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## Social Insecurity on the Horizon for Disabled Workers

Robert E. Rains

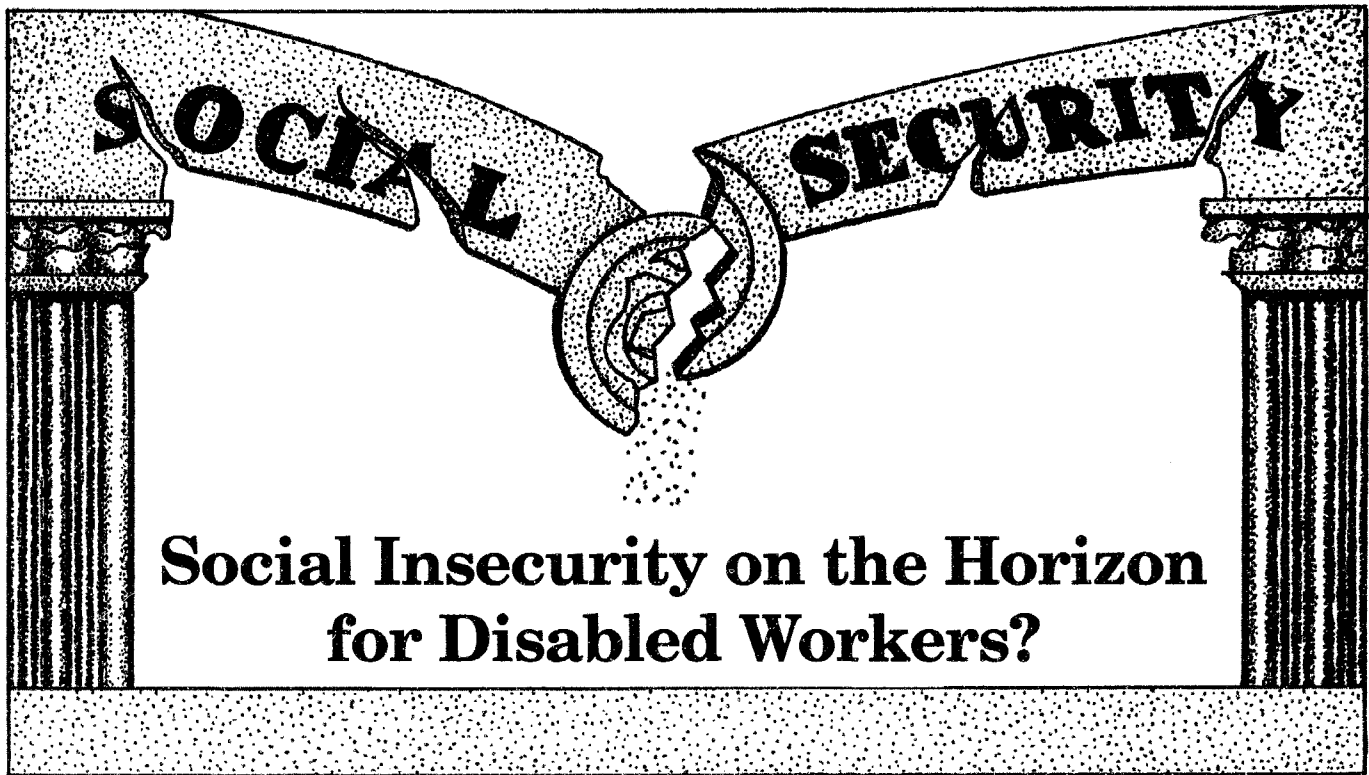
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## Social Insecurity on the Horizon for Disabled Workers?

By Robert E. Rains

**I**n April 1995, as part of "Reinventing Government – Phase II" (REGO II), the Social Security Administration (SSA) proposed to eliminate the attorney fee program. In a message from SSA Commissioner-Designate Shirley S. Chater, the proposal was explained as follows:

SSA currently approves the fee that may be charged by an attorney to represent a claimant in administrative proceedings. SSA withholds a specified amount of past due disability or black lung benefits for direct payment to the attorney. As a result of the REGO II effort, SSA will no longer approve fees, withhold benefits, or pay attorneys because these are not functions that are critical to the administration's mission. Claimants, if they choose, would contract for Social Security representation as they do for any other legal service. However, to ensure that claimants are fairly treated, the proposal provides for a statutory limit on the amount a representative may charge, and allows for claimants to seek relief from SSA if overcharged by their attorneys.

Under current law, SSA withholds 25 percent of a represented claimant's back award of Social Security Disability Insurance benefits and the attorney files either a fee agreement or fee petition for approval of fees for administrative work. (The streamlined fee agreement process was enacted by Congress in 1990 and is used in the great majority of cases.)

Now SSA proposes to eliminate the fee agreement process, the fee petition process, the requirement that it withhold 25 percent of a claimant's past-due benefits, and the statutory limit of 25 percent of past-due benefits on the amount a federal court can award. It is also proposing a statutory fee cap of \$4,500 for administrative legal services.

### ■ Article in Brief

- > The Social Security Administration has proposed eliminating its attorney fee program.
- > Although the program was streamlined by Congress in 1990, SSA claims that it is too costly to continue.
- > This proposal could effectively prevent many disabled workers from obtaining competent legal representation in appealing the wrongful denial of their Social Security benefits.

The National Organization of Social Security Claimants' Representatives (NOSSCR)<sup>1</sup> has suggested to SSA Commissioner Chater that a flat fee of \$4,500 "is an abdication of SSA's responsibility toward claimants." NOSSCR argued that the current fee mechanism has been working well, but, if it must be changed for cost-cutting reasons, it should be replaced with the issuance of a back award check, payable jointly to attorney and client, and sent to the attorney. An SSA study in 1988 suggested exactly such a program. An alternative would be to issue the back award check payable to the attorney in trust for the claimant.

By letter of May 19, 1995, SSA's Director of the Office of Policy, Planning, and Evaluation rejected both alternatives. Although private insurance carriers regularly issue payments by such methods, SSA claims that this would not be feasible:

After consultation with the affected components within the Social Security Administration (SSA), we concluded that neither direct payment idea was feasible because systems and operational modifications would be so expensive that SSA would realize none of the savings the initiative is designed to produce. We found that there was no systems support for issuing a one-time-only two-party check for retroactive benefits, then switching to a check issued only in the claimant's name. Therefore, the entire process would involve manual folder handling and processing, comparable to the current process of withholding 25 percent of past-due benefits and paying the attorney directly.

As of July 1995, claimants' representatives and SSA are at an impasse. Many experienced attorneys believe that this proposal, if enacted, would effectively preclude most disabled workers from obtaining legal representation when SSA denies their meritorious claims. (In fiscal year 1993, SSA's administrative law judges (ALJs) reversed the denial of benefits in 68 percent of cases appealed; and statistics indicate that represented claimants fare significantly better before such ALJs than unrepresented ones.)

Because most claimants have been out of work for a considerable period of time before their claims rise to the ALJ hearing level, most cannot afford to deposit a reasonable retainer for legal services. Further, the Social Security Act specifically prohibits any assignment of benefits.<sup>2</sup> Thus, SSA's proposal, in its current incarnation, would leave most claimants without the practical ability to assure reasonable payment for legal services; and it is likely that many attorneys would cease this practice. While the attorneys could readily refocus their practices into such related—and more remunerative—areas as workers' compensation and personal injury, the claimants would be the ones left without professional assistance in negotiating their way through a legal labyrinth which has been described by the Supreme Court as "Byzantine."<sup>3</sup>

Fortunately, eliminating the attorney fee program would require amending the Social Security Act.<sup>4</sup> Efforts are being made to dissuade the administration from sending Congress proposed implementing legislation. Recently, the Philadelphia Bar Association and the Pennsylvania Bar Association have adopted formal resolutions opposing

"all efforts of the Social Security Administration to eliminate the attorney fee program." Additionally, the South Carolina Trial Lawyers Association and the Social Security Sections of the Orange and Los Angeles County Bars, among others, have voiced their opposition. A spokesperson for the Allegheny County (PA) Bar Association stated, "Citizen protection from abuse and poor decision making requires the intervention of legal counsel. To limit access to attorneys is at its worse anti-consumer and anti-claimant."

Given the current efforts to reduce or end funding for legal services programs, elimination of private representation could have particularly dire consequences for disabled workers seeking their Social Security Disability Insurance benefits. ■

#### Endnotes


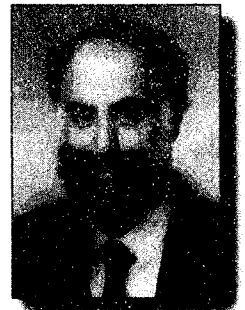
<sup>1</sup>Interested persons can contact NOSSCR in writing at 6 Prospect Street, Midland Park, NJ 07432, or call them at (800) 431-2804.

<sup>2</sup>42 U.S.C. § 407 See *Philpott v Essex County Welfare Board*, 409 U.S. 413 (1973).

<sup>3</sup>*Schwelker v. Gray Panthers*, 453 U.S. 34, 43 (1981).

<sup>4</sup>42 U.S. C. § 406.

*Robert E. Rains is a professor of law and director of the Disability Law Clinic, The Dickinson School of Law, Carlisle, PA. © 1995, Robert E. Rains.*



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