

## APPEALS TO THE FEDERAL COURTS: YOU NEED TO BE DOING IT

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For many disability representatives (non-attorneys and attorneys alike), if an application is denied by an ALJ and the Appeals Council does not grant review, then the claim is effectively dead. That shouldn't be the case. In order to best represent your clients, federal court appeals must be part of your overall strategy. I want to briefly describe the federal court appeals process and then explain how it can benefit both you and your clients.

### **The Federal Court Process**

After the Appeals Council denies a request for review, you have approximately 60 days to bring a federal court action challenging the denial of benefits. As a non-attorney representative, you will need to establish a relationship with an attorney who does this kind of federal court work. Unlike the administrative process, non-attorneys are barred from pursuing appeals in federal court on behalf of their clients.

The federal court appeals process is entirely different than the administrative process. The biggest difference is that you are not trying to prove that your client is disabled. Instead, the focus of any federal court appeal needs to be on the legal errors committed by the ALJ. The goal is to identify such errors and explain why they require a remand for additional administrative proceedings. In other words, you are not looking for an outright award of benefits, but rather another bite at the apple. The key is to hone in on specific legal errors which violate agency policy, as opposed to asking the Court to re-weigh the evidence and reach a different disability decision than the ALJ did. Based on my 10 years at SSA litigating these cases in federal court, asking for a re-weighing of the evidence is usually totally futile.

### **Two Simple Things to Help Set Up Strong Federal Court Appeals**

You can set up many successful federal court appeals by doing two simple things. First, ask the following question of every VE who has just finished identifying jobs in response to an ALJ's hypothetical questions: "It is correct that in responding to the ALJ's questions you considered no functional limitations beyond those specifically identified by the ALJ?" The VEs almost always say yes. In the event that the ALJ left anything out of the hypothetical questions, as is often the case, you just set yourself up for a strong federal court appeal. Most federal

courts will remand for a new hearing because the hypothetical questions did not include all of the relevant functional limitations.

Second, any requests you make should be documented in the record either in writing or at the hearing. For example, if you request any subpoenas, consultative examinations, an additional hearing, or anything else, you need to have a record of that. Having off the record conversations with the ALJ or a clerk will not be enough. If the requests are honored they may help you build your case. If the ALJ ignores them, as is common, then you have a built in issue for an appeal to the federal courts. Along these lines, do not believe ALJs who say the record is closed at the end of the hearing. That is simply not true. The reality is that the regulations and the Social Security Act provide that the record is open until the date of the ALJ's decision. It is utterly routine for an ALJ to fail to address evidence submitted after the hearing. This is often a very strong issue on which to pursue an appeal to federal court.

There are almost a limitless number of ways in which ALJs can commit legal errors in writing their decisions. However, if you do the two simple things I talked about above in every case, you are setting yourself up for some strong appeals in federal court.

### **Is it worth it to appeal to federal court?**

Yes, for several reasons. First and foremost, you are providing a higher quality of representation for your clients when you anticipate the possible need for federal court appeals. Second, the allowance rate for remanded cases is very high. In fact, it is much higher than the normal allowance rate at the ALJ level. Obviously an award of benefits helps the client. However, it also benefits you because the additional time delay caused by the federal court litigation has caused the back benefits to grow. Therefore, your fee is higher. In the end, a case that you would have otherwise just written off could end up generating a max fee or better. Third, you win more cases. Of course you get the direct benefit of winning cases that were remanded by the federal courts. But even more important is the indirect benefit. Once you get a reputation as someone who will appeal to the federal courts, ALJs are much more inclined to rule in your favor on those borderline cases. It is a subtle but very real phenomena.

Overall, you should include appeals to the federal courts as part of your overall strategy for effectively representing your clients. If you do, it will produce benefits for both your clients and your business.

## BIO

David F. Chermol, Esquire is a Social Security Disability attorney based in the Philadelphia area. He worked with SSA's Office of the General Counsel for more than 10 years and litigated hundreds of disability appeals in federal courts across the United States. As SSA's senior disability litigator in Mid-Atlantic Region III, he participated directly or indirectly in most of the major precedential cases decided by the Third and Fourth Circuit Courts of Appeal over the last decade. He is a NADR member and served on President Barack Obama's National Disability Policy Committee. His firm focuses on disability appeals in the federal courts.