001.C; POMS DI 27501.001. The POMS is a primary source of information used by Social Security employees to process claims for Social Security benefits.

² See 20 C.F.R. § 404.902 & 416.1402, for a full list of initial determinations.

³ 20 C.F.R. § 416.1403.

⁴ 42 U.S.C. 405(g).

Overcoming Administrative Finality

There are many ways to overcome administrative finality. If the claimant, recipient or his or her representative missed deadlines, this Policy and Practice will help explain how to correct them and preserve the individual's rights. More specifically, and somewhat incredibly, even if it seems as though it may be too late for the claimant to file a timely appeal, certain court precedents and SSA rules may enable the claimant to overcome administrative finality. The following concepts are described in the brief below:

- “timely appeals” – Claimants and advocates should always file “timely” appeals, and should always seek to characterize all appeals as “timely,” even if an appeal might appear to be late.
- “extensions of time” – Claimants may seek an “extension of time” in which to file the late appeal, and under certain circumstances may be excused for failing to have filed a timely appeal.
- “reopening” – Claimants may seek “reopening” of adverse decisions.
- “res judicata” – Claimants who have lost their SSDI claims, and who reapply for benefits, may employ certain strategies to overcome the normal “res judicata” barrier to reapplications.

Timely Appeals

Disputes over timeliness are incredibly time consuming, and have the effect of delaying the award of benefits, even when the dispute is resolved in the claimant's favor (if resolved adversely to the claimant, benefits may be forever denied). Thus, claimants, recipients and representatives should always seek to file on time, and should avoid last-minute filings since such actions often lead to disputes.

Unless a representative is certain that a request is untimely, he or she should allege that the request was “timely.” If “timely,” the request must be processed by SSA. Failure by SSA to process a timely request violates the regulations and the Constitution's due process clause. For example, if the claimant visited the SSA office during the time period when an appeal would have been timely, but did not complete the standard form for requesting review, allege that the date of the visit should serve as the date of filing. By alleging that the appeal was “timely” you protect the record and make it easier to win the dispute if the case ever gets to court.

Practice Tips on Alleging “Timely” Filing

Mailing is filing – In two cases in 1983, the Second Circuit Court of Appeals, that encompasses New York, Connecticut and Vermont, held that mailing the appeal request constituted filing the request and thus the request had to be considered. In one of the cases, the Court remanded the case to have SSA conduct an inquiry, with testimony taken, as to whether the request was timely.⁵

⁵ See *Dietsch v. Schweiker*, 700 F.2d 865, (2d Cir. 1983) and *Monferrato v. Schweiker*, 700 F.2d 869 (2d Cir. 1983).

Measure time from the date of the notice – The date of the SSA notice and the date of the submission of the request for review must always be carefully evaluated. Avoid disputes by requesting review within 60 days of the actual date of the notice. Avoid reliance on SSA’s 5 day rule (SSA’s rule for assuming that notice was received 5 days after the date on the notice)⁶ since last minute appeals lead to problems. If seemingly outside the 60 day appeals period, consider the following possible approaches.

Defective notice may cause time not to run – When SSA fails to give proper notice of the adverse decision, or when the claimant lacks the capacity to comprehend the notice, courts may find that the appeals period never started, and that the request is therefore timely.⁷ This is often the case when your client is an individual with a mental impairment.

Defective SSA record-keeping may rescue case – If SSA failed to keep track of crucial information, or if SSA systematically fails to keep track of such information, like entering wages submitted by recipients when it receives them, courts may be disinclined to defer to agency refusals to extend time limits.⁸

Class action order in Robinson – A settlement order in *Robinson v. Heckler*, (S.D.N.Y.), dated August 22, 1984 provides that prior to dismissal of a request for review by the Appeals Council as untimely, SSA must mail a notice to the claimant or the claimant’s representative seeking information as to when the request was actually mailed, and when the ALJ decision was received. SSA applies this order nationwide although it only needed to apply it in New York.

Extensions of Time

“Extensions of time,” as described below, allow the request for review to be processed as “timely,” and allow review on the merits to occur at the level of review that is higher than the level of the previous decision.⁹ All these regulations refer back to the good cause for “missing the deadline” regulations discussed below.

SSA’s rules allow the agency, in its discretion, to extend appeals deadlines for “good cause.” The SSA regulations, 20 C.F.R. §§ 404.911, 416.1411, state:

- a. “In determining whether you have shown that you have good cause for missing a deadline to request review, we consider?
 - 1) what circumstances kept you from making the request on time;
 - 2) whether our action misled you;
 - 3) whether you did not understand the requirements of the Act resulting from amendments to the Act, other legislation, or court decisions; and,
 - 4) whether you had any physical, mental, educational, or linguistic limitations (including any lack of facility with the English language) which prevented you from filing a timely request or from understanding or knowing about the need to file a timely request for review.

⁶ 20 C.F.R. § 422.210(c).

⁷ *Christopher v. HHS*, 702 F.Supp.41 (N.D.N.Y. 1989).

⁸ *Cruz v. Sullivan*, 802 F.Supp. 1015 (S.D.N.Y. 1992).

⁹ See 20 C.F.R. §§ 404.909(b), 416.1409(b) for reconsideration level; 20 C.F.R. §§ 404.933(c), 416.1433(c) for hearing level; 20 C.F.R. §§ 404.968(b), 416.1468(b) for Appeals Council level; and, 20 C.F.R. §§ 404.982, 416.1482 for district court level.

- b. Examples of circumstances where good cause may exist include, but are not limited to, the following situations:
- 1) You were seriously ill and were prevented from contacting us in person, in writing, or through a friend, relative, or other person.
 - 2) There was a death or serious illness in your immediate family.
 - 3) Important records were destroyed or damaged by fire or other accidental cause.
 - 4) You were trying very hard to find necessary information to support your claim but did not find the information within the stated time periods.
 - 5) You asked us for additional information explaining our action within the time limit, and within 60 days of receiving the explanation you requested reconsideration or a hearing or within 30 days of receiving the explanation you requested Appeals Council review or filed a civil suit.
 - 6) We gave you incorrect or incomplete information about when and how to request administrative review or to file a civil suit
 - 7) You did not receive notice of the initial determination or decision.
 - 8) You sent the request to another Government agency in good faith within the time limit and the request did not reach us until after the time period had expired.
 - 9) Unusual or unavoidable circumstances exist, including the circumstances described in paragraph (a)(4) of this section, which show that you could not have known of the need to file timely or which prevented you from filing timely.”

In 1991, SSA also issued a Social Security Ruling (SSR) ruling,¹⁰ “SSR 91-5p,” which clarifies SSA’s “good cause” policies and requires the decision maker to determine whether the claimant “lacked the mental capacity to understand the procedures for requesting review.” In determining whether such a lack was present, the decision maker: “must consider the following factors as they existed at the time of the prior administrative action: inability to read or write; lack of facility with the English language; limited education; any mental or physical condition which limits the claimant’s ability to do things for him/herself.” Although the regulations cited above incorporate much of the language in “SSR 91-5p,” the SSR remains in effect as it mandates that adjudicators must consider the factors listed above.

¹⁰ Social Security Rulings are effective upon publication. Thus, SSR 91-5p, (the first two numbers are for the year and the next two numbers are for the number of the policy ruling during the year) was published and became effective in 1991. Although Social Security Rulings do not have the force and effect of the law or regulations, they are binding on all components of the Social Security Administration and are to be relied upon as precedents in deciding or adjudicating other cases.

The Federal Second Circuit Court of Appeals has addressed the issue of when claimants may be excused, on fairness grounds, from administrative deadlines, and from analogous deadlines to appeal to court. In the first case, the Court accepted the case based on plaintiff's specific claim of mental impairments preventing his comprehension of an SSA notice, and remanding claim for consideration of whether SSA's determination that claimant did not have good cause for missing deadline to request hearing was supported by substantial evidence.¹¹ In the second case, the Court refused to dismiss the complaint where plaintiff, who had filed an untimely civil action, had alleged that her lateness should be excused in light of her mental impairment.¹² In this case, the court declared that "equitable tolling" also applied to failure to meet administrative appeals deadlines. Finally, in a third case, the Court extended the deadline to appeal to court, and waived the requirement of exhaustion of administrative remedies, for a class of claimants who had been denied benefits based on cardiac policy contained in an unpublished Social Security Ruling.¹³

The Federal District Courts have also addressed the issue of when claimants may be excused from administrative deadlines. In one case, the Court tolled the deadline to appeal to court for a Spanish speaking claimant who had visited the SSA office instead of timely filing a civil action in court.¹⁴ In a second case, the Court tolled the deadline to appeal to court because a Spanish speaking claimant had received an English-only denial notice.¹⁵ In another case, the Court remanded the case for a hearing about whether a paralegal's failure to file timely request for Appeals Council review should be excused "good cause" after the paralegal had suffered extreme physical illness following a car accident.¹⁶

Practice Tips on Extending Deadlines

- Allege grounds which, based on the facts of your case, precisely match some of the examples that constitute "good cause" in SSA's regulations, and argue that SSA must find good cause when the regulations are squarely met.
- In requesting extensions of time deadlines, emphasize the circumstances of the claimant (e.g., mental capacity) that causes him or her to miss the deadline.
- If possible, attack the fairness of the underlying hearing decision.
- Demand an opportunity for the claimant to testify about the circumstances supporting his or her claim of good cause or challenge the agency's procedures for determining "good cause" as procedurally deficient.
- In any case, it would be advisable to file a new application and request reopening of the old determination.

¹¹ *Stieberger v. Apfel*, 134 F.3d 37 (2d Cir. 1997).

¹² *Canales v. Sullivan*, 936 F.2d 755 rehearing denied 947 F.3d 45 (2d Cir. 1991).

¹³ *State of New York v. Sullivan*, 906 F.2d 910 (2d Cir. 1992).

¹⁴ *Walter v. Secretary of HHS*, CV 90-1977, slip opinion (S.D.N.Y., June 26, 1991).

¹⁵ *Correa v. Bowen*, 682 F. Supp. 755, 757 (S.D.N.Y. 1988).

¹⁶ *Higdon v. Bowen*, 88 Civ. 0198, 1988 WL 86694, 1988 U.S. Dist. Lexis 9146 (E.D.N.Y., August 11, 1988).

Reopening Prior Decisions

“Reopening” is a way of obtaining a new decision on a claim, at the same level of review as the prior decision. Reopenings provide claimants with a second bite at the apple, and thus permit claimants to conquer administrative finality. SSA’s regulations on reopening allow SSA, in its discretion, to reopen a decision that has become final and binding, (a) at the request of a party, (b) under certain conditions and (c) within certain time limits.¹⁷

According to SSA, both SSDI & SSI cases may be reopened within twelve months “for any reason.” SSA has taken the position that this provision is totally discretionary and has stated in the POMS that “for any reason” is not to imply that revision can occur without “good reason.” According to the POMS, the evidence must clearly show that a determination or decision is incorrect.¹⁸ However, in several cases in the Western District of New York the courts have held that this regulation mandates that the Secretary open a case for any reason if the request is made within a year. All the cases held that good cause need not be shown.¹⁹ SSA may also reopen within two years of the date of the initial SSI decision, and within four years of the initial SSDI decision.²⁰

SSA may also reopen “at any time” if one of the following apply:

- “fraud or similar fault” rule – For SSDI or SSI claims, SSA may reopen at any time if benefits were obtained by “fraud or similar fault.”²¹ Note that the regulations on determinations of good cause now require that physical, mental, educational or linguistic limitations be taken into account in fraud determinations.
- “error on the face” and other Title II special rules – Specific rules applicable to Title II (but not SSI) claims, designate certain specific grounds warranting reopening “at any time.”²² 20 C.F.R. § 404.988 (c)(8), is especially useful because it allows reopening if the decision “is wholly or partially unfavorable to a party, in order to correct a clerical error or an error that appears on the face of the evidence that was considered when the determination or decision was made.”

Computing Time Periods for “Reopening” Under SSA’s Regulations

Possible basic methods of measurement

- Standard SSA method – Compute the period from the date of the reopening request back to the date of the initial decision that is the subject of the request.
- Constructive Dates of Filing of requests – Compute the period from the constructive date of reopening request, for example, the date that the claimant visited an SSA office or the date that the claimant reapplied for benefits, back to the date of the initial decision that is the subject of the request.

¹⁷ 20 C.F.R. §§ 404.987-404.989 & 416.1487-416.1489.

¹⁸ POMS DI 27505.001B.2.

¹⁹ See, e.g., *Pollot v. Secretary of HHS*, Civil No. 81-7098 (C) (W.D.N.Y., July 16, 1982).

²⁰ 20 C.F.R. §§ 404.988 & 416.1488(b)&(c).

²¹ 20 C.F.R. §§ 416.1488(c) & 404.988(c).

²² 20 C.F.R. § 404.988 (c)(2-11).

- Incorrect method (not accepted by SSA or courts) – Compute the period from date of reopening request back to date of final decision that is the subject of the request.

Establishing Good Cause Warranting Reopening Under SSA’s Regulations

Good cause is established when new and material evidence is furnished “in either an SSDI case or an SSI case; or, a clerical error in the computation or recomputation of benefits was made” in an SSDI case; or “a clerical error was made” in an SSI case; or the evidence ... clearly shows on its face that an error was made” in either an SSDI or SSI case.

New and Material Evidence

Reopening within 2 years, or 4 years, is warranted when the “new and material evidence” constitutes “good cause” under the regulations. In SSDI cases, the evidence must not have been in the file when the final determination that is to be reopened was made; and the information must relate back to the date of the original determination; and the new evidence must reveal facts that would result in a conclusion different from the decision.²³

In SSI cases, the new evidence must not have been in the file when the final determination of which reopening is requested was made; and the new evidence must reveal facts that would result in a conclusion different from the decision.²⁴

SSA has included some examples of “new and material evidence” as a basis for reopening in its HALLEX.²⁵ In the first example, new medical evidence showed that the claimant’s impairment met a Listing in Appendix 1, Subpart P, during the previously adjudicated period and that an allowance based on the prior application was warranted.²⁶ In the second example, new medical evidence showed that the original medical prognosis did not prove to be accurate and that an allowance based on a prior application was warranted. In this example, the prior adjudicator believed that the claimant’s broken hip would be healed within 12 months, but later medical evidence showed that the broken hip had not healed sufficiently within 12 months to permit the claimant’s return to substantial gainful activity.²⁷

Fraud or Similar Fault

Reopening “at any time” is established if there is “fraud or similar fault” under SSA’s regulations. SSR 85-23 clarifies that an individual accused of fraud or similar fault must have knowingly done something wrong. The SSR applies to SSI cases, but the Second Circuit has held that it is also applicable to Title II cases. In one case,²⁸ the Second Circuit held that when a person was “not without fault” in receiving an overpayment, the person nevertheless, had not committed a “similar fault” (i.e. had not “knowingly”

²³ POMS GN 04010.060.

²⁴ POMS GN 04070.090.

²⁵ HALLEX—the Hearings, Appeals and Litigation Law (LEX) manual. Through HALLEX, the Associate Commissioner of Hearings and Appeals conveys guiding principles, procedural guidance and information to the Office of Hearings and Appeals (OHA) staff. HALLEX includes policy statements resulting from an Appeals Council en banc meeting under the authority of the Appeals Council Chair. It also defines procedures for carrying out policy and provides guidance for processing and adjudicating claims at the Hearing, Appeals Council and Civil Actions levels.

²⁶ HALLEX § I-3-904C.1.

²⁷ HALLEX § I-3-904C.1.

²⁸ *Barone v. Bowen*, 869F.2d 49 (2d Cir. 1989).

²⁹ *Byam v. Barnhart*, 324 F.3d 110 (2d Cir. 2003).

done “something wrong”) and thus SSA’s attempt to reopen was unwarranted). Although this section appears intended to be used by rather than against SSA, the Second Circuit recently interpreted it to allow for reopening due to a claimant’s allegations of a mental impairment that interfered with her ability to comprehend and act upon the notice.²⁹

Error on the Face of the Evidence

Reopening “at any time” is established if there is “error on the face of the evidence” under SSA’s regulations. According to SSA’s HALLEX,³⁰ error on the face of the evidence occurs if the error clearly caused an incorrect determination or decision to be made. Some HALLEX examples include:

- Another claimant’s medical report was in the claim file and the adjudicator relied on that report in making an incorrect determination or decision.
- In an SSDI case, the adjudicator relied on another claimant’s earnings record.
- In an SSDI case, onset of disability was found as of a date after the claimant last met the special earnings requirements.
- Benefits in a cessation case were terminated as of the month disability ceased, rather than being terminated as of the close of the second month following the month in which disability ceased.
- Evidence in the possession of the Social Security Administration at the time the determination or decision was made clearly shows that the determination or decision was incorrect. For example, while the claim was being processed, the claimant submitted to the Social Security field office a medical report that would have resulted in a different conclusion. However, the medical report was inadvertently misplaced and not associated with the claim file until after the determination or decision became final.

Practice Tips for Obtaining Reopening

In requesting reopening, emphasize new and material evidence as a basis for changing the earlier, erroneous decision. This is different than requesting an extension of time, which usually involves circumstances or excuses regarding the individual claimant. Notwithstanding, the two often overlap.

Additionally, requests for reopening should be made in writing.³¹ Special rules govern requests for reopening under class action judgments and settlements. Amazingly, these rules are contained in the class action orders, and are often also translated into implementing POMS and HALLEX instructions that can be used to reopen old claims when they have been made in writing.

³⁰ HALLEX § 1-3-904(H)(1).
³¹ POMS GN 04010.010(A) (SSDI), POMS GN 04070.070(A) (SSI).

A new application can constitute a request for reopening. The POMS state that it is not enough for the claimant just to complete a new application. A claimant must take some affirmative action in writing.³² A claimant's new application for benefits will serve as an affirmative action in writing if the new application contains a statement that the prior determination or decision was incorrect.³³ Notwithstanding, at least one court has held that a claimant's new application constituted a request for reopening when his new application requested retroactive benefits back to the time covered by his earlier application. (i.e. same onset date).³⁴

Finally, according to SSA's reopening regulations, reopening may be initiated by the claimant, SSA or any party to the decision.³⁵

Res Judicata

SSA often relies on administrative res judicata to bar a new claim for benefits if there was a final administrative determination on a prior claim that involved the same parties and same issues.³⁶ Administrative res judicata stems from the legal doctrine of res judicata which is defined in Black's Law Dictionary as the "rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." The phrase is translated as "the thing having been adjudicated."³⁷

Administrative res judicata is usually applied by SSA to block reapplications for SSDI claims. Res judicata may prevent an award of benefits for a specific period of time that was adjudicated in the prior decision (keep in mind that reapplications have finite retroactive effect). Res judicata may also prevent eligibility altogether; for example, if a claimant were denied SSDI benefits and the period adjudicated included the claimant's date last insured, then the claimant would be barred from proving the onset of disability prior to the date last insured.

³² POMS GN 04010.010(B) (SSDI), POMS GN 04070.070(A) (SSI).
³³ POMS GN 04010.020 (SSDI), POMS GN 04070.070(B) (SSI).

Overcoming Res Judicata

The federal courts have established a number of exceptions to the doctrine of res judicata. Note: judicial decisions are often imprecise in their analysis of administrative finality, and thus may not effectively distinguish between "extensions of time," "reopening," and "res judicata." Consequently, some of the following discussion may be applicable when requesting extensions of time and requests for reopening.

- Stieberger settlement – The settlement in *Stieberger v. Sullivan*, 801 F.Supp. 1079 (S.D.N.Y. 1992), prohibits SSA from according res judicata effect to any disability decision rendered in New York between 10/1/81 and 7/2/92 as a basis for precluding a subsequent disability claim.
- No hearing, no res judicata – SSA cannot apply the doctrine of administrative res judicata to a prior application in which no hearing took place.³⁸ The Courts have supported this requirement.³⁹

³⁴ *Purter v. Heckler*, 771 F.2d 682 (3rd Cir. 1985).

³⁵ 20 C.F.R. §§ 404.987 & 416.1487.

³⁶ 20 C.F.R. §§ 404.957 & 416.1457.

³⁷ See generally, *Purter v. Heckler*, 771 F.2d 682 (3rd Cir. 1985) ("flexible approach" appropriate for administrative res judicata).

³⁸ Section 405(h) of the Social Security Act, 42 U.S.C. § 205(h).

³⁹ *Dealy v. Heckler*, 616 F.Supp. 880 (W.D. Mo. 1984). *Accord, Aversa v. Secretary of HHS*, 672 F.Supp. 775 (D.N.J. 1987).

- Different claims – Res judicata may not be applied to bar a current application if it does not involve the “same claim,” even when the claimant alleges the same onset date as in the prior application. The party asserting the defense of res judicata must demonstrate that (a) there has been a final judgment on the merits in a prior suit; (b) the prior suit involves the same parties; and (c) the subsequent suit is based on the same causes of action. With respect to identity of causes of action the court must consider four factors (i) whether the acts complained of and the demand for relief are the same; (ii) whether the theory of recovery is the same; (iii) whether the witnesses and documents necessary at trial are the same; and (iv) whether the material facts alleged are the same.⁴⁰ If the causes of action or issues, either factual or legal, are not identical then res judicata does not apply. For example, in *Purter*, the claimant’s third application presented a new cause of action because his disability was characterized as alcoholism for the first time, even though evidence of alcoholism had been presented in the prior applications. Note that *Purter* also involved a prior federal court decision, as well as administrative decisions, none of which were accorded res judicata effect.
- Raise it or waive it – If res judicata is not raised as an affirmative defense at an early stage during the administrative process or in the court pleadings, it is deemed waived.⁴¹ In a very important decision from Wisconsin, the court held that the defense of res judicata had been waived once the hearing examiner did not rely on it to deny the current application.⁴²
- Bad notice – If SSA personnel advised the claimant, though incorrectly, that she could file a second application and forego her hearing on her first application, res judicata is deemed waived. In an incredibly important decision, a New York District Court noted that reconsideration denial notices inform claimants that they have the right to file another application at any time in the future. These notices do not tell claimants that their failure to appeal the reconsideration denial will be res judicata and foreclose receiving additional accrued benefits if a subsequent new application is filed. Thus, it refused to apply the doctrine of res judicata.⁴³ Additionally, Congress’s 1990 amendments to the Social Security Act provided that if a claimant could demonstrate that he failed to appeal an adverse decision because of reliance on incorrect, incomplete or misleading information provided by SSA, failure to appeal could not serve as a basis for denial by the SSA of a subsequent application. This provision applies to both initial denials and reconsideration denials made on or after July 1, 1991.⁴⁴
- Pro se Cases – If the claimant proceeded pro se, and the lack of representation resulted in material injury, res judicata may not be applied.⁴⁵
- New Evidence – Res judicata is inapplicable when new evidence is submitted. Res judicata does not apply to a claim when new evidence is presented which was not before SSA when it made the prior determination and when inclusion of the new evidence would result in a favorable decision. *Collins v. Matthews*, 456 F.Supp. 813 (S.D.Ga. 1978).

⁴⁰ *Purter v. Heckler*, 771 F.2d 682 (3rd Cir. 1985), *McGowen v. Harris*, 666 F.2d 60, 67 (4th Cir. 1981) and *Crouch v. Sec. of Hew.*, 378 F. Supp. 1384 (S.D.N.Y. 1974).

⁴¹ *Hernandez v. Heckler*, Opinion No. C-80-4402-MHP (N.D.Ca. 9--24-85), (Unempl. Ins. Rep. (CCH) New Matter & 16,519).

⁴² *Brandt v. Califano*, 470 F.Supp. 795 (E.D.Wis. 1979).

⁴³ *Christopher v. Secretary of HHS*, 702 F.Supp. 41 (N.D.N.Y. 1988).

⁴⁴ 42 U.S.C. § 405(b)(3)(A).

⁴⁵ *Butts v. Heckler*, Opinion No. 82-67-1-NAC (N.D.Ga., August 15, 1984) cited in Unempl. Ins. Rep. (1977, & 14,550).

- SSA Screw ups – Res judicata is inapplicable when the record demonstrates manifest error. This means that res judicata cannot not be applied to bar reopening by the Appeals Council for the purposes of correcting a clerical error or an error on the face of the evidence. *Burns v. Weinberger*, 394 F.Supp. 1159 (W.D.Mo. 1975).
- Mental Impairments/Limited Intelligence – If the claimant suffered from a mental impairment or limited intelligence at the time his prior application for benefits was denied, which prevented him from understanding and protecting his legal rights, then due process precludes SSA’s reliance on the doctrines of administrative finality and administrative res judicata to bar reopening and revising the prior application. In a landmark decision, the Fourth Circuit Court of Appeals did not allow SSA to use the doctrine of res judicata to deny the claimant’s application, when the claimant was so mentally ill that he could not understand the administrative procedure. *Young v. Bowen*, 858 F.2d 951 (4th Cir. 1988). Because of this decision, SSA issued Acquiescence Ruling 90-4(4), which bars the agency from relying on res judicata or administrative finality if the alleged mental incompetence of a claimant precluded the claimant from understanding the procedures for requesting administrative review in a prior application. According to the Appeals Council announcement after its January 8, 1990 meeting, this aspect of the ruling will be applied on a nationwide basis even though the Acquiescence Ruling (which also requires evidentiary hearings on competency) is limited to the Fourth Circuit.
- Changes in Laws or Listings – SSA concedes that if the law or the listings become less restrictive between the time of the prior and subsequent applications, res judicata cannot bar the new application.⁴⁶
- Implicit Reopening – If SSA considers the evidence on the merits in the course of a request for reopening, but does not explicitly deny the request to reopen, it has implicitly reopened the earlier claim and it will not be given res judicata effect.⁴⁷

⁴⁶ See POMS DI 27515.050; HALLEX I-2-440(F).

The Role of the BPA&O in Avoiding Reopening Issues

⁴⁷ See, e.g., *McGowen v. Harris*, 666 F.2d 60 (4th Cir. 1981); *Taylor for Peck v. Heckler*, 738 F.2d 1112, 1114-15 (10th Cir. 1984).

⁴⁸ There are 5 main tools in the SGA tool box used by CRs to make SGA determinations: unsuccessful work attempts (UWA), income averaging, impairment related work expense (IRWE), subsidies and unincurred business expenses and unpaid help for self employed individuals.

For the BPA&O benefits specialist, reopening issues will often come about in the substantial gainful activity context. The best strategy for dealing with SGA determinations is to follow the rule that a stitch in time saves nine. When work CDRs are being conducted, a proactive approach should be pursued to insure that a proper SGA determination is made in the first place, rather than relying on a reactive approach of trying to go backwards to change an incorrect SGA decision.

First and foremost, the benefits specialist should insure that recipients report all wages to SSA in a timely fashion and make certain that this information is accepted and acted upon. Secondly, it is important to be informed about how and when SGA determinations are made, and particularly knowing about how to apply the “tools” in the SGA determination toolbox.⁴⁸ Thirdly, prepare beneficiaries to participate in the SGA determinations and remind them of the appeals process. Finally, keep in mind that some prior SGA determinations may be “reopened under certain circumstances.”

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