

Social Security Reconsideration Appeals

Kate Lang, Senior Staff Attorney
Trinh Phan, Senior Staff Attorney

March 21, 2018

Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems with getting on to the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Slides and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

Justice in Aging

Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we've focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.

Key Lessons

1. Filing a Request for Reconsideration is the **first step** in the administrative appeal process, across the different benefit programs that SSA administers.
2. Those receiving Supplemental Security Income (SSI) benefits have **stronger protections** in the reconsideration process.
3. The **different benefit programs** that SSA administers have **different issues** that may result in benefits being reduced or terminated.
4. Pursuing a reconsideration appeal can be a **complex process**, and **SSA often makes mistakes** in handling reconsiderations.

Section I: Reconsideration Context and Basic Process

Social Security Administrative Appeal Process

- Initial determination
- Reconsideration
- Administrative Law Judge hearing
- Appeals Council
- District Court

When Reconsideration Applies

- Programs administered by SSA
 - Supplemental Security Income (SSI)
 - Social Security Old-Age, Survivors, and Disability Insurance (OASDI)
- Before and after benefits are approved
 - Application appeal: denied at application
 - Post-eligibility appeal: benefits approved, then later reduced or suspended/terminated

Reconsideration Basic Process

1. Request Reconsideration within 60 days of receiving initial determination notice
2. Review of decision by someone who did not participate in the initial determination
3. Right to written decision, and appeal rights if denied

Reconsideration Basic Process

1. Request Reconsideration within 60 days of receiving initial determination notice

- For SSI post-eligibility actions only: benefits will continue if appeal within 10 days of receiving notice (*Goldberg v. Kelly*)
- Good cause can extend deadline, both 60-day and 10-day.

20 CFR: § 404.911, § 416.1411

Filing the Reconsideration Appeal

- In person at local SSA office, or by mail
 - [Form 561](#)
 - Online through iAppeals
 - Both disability appeals, and non-disability appeals (new option)
 - [SSA online appeals information](#)
- *Keep confirmation that appeal was filed

Reconsideration Basic Process

2. Review of decision by someone who did not participate in the initial determination

- Substance of appeal: Reviewing evidence from SSA and providing evidence to SSA to support appeal. Developing case theory.
- Options available for the format of the review varies by program and issue: case review, informal conference, formal conference.

Format of Reconsideration Review

Review Option	Review Rights
Case review <i>all OASDI and SSI issues</i>	Paper review only POMS GN 02201.025, SI 04020.040
Informal conference, or formal conference <i>only SSI post-eligibility</i>	Informal = may present witnesses Formal = may also subpoena adverse witnesses/documents and cross-examine adverse witnesses POMS SI 04020.050
In-person hearing at state Disability Determination Services <i>only medical cessation for SSDI or SSI disability</i>	Similar to formal conference POMS DI 12026.001

Reconsideration Basic Process

3. Right to written decision, and appeal rights if denied

- Request for ALJ hearing within 60 days of receiving Reconsideration determination

Example

Mr. A receives SSI. After his mother passed away, Mr. A and his siblings inherited her house. SSA suspended Mr. A's SSI benefit because the alleged value of his share of the house puts him over the \$2,000 resource limit.

Mr. A believes that the house is not worth much, and that his share will be minimal if or once the house is sold. He also does not know if the house can be sold, because his siblings do not agree on what to do with the house.

What happens if Mr. A does nothing?

- SSI stays suspended
 - After 12 months in suspense, Social Security will terminate his SSI benefits
- In states with SSI-linked Medicaid, Medicaid also terminates with the SSI suspension

What could Mr. A do?

1. Request Reconsideration within 60 days of receiving initial determination notice
 - Files online, in-person, or by mail. Gets confirmation of submission.
 - Because this is an SSI post-eligibility action, Mr. A (1) can continue his SSI benefits if he appeals within 10 days, and (2) can choose an informal conference or formal conference, rather than a case review.

Conducting the Appeal

2. Review of decision by someone who did not participate in the initial determination
 - Prepare for informal or formal conference. Ask for an interpreter if needed.
 - Does SSA have sufficient evidence of the existence and value of the resource?
 - Collect evidence on the alleged resource (ownership, restrictions on sale)
 - Is spend down of resources appropriate?

Getting to the Outcome

3. Right to written decision, and appeal rights if denied
 - No deadline for issuing Reconsideration determination
 - If denied and disagree, request hearing in front of an Administrative Law Judge (ALJ) within 60 days of receiving the Reconsideration determination

Section II: Due Process Protections for SSI Post-Eligibility Appeals

Goldberg v. Kelly Due Process Protections

Goldberg v. Kelly (1970): Right to advance notice, face-to-face hearing, benefits continuation.

What it means

- Benefits continue through Reconsideration, if appeal within 10 days of receiving the notice
 - Good cause can extend 10-day deadline.
20 CFR: § 416.1411
- More than just a paper appeal (case review): can choose informal conference or formal conference

Benefits of an In-Person Conference

- Instead of Case Review, can choose in-person meeting:
 - Informal Conference: may present witnesses
 - Formal Conference: may also subpoena adverse witnesses/documents, and cross-examine adverse witnesses. POMS SI 04020.050

Benefits of an In-Person Conference

- SSA must schedule conference within 15 day of filing of Reconsideration. POMS SI 04020.050
- SSA must hold conference before denying Reconsideration request

Benefits Continuation Compared

Goldberg v. Kelly

- Any action by SSA to reduce or suspend **SSI benefits**
- Must request within 10 days of receiving notice
- Lasts through Reconsideration decision
- POMS SI 02301.301

Statutory benefits continuation

- Action by SSA to terminate **SSI disability or SSDI benefits** because of finding that person is no longer disabled
- Must request within 10 days of receiving notice
- Lasts through ALJ decision
- POMS DI 12027.008

If Receive Both SSI and Another SSA Benefit

- **“Concurrent beneficiary”**: Person receiving a small OASDI benefit also receives SSI in an amount that tops them up to the SSI benefit maximum; in 2018: \$750 individual / \$1,125 couple
- *Goldberg v. Kelly* also applies to concurrent beneficiaries

Example

Ms. R receives a notice **stopping her SSI** because a newly identified resources put her over the resource limit: a bank account. She receives a second notice **assessing an overpayment** of all SSI benefits received in the past year.

She disagrees that the bank account is her resource, because she holds it in trust for a friend's adult child who has a disability and whose family lives in another country. She has never accessed the account.

What can Ms. R do?

- Appeal first notice to dispute the merits. The bank account does not belong to her and she cannot use the money on her own needs.
- Appeal second notice to dispute the overpayment.
- May also want to ask for waiver of the overpayment.

Practice Tip: The Appeal

- Collect evidence to rebut ownership of bank account. POMS SI 01140.205
- Consider spending down excess resources to re-establish SSI eligibility?
- Ensure that benefits continue per *Goldberg v. Kelly*

Example

Same scenario with Ms. R, except the newly identified resource is a life insurance policy. Again, she receives two notices from SSA, one **stopping her SSI** because a newly identified resource puts her over the resource limit, and a second notice **assessing an overpayment** of all SSI benefits received in the past year.

Ms. R realizes she had forgotten about the life insurance policy purchased many years ago. Combining the cash surrender value of the life insurance policy with her personal bank account, she was over the resource limit for only 4 months in the past year.

What can Ms. R do?

- Consider cashing out life insurance policy and spending down to re-establish SSI eligibility within 12 months.
- Appeal second notice to dispute the amount. She was overpaid 4 months, not 12 months.
- May also want to ask for waiver of the overpayment.

What if Ms. R Received Both SSI and SSA Retirement Benefits?

Both SSI and SSA retirement benefit stop.

1. Overpayment withholding from current SSI benefit is capped at 10%.
2. **But** 10% SSI cap does not apply if action is to suspend SSI (thus no current SSI benefit from which to withhold).
3. SSA would therefore apply default OASDI withholding = withhold entire OASDI check.

Practice Tip: *Goldberg v. Kelly* benefit continuation applies to concurrent cases.

Section III: Common Issues That Are Appealed

Common SSI Problems

- Suspension/Termination
 - Over resource limit
 - Outside U.S. for more than 30 days
 - Reduction
 - Fluctuating income, other income
 - In-kind support and maintenance
 - Institutionalization (nursing home, hospital)
 - Overpayment (due to above)
- *Issues often arise from routine non-medical reviews.

Common SSDI Problems

Terminations and overpayments due to application of the work incentive rules

- Alleged work at Substantial Gainful Activity level (2018: \$1,180 non-blind / \$1,970 blind)
- Applying Trial Work Period and Extended Period of Eligibility rules
- Calculating deductions from work income (Impairment-Related Work Expenses, subsidies, unpaid help)

Continuing Disability Review (CDR) Process

- SSA periodic medical review of whether disability continues
 - SSDI or SSI on the basis of disability
- Statutory benefits continuation during appeal, through ALJ hearing level
 - If requested within 10 days of receiving notice
POMS DI 12027.001
- Reconsideration conducted by **state Disability Determination Services**; in-person hearing

Example

Mr. L receives SSDI. SSA conducts a Continuing Disability Review, then sends a notice informing Mr. L that his medical condition has improved and that he is able to do substantial work.

Mr. L disagrees, as he is still disabled and is not able to do substantial work.

Appealing the Termination

- Within 10 days of receiving the notice, appeal and request statutory benefit continuation
 - Statutory benefit continuation can last past Reconsideration, through ALJ hearing decision
- Conducting the appeal:
 - Collect updated medical evidence
 - In-person Reconsideration hearing at state Disability Determination Services

Overpayments

- May decide to both appeal an overpayment on the merits and request a waiver
- Confirm that SSA not recouping overpayment while Reconsideration (or waiver request) is pending
- If Reconsideration denied, consider negotiating a payment plan while ALJ hearing request pending
- [Justice in Aging overpayments training](#)

Section IV: Common Problems with the Reconsideration Process

Adequacy of Notice

- SSI: Notice must include the reasons for the determination, and the right to appeal. [POMS SI 04010.020](#)
- Overpayments: Notice must include total amount and how and when it occurred. [POMS GN 02201.009](#)
- **Practice Tip**: Inability to understand the notice may be good cause to extend the deadline to request Reconsideration.

Processing Problems

- SSA loses appeal, or does not process appeal in timely manner
- Also, SSA representative discouraging people from filing an appeal
 - Submit appeal with verification of submission (online, in-person or by mail with verification)
- Dealing with delays
 - Follow up with local office, ask for supervisor
 - Congressional inquiry

Dealing with Delays

- Delays in SSA scheduling and holding in-person conference
- Delays in SSA effectuating a favorable Reconsideration decision

Access to Client File

- Should be able to review client file, regardless of the program or issue being appealed
- For SSDI work incentive issues, work review may have happened in regional office rather than in local office

Example

Ms. V receives SSDI, and she works. Social Security sends her two notices: the first terminating her benefits retroactive to 2016 because she worked over the Substantial Gainful Activity (SGA) level, and the second assessing an overpayment for all SSDI benefits she received from 2016 to today.

Ms. V exhausted her Trial Work Period and Extended Period of Eligibility some time ago. She pays for in-home care and medical supplies that she needs to be able to work. She did not report these expenses to Social Security, as she did not know about the rule to deduct impairment-related work expenses (IRWEs) from work income to determine SGA.

Appealing the Termination

- Appeal
- Provide verification of income related work expenses (IRWEs)
 - When IRWEs are deducted from work income, is income below the SGA level? **POMS DI 10520.001 et seq.**
 - Documentation is critical (SSA's and client's)

Appealing the Overpayment

- Appeal, and possibly request waiver
- Advocate not certain that SSA has enough evidence to support the overpayment
 - Is notice adequate? **POMS GN 02201.009**
 - Ask for further explanation. **POMS GN 02201.017**

Tips to Avoid Problems

- SSI: Report changes within 10 days after end of month in which change occurred. **POMS SI 02301.005**
 - Changes in income including wages, resources, living arrangement, marital status; trips outside US > 30 days, institutionalization
- SSDI: Report when work starts or stops, changes in duties/hours/pay, or payment for items or services needed for work. **POMS DI 13010.020**
 - Keep documentation of work incentives (alleged work issues often identified years after the fact)

Tips for Resolution

- Persistence pays off
 - Put requests in writing and provide support with documentation
 - Follow up with phone calls
- Develop good working relationship with field office staff/supervisor
- Document thoroughly

What You Can Do

- Represent claimants on Reconsideration appeals
- Request formal conferences
- Ensure due process requirements are met
- Assist with gathering documentation
- Spread word about systemic advocacy to networks

Case Consultations

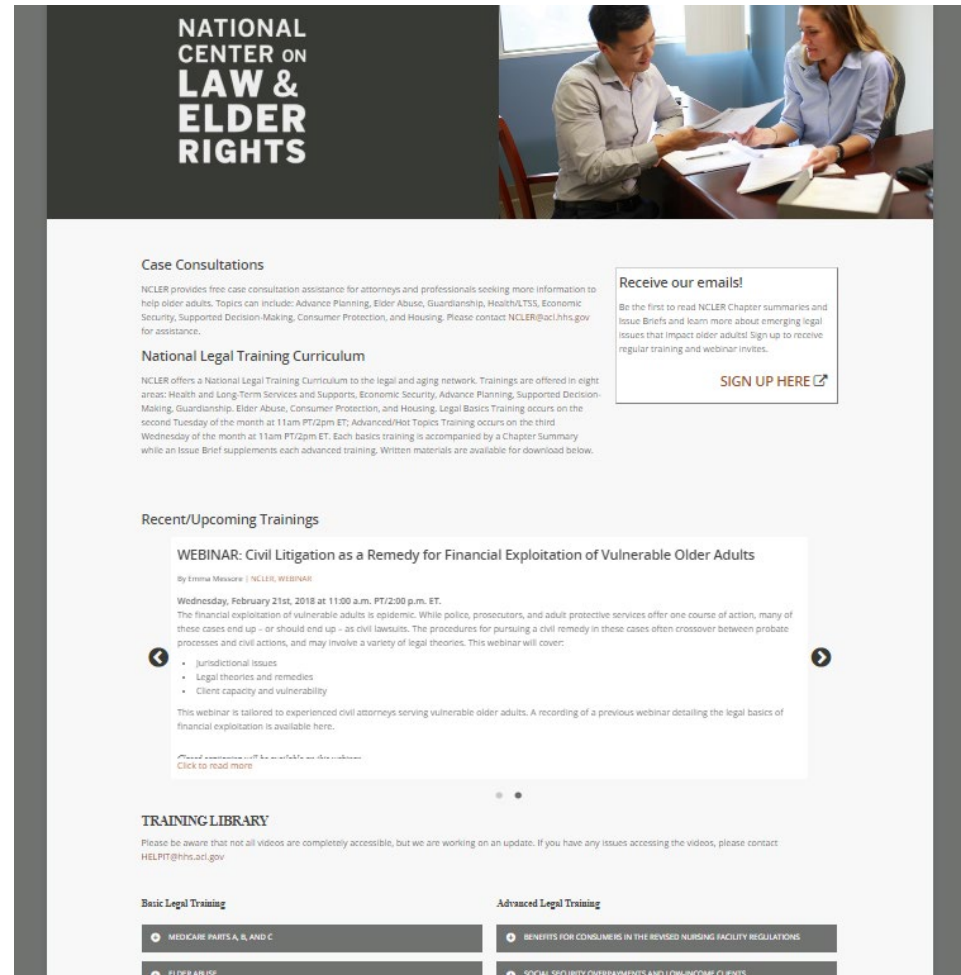
Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

Additional Resources

- Kate Lang, klang@justiceinaging.org
- Trinh Phan, tphan@justiceinaging.org
- Regulations
 - 20 C.F.R. §§ 404.907 – 922 (OASDI)
 - 20 C.F.R. §§ 416.1407 – 1422 (SSI)
- Program Operations Manual System (POMS)
 - GN 03102.000 et seq. (OASDI)
 - SI 04020.000 et seq. (SSI)

Visit Our Website: [NCLER.acl.gov](https://www.ncler.acl.gov)

- Learn about upcoming NCLER trainings
- Access all materials from past trainings, including webinar recordings
- Sign up for our email list



NATIONAL CENTER ON LAW & ELDER RIGHTS

Case Consultations
NCLER provides free case consultation assistance for attorneys and professionals seeking more information to help older adults. Topics can include: Advance Planning, Elder Abuse, Guardianship, Health/LTSS, Economic Security, Supported Decision-Making, Consumer Protection, and Housing. Please contact NCLER@acl.hhs.gov for assistance.

National Legal Training Curriculum
NCLER offers a National Legal Training Curriculum to the legal and aging network. Trainings are offered in eight areas: Health and Long-Term Services and Supports, Economic Security, Advance Planning, Supported Decision-Making, Guardianship, Elder Abuse, Consumer Protection, and Housing. Legal Basics Training occurs on the second Tuesday of the month at 11 am PT/2pm ET; Advanced/Hot Topics Training occurs on the third Wednesday of the month at 11am PT/2pm ET. Each basics training is accompanied by a Chapter Summary while an Issue Brief supplements each advanced training. Written materials are available for download below.

Recent/Upcoming Trainings

WEBINAR: Civil Litigation as a Remedy for Financial Exploitation of Vulnerable Older Adults
By Emma Messore | NCLER WEBINAR
Wednesday, February 21st, 2018 at 11:00 a.m. PT/2:00 p.m. ET.
The financial exploitation of vulnerable adults is epidemic. While police, prosecutors, and adult protective services offer one course of action, many of these cases end up - or should end up - as civil lawsuits. The procedures for pursuing a civil remedy in these cases often crossover between probate processes and civil actions, and may involve a variety of legal theories. This webinar will cover:

- Jurisdictional issues
- Legal theories and remedies
- Client capacity and vulnerability

This webinar is tailored to experienced civil attorneys serving vulnerable older adults. A recording of a previous webinar detailing the legal basics of financial exploitation is available here.

[Click to read more](#)

TRAINING LIBRARY
Please be aware that not all videos are completely accessible, but we are working on an update. If you have any issues accessing the videos, please contact HELPT@hhs.acl.gov

Basic Legal Training

- MEDICARE PARTS A, B, AND C
- ELDER ABUSE

Advanced Legal Training

- BENEFITS FOR CONSUMERS IN THE REVISED NURSING FACILITY REGULATIONS
- SOCIAL SECURITY OVERPAYMENTS AND LOW-INCOME CLIENTS

Receive our emails!
Be the first to read NCLER Chapter summaries and Issue Briefs and learn more about emerging legal issues that impact older adults! Sign up to receive regular training and webinar invites.

[SIGN UP HERE](#)