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Work Incentive Support Center

Policy and Practice Brief:

Delivering Advocacy Services Through P&A for Beneficiaries of Social Security Programs

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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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I. Introduction

The Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA) established several new initiatives within the Social Security Administration (SSA). These included: several new work incentive provisions; the Ticket to Work and Self Sufficiency program; the Benefits Planning, Assistance and Outreach (BPA&O) projects; and improvements in the optional Medicaid Buy-In program. The legislation also created the Protection and Advocacy for Beneficiaries of Social Security (PABSS) program to serve Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) beneficiaries who want to work despite their continuing severe disabilities. From the outset, PABSS was viewed as an advocacy program geared to help beneficiaries overcome obstacles to finding and keeping a good job.

When it was created, PABSS became the fifth Protection and Advocacy (P&A) program, or sixth if we count the Client Assistance Program (CAP) in the P&A family of programs. Since the creation of PABSS in the 1999 legislation, two additional P&A programs have been added as well.¹

P&A agencies typically face challenges associated with a new advocacy program. As part of the start-up phase, the P&A agency needs to: hire or assign new staff; develop program priorities; develop outreach and marketing strategies; and determine how the new P&A program fits into their existing agency structure. These challenges were faced by P&A agencies during 2001 and 2002 as they began to implement the new PABSS programs.

On top of the usual start-up challenges, PABSS programs also faced significant limitations associated with program grant conditions. During the program's early years, PABSS advocates and attorneys could only serve SSI or SSDI cash beneficiaries. Additionally, they were not permitted to pursue any appeals involving SSI or SSDI benefits no matter how closely related they were to the individual's long-term work goals.

Since these early years of the program, two developments have occurred to expand the services available through PABSS programs, including: a change in grant conditions to allow PABSS attorneys and advocates to handle work-related SSI and SSDI administrative appeals, including overpayments; and amendments, as part of the Social Security Protection Act of 2004, which allow PABSS attorneys and advocates to represent former cash beneficiaries who are getting continued health insurance coverage through either 1619(b) (Medicaid While Working) or the extended Medicare.

This article will describe both the original legislation creating PABSS and original PABSS grant conditions and how amendments to both have expanded who PABSS programs can represent and the type of issues they can handle.

¹ For a detailed discussion of the seven P&A programs and the CAP program, see our policy and practice brief, *State Protection and Advocacy Programs*, available on Cornell's website at www.ilr.cornell.edu/ped/dep/PP_2.txt or .pdf.

II. TWWIIA Amendments of 2004 Expand Who is Eligible for PABSS Services

A. The Authority Granted Through the Original 1999 Legislation

The underlying purpose of the TWWIIA legislation was to provide individuals with disabilities additional incentives, supports, and services needed to achieve long-term work goals to enable them to either eliminate or reduce their dependence on SSI or SSDI benefits. The creation of the PABSS program was just one part of the package of services to be offered in order to meet these goals.

The 1999 legislation, in authorizing the PABSS program, stated that services provided to beneficiaries may include:

- (1) information and advice about obtaining vocational rehabilitation and employment services; and
- (2) advocacy or other services that a disabled beneficiary may need to *secure or regain* gainful employment.²

In describing the individuals who were eligible for services, the original legislation limited eligibility to “disabled beneficiaries” who received cash SSI or SSDI benefits.³

Ironically, and we believe quite unintentionally, the original legislation prohibited PABSS programs from representing those beneficiaries who showed the greatest chances of becoming long-term success stories — namely, those who had recently worked their way off SSI or SSDI cash benefits and whose only connection to the Social Security system was through their continued eligibility for 1619(b) Medicaid or extended Medicare benefits (both described below).

B. The Expansion of PABSS Authority Through the Social Protection Act of 2004

Three key amendments, as related to PABSS, were enacted as part of the Social Security Protection Act of 2004 and provided:

- The original authority for the PABSS program, which extended through 2004, would now extend through 2009⁴;
- Advocacy services would be available if needed “to secure, *maintain*, or regain gainful employment”⁵;
- Eligibility for PABSS services would be expanded to include former cash beneficiaries who receive continued Medicaid under the 1619(b) provisions or who receive continued Medicare under the extended Medicare provisions.⁶

The addition of the word “maintain” (PABSS to provide services if needed “to secure, *maintain*, or retain gainful employment”) is an acknowledgment by Congress that individuals with disabilities may need advocacy services in order keep current jobs so

² See the original 42 U.S.C. § 1320b-21(b) enacted as part of 1999 TWWIIA legislation.

³ See the original 42 U.S.C. § 1320b-21(g)(2) from 1999 legislation.

⁴ 42 U.S.C. § 1320(b)-21(h).

⁵ 42 U.S.C. § 1320(b)(2) (emphasis added).

⁶ 42 U.S.C. § 1320b-21(g)(2).

long as they are still eligible for PABSS services. In fact, in many cases PABSS services may become most valuable after the individual has secured a job and needs advocacy assistance to overcome barriers that might force them to otherwise stop working. By recognizing these facts, it only followed that PABSS eligibility should include individuals who are benefiting from work incentives allowing for continued Medicaid or Medicare.

1. Section 1619(b) - Medicaid While Working

This special work incentive has been a permanent part of the SSI program since 1987. Section 1619(b) of the Social Security Act (also called Medicaid While Working) allows individuals, in most cases, to retain Medicaid when they lose SSI due to increased wages or a combination of wages and unearned income.

If an SSI beneficiary works, the first \$65 of wages each month is not counted (or \$85 if there is no unearned income). The SSI check is then reduced by \$1 for every additional \$2 of gross monthly wages. For a person who lives in a state that pays the 2005 SSI federal benefit rate of \$579 per month (and has no unearned income), SSI payments will cease if they earn \$1,243 or more per month in 2005. This is because countable earned income, at this rate of pay, would be equal to the SSI federal benefit rate of \$579 per month. This \$1,243 figure is often referred to as SSI's "break-even point," since countable wages at this level of gross income will be equal to the \$579 monthly SSI rate.

Section 1619(b) allows Medicaid to continue if a person loses SSI due to wages or a combination of wages and unearned income. If the person is still disabled and would be eligible for SSI if the wages were not counted, Medicaid should continue if annual gross income from wages is below the state-specific threshold established for 1619(b). In 2004, these thresholds ranged from a high of \$42,390 per year in Connecticut to a low of \$18,719 in Alabama. The income limit can be higher than the designated threshold if medical expenses are high enough or if a person is using work incentives such as impairment related work expenses.

An example will show how section 1619(b) could work. William is an SSI beneficiary who goes to work and earns \$18,000 per year (\$1,500 per month). He loses SSI cash benefits as his monthly income is greater than the SSI break-even point. In all states, William would be eligible for 1619(b) Medicaid so long as he meets the remaining criteria for eligibility.

Would William be eligible for PABSS services after losing cash benefits?

Under the original, 1999 legislation, William would not be eligible for PABSS if his only SSI-related benefit is through 1619(b) Medicaid. This meant, for example, that if William faced a job loss because his employer refused to provide what William believed was a reasonable accommodation under the Americans with Disabilities Act, a PABSS program could not represent him on this issue. Rather, they could only represent William, under PABSS, if he lost the job first and returned to cash benefits status. The 2004 amendments will now allow a PABSS program to represent William on issues like this.

2. Extended Medicare Benefits

Like 1619(b) the extended Medicare work incentive has been around for many years. Importantly, this work incentive was enhanced by the 1999 TWWIIA legislation.

SSDI beneficiaries are allowed a nine-month trial work period (TWP) to test their ability to work despite a continuing disability. In 2005, a month is counted towards the trial work period if the beneficiary earns more than \$590 per month or works more than 80 hours per month if self-employed. During the nine TWP months and a three-month grace period, beneficiaries can continue to collect a benefit check and a pay-check even if gross monthly wages are more than the current monthly amount considered to be substantial gainful activity (SGA). The SGA amount for 2005 is \$830 per month or \$1,380 per month if the individual is legally blind.

The extended period of eligibility (EPE) begins after the end of the TWP and continues indefinitely depending on the person's work activity. During the EPE, cash benefits are stopped for months earnings are above SGA. However, benefits are paid for the first SGA month and the two following months, which is the grace period. The EPE ends when SGA is performed after the 36-month reentitlement period.

The reentitlement period is the first 36 months of the EPE. During the reentitlement period, cash benefits are reinstated for any month earnings are below SGA. Once SGA is performed after the 36-month reentitlement period, cash benefits end and cannot be reinstated without a new application or a request for expedited reinstatement.

The good news for beneficiaries is that they can retain Medicare, following the TWP, even if they remain ineligible for SSDI cash benefits.⁷ Under current provisions, extended Medicare benefits are available for a minimum of 93 months following the ninth TWP month. So, for example, if Cynthia maintains monthly gross wages of \$1,500 following a TWP, she could expect to lose her SSDI cash benefits following a three-month grace period. However, her Medicare eligibility could be expected to continue for the 93-month extended period on the same terms as before — i.e., Medicare Part A would be automatic and cost-free, Medicare Part B would be optional and subject to a monthly premium.

Would Cynthia be eligible for PABSS services after losing cash benefits?

During the early years of the PABSS program the answer would be no. So, for example, if Cynthia had a dispute with her private insurance plan about coverage for an expensive prescription drug that would allow her to control a seizure disorder and continue working, a PABSS program could not represent her on this dispute if she was no longer a cash beneficiary. The 2004 amendments will now allow a PABSS program to represent Cynthia on issues like this.

⁷ SSDI beneficiaries are eligible for Medicare after 24 months of SSDI eligibility.

3. PABSS Programs May Now Represent Former Cash Beneficiaries Who Retain Health Insurance Benefits Through the 1619(b) Medicaid Provisions or the Extended Medicare Provisions.

Congress, at the urging of SSA, amended the law in 2004 to allow PABSS programs to represent individuals like William and Cynthia, in the examples above, even after they lose entitlement to SSI or SSDI cash benefits. The Social Security Protection Act of 2004 did this by amending the definition of “disabled beneficiary” in the section of TWWWIIA authorizing the PABSS program.⁸ Now, the term specifically references 1619(b) recipients⁹ and extended Medicare beneficiaries¹⁰ as part of the definition of disabled beneficiary. The PABSS attorney or advocate is now able to represent these individuals who are successfully working if they present a legal issue that could be a barrier to “maintaining” their employment.

III. Revised Grant Conditions

This section explores the type of advocacy services allowed by SSA in PABSS grant conditions. As we explain more fully below, SSA originally prohibited PABSS attorneys and advocates from pursuing any appeals that involved SSI or SSDI benefits. Now, under amended PABSS grant conditions, this type of administrative appeal can be handled for eligible individuals so long as the issues are work-related.

A. Advocacy Services Must Fall Under SSA-Defined PABSS Priorities

This section explains the priorities PABSS programs must follow for delivering services, as well as the types of case work and other services PABSS programs may provide within those priority categories.

1. Priorities of PABSS

PABSS programs are to provide the following services in the order of priorities listed below:

- i. Investigate and review any complaint of improper or inadequate services provided to a beneficiary with a service provider, employer or other entity involved in the beneficiary's return to work effort.
- ii. Provide information and referral to SSI and SSDI beneficiaries about work incentives and employment, including information on the types of services and assistance available to them in securing, maintaining, or regaining gainful employment, particularly services and assistance through employment networks under the Ticket to Work and Self Sufficiency Program. Provide information and technical assistance on work incentives to beneficiaries with disabilities.

⁸ 42 U.S.C. § 1320b-21(g)(2).

⁹ 42 U.S.C. § 1382h(b).

¹⁰ 42 U.S.C. § 426(b).

- iii. Provide consultation to — and legal representation on behalf of — beneficiaries with disabilities when such services become necessary to protect the rights of such beneficiaries. To the extent possible, alternative dispute resolution procedures should be used.
- iv. Assist beneficiaries with disabilities in disputes before SSA involving work-related program decisions and benefits overpayments that are clearly a barrier to securing, maintaining, or regaining employment.
- v. Provide information and technical assistance on work incentives to governmental agencies, employment networks and other service providers, and advocacy organizations.
- vi. Advocate to identify and correct deficiencies in entities providing vocational rehabilitation (VR) services, employment services, and other support services to beneficiaries with disabilities, including reporting to the program manager on identified deficiencies related to employment networks and other concerns related to the Ticket to Work and Self-Sufficiency program.

2. Services that May be Provided Within the PABSS Priorities

Within these priorities, it appears that PABSS programs can provide any advocacy services that fall within a P&A's traditional categories of service. In the early years of the program, PABSS grant conditions provided that P&A programs could not use this grant money to pursue appeals or litigation against SSA, its Commissioner, or any SSA official because of decisions on program issues (including decisions related to interpretation of work incentive provisions or overpayment of benefits). Under more recent amendments to the grant conditions, PABSS programs may now pursue administrative appeals (but not litigation) involving SSI or SSDI so long as the issues involved are work-related. Allowable appeals, under these new grant conditions, may involve enforcement of the range of work incentives and include overpayment of benefits issues. Allowable casework can include administrative law judge hearings and Appeals Council review, but not litigation.¹¹ PABSS programs may pursue appeals and litigation against other federal agencies for issues directly related to securing or regaining employment.

Within priority category one, SSA clearly envisions that PABSS programs will represent beneficiaries in disputes with the new employment networks under the Ticket to Work and Self Sufficiency program. This will involve the Ticket's dispute resolution system.¹² The Ticket program has now been implemented, nationwide, with new Tickets issued only as additional beneficiaries become eligible. PABSS programs could also handle beneficiary disputes with state and private VR programs under this priority, but many of those cases are expected to be referred to CAP programs.

Priority two creates a mandate similar to what is expected of the BPA&O projects — that is, to provide information and technical assistance to beneficiaries with disabilities regarding the SSI and SSDI work incentives and related provisions. Priority five extends this category of service providers, and advocacy organizations. What PABSS programs do under this mandate may depend, in part, on collaborative and articulation agreements they negotiate with the BPA&Os in their states. In many states, PABSS programs are collaborating with BPA&Os to maximize their combined resources and jointly

¹¹ The extent of other (i.e., non work-related) SSA advocacy and appeals done through the other P&A programs will vary from state to state. A number of state P&A agencies have established priorities, within their P&A for the Developmentally Disabled (PADD) and P&A for Individuals with Mental Illness (PAIMI) programs, for example, to pursue SSI and SSDI issued on behalf of persons with disabilities.

¹² 20 C.F.R. §§ 411.600-411.730.

embark on efforts to provide training, disseminate materials, and provide technical assistance to beneficiaries and the providers that serve them.

Priority three provides authority for PABSS programs to provide consultation and legal representation to beneficiaries, when necessary to protect their rights. As long as the issues involved have a connection to employment, we can expect PABSS attorneys and advocates to be potentially available to provide consultation or representation on the following types of cases: special education; vocational rehabilitation; enforcement of the Americans with Disabilities Act or section 504 of the Rehabilitation Act as related to employment, training, college programs, transportation, or anything else that stands as a barrier to employment; and denials of funding for goods and services (including assistive technology) through Medicaid, Medicare or private insurance companies.

Priority four has now extended the legal representation mandate to include administrative appeals concerning SSI or SSDI issues that are work-related. Again, as noted above, this expansion of casework has been allowed through revised grant conditions governing PABSS funding to P&A agencies. A more detailed explanation of the types of appeals that might fit under this expanded authority appears below. In all their advocacy work, under priorities three and four, PABSS programs are required to first pursue administrative remedies, where available, before initiating litigation in a state or federal court, unless doing so would compromise the rights of the beneficiary.

Priority six is best described as performing a watchdog function over the existing and new VR and employment systems which are available to serve individuals with disabilities. Under this priority, we can expect PABSS programs to: monitor the existing state and private VR systems; monitor the new one-stop agencies established pursuant to the Workforce Investment Act; and monitor the employment networks serving beneficiaries under the Ticket program, reporting concerns to the program manager who oversees that program. Here again, many PABSS programs are collaborating with BPA&Os to identify how best to accomplish this priority. In many states, the PABSS programs are addressing this priority by attending public meetings or seeking appointments to boards that oversee the functions of the systems described above. In addition, individual complaints from beneficiaries about these systems can be regularly referred by the BPA&Os and others to the PABSS staff.

3. Examples of “Work-Related” SSI and SSDI Administrative Appeals Now Allowed Under PABSS Grant Conditions

The appeals now allowed, within SSA's system, are limited to appeals at the reconsideration, administrative law judge hearing, and Social Security Appeals Council levels. After an unfavorable decision at the Appeals Council, PABSS funds cannot be used to support an appeal to the U.S. District Court.

Readers should also keep in mind that to be served by a PABSS program, an individual must be the definition of “disabled beneficiary” as discussed above. For example, a PABSS program is not permitted to pursue an SSI or SSDI-related appeal on behalf of an individual who is neither a cash beneficiary nor a recipient of extended health insurance benefits under the 1619(b) Medicaid or extended Medicare provisions.

a. Representative SSI Issues¹³

Since appeals must be work-related, disputes would typically involve the issue of whether SSA has properly applied its rules for disregarding all or part of an individual's earned income when determining eligibility for SSI or SSI payment amount. Some of the more typical deductions from earned income that might be involved include the following: Impairment Related Work Expenses (IRWE),¹⁴ Blind Work Expenses (BWE),¹⁵ the Student Earned Income Exclusion (SEIE),¹⁶ and business related expenses (subsidy and special considerations) for individuals who are self employed. Similarly, a work-related dispute might involve whether SSA has properly applied exclusions from countable resources under the property essential for self support provisions.¹⁷

With an increasing number of individuals seeking to use SSI's Plan for Achieving Self Support (PASS), we can expect a certain percentage of PASS proposals to be denied or denied in part. An appeal involving such a denial could be an appropriate PABSS case.

b. Representative SSDI Issues

As explained above, when an SSDI beneficiary works, a number of work incentive provisions may come into play. These include the SGA rules, the Trial Work Period (TWP), and Extended Period of Eligibility (EPE). In determining whether the individual has performed SGA, it might involve many additional rules such as provisions for reducing countable wages by use of Impairment-Related Work Expenses¹⁸ and Subsidies and special considerations.¹⁹ These issues could also become the basis for an appropriate PABSS administrative appeal.

c. Overpayment Issues

In the SSI and SSDI context, work activity can result in an overpayment of benefits. When this occurs, the beneficiary has two choices: challenge the overpayment determination itself; or seek a waiver, i.e., asking SSA to waive its right to recover the overpayment.²⁰ So long as the overpayment relates to work activity, either of these two approaches would be appropriate for PABSS intervention.

¹³ A comprehensive discussion of the SSI and SSDI work incentives that will come into play on many of these work-related appeals appears in *Work Incentives for Persons with Disabilities Under the Social Security and SSI Programs*, available at www.nls.org/work_incentives.htm or www.nls.org/pdf/work_incentives.pdf.

¹⁴ 20 C.F.R. § 416.976.

¹⁵ 20 C.F.R. § 416.1112(c)(8).

¹⁶ 20 C.F.R. § 416.1112(c)(2).

¹⁷ 42 U.S.C. § 1382b(a)(3).

¹⁸ 20 C.F.R. § 404.1576.

¹⁹ 20 C.F.R. § 404.1574(a)(2).

IV. Conclusion

The PABSS program is an important service available to beneficiaries who are seeking to obtain, maintain, or regain employment. With expanded authority to represent both cash beneficiaries and certain non-cash beneficiaries on an expanded number of issues, this advocacy program will become an even more important part of the employment support pyramid outlined in the Ticket to Work Act.

²⁰ For a detailed discussion of the beneficiary's rights concerning SSI and SSDI overpayments, see our policy and practice brief, *Dealing with Post-Entitlement Issues: A Practical Guide for Advocates*, available on the Cornell website at www.ilr.cornell.edu/edi/publications/PPBriefs/

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