JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

SSDI/SSI Federal Court Appeals for Beginners

Webinar Transcript

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Kate Lang: Hello everyone, and welcome to today's webinar entitled SSDI/SSI Federal Court Appeals for Beginners. I'm Kate Lang, director for federal income security on the economic security and housing team at Justice in Aging. Today I'll be the moderator for the webinar and we'll be hearing the presentation from Tom Krause. Can we go to the next logistics slide? Before we begin, I'll go over a few webinar logistics. Again, welcome to all participants. You are all on mute, but we welcome your participation in today's presentation through the Q&A function on the Zoom control panel. Also, available in the Zoom control panel is the CC button, which enables closed captioning. We're also providing American Sign Language interpretation on this webinar. The ASL interpreters will stay on video throughout the training to provide interpretation. You have the option to pin the interpreter's video box to maximize your view of the interpreter.

And to do this, just click on their video window and select the pin icon. I'll be watching the participant questions as they come in throughout the webinar. And time permitting, I'll uplift some themes from the submitted questions during the Q&A segment at the end of today's presentation. Any questions that are unanswered in today's webinar will be addressed via email following the conclusion of the presentation. You can also use the Q&A function to request technical assistance with Zoom and our Justice in Aging staff will do our best to assist you. The webinar is being recorded, and after the conclusion of the webinar the slides, material, and recording of today's presentation will be available on our Justice in Aging website and will be emailed to all registrants. We would also appreciate your participation in our post-webinar survey that will pop up on your screen following the close of the webinar. Okay, next slide.

This is about Justice in Aging. We're a national organization that uses the power of law to fight senior poverty by securing access to affordable healthcare, economic security, and the courts for older adults with limited resources. Since 1972, we've focused our efforts primarily on fighting for people who have been marginalized and excluded from justice, such as women, people of color, LGBTQ+ individuals, and people with limited English proficiency. Next slide.

Our presenter today is Tom Krause. He worked for legal services in Iowa and Minnesota for 20 years, and he's spent 20 years in private practice with 16 years focused on federal court appeals of disability claims. And as a young attorney, Tom anxiously awaited Ethel Zelenske's monthly Social Security mailings from the National Senior Citizens Law Center, which was Justice in Aging's former name. We changed our name about 10 years ago, but our mission remains the same and that includes supporting advocates on the front line. We really appreciate Tom bringing his expertise to us today. Take it away, Tom.

Tom Krause: Thank you, Kate. It's always good to work with Justice in Aging. As we were talking prior to the webinar, even before Ethel Zelenske was sending out these disability mailings every month, it was Eileen Sweeney and the NOSSCR, National Organization of Social Security Claimants Representatives. Their distinguished service award is named after Eileen Sweeney, and I think the first one went to Ethel Zelenske. I've been a long time member of NOSSCR and I do appreciate the cooperation between the two agencies, and have a great amount of respect for the staff back then and for the staff right now. Turning to some of our objectives. Just to help you understand the appeal process, identify some of the key procedural requirements, and to give you a clue of some of the effective advocacy strategies.

One thing I should make clear, the great bulk of my experience has been with appeals involving the determination of disability. But what I am talking about today will generally be the same, whether we're talking about a disability appeal, an overpayment appeal, continuing disability review appeal, age-18 redetermination appeals, whatever. All of these appeals are under 42 U.S.C. Section 405(g). The procedure is basically the same. The biggest difference obviously is going to be that the issues that you address in your written brief or argument are going to be different if it's not a straight disability case. Why take a case to federal court?

There's a lot of reasons. It helps you understand what you need to prove at the hearing. Hopefully, makes the ALJs take you more seriously and it helps you learn a lot about... It gives you a deeper dive, so to speak, into some of the issues such as Social Security ruling 24-3p, which became effective in January of this year, that deals with vocational expert testimony at hearings. Doing the appeal will give you a better idea of what do the ALJs want, what should they want, and what do the courts want? It helps that way.

When I was in Iowa for several years, I worked with Iowa Legal Aid. I had more work than I needed and didn't want to hire an associate or anything, so I co-counseled a fair number of cases with Iowa Legal Aid attorneys. The reports that I received, they really enjoyed doing the cases in federal court. They thought they were a lot of fun. They learned a lot, something out of the ordinary. Those are all reasons to take a case to federal court. And obviously, of course, the number one reason is to get the benefits for your client.

What do you have to consider before you file? Well, it helps to have an idea of where you stand before you file an appeal. In the federal courts, this is discussed in more detail in the materials, there's something like 14,000 cases a year being filed in federal court. 1

to 2% are reversed and remanded for payment of benefits. But about 50 to 60%, I believe the last fiscal year it was 58%, were reversed and remanded for further proceedings. I don't know of any firm statistics, but personal experience in talking with other attorneys, our best guess is about 2/3 of them are going to be allowed on remand, which means that ultimately you're looking at 35 to 40% of cases filed in court result in benefits. Now that's going to vary significantly from one district to another and it can even vary from one division within a district to another division.

There was a time when I was in Iowa. I would take almost any case that came out of the Northern District of Iowa, especially the western division or the central division because there was only one judge up there who was very favorable for our clients. Much less likely to take a case from the Southern District of Iowa because the judges there were not nearly as friendly. It does help to know the judges and I think we'll come back to this, but if you don't know the judges, well, you can look them up and get a little information online, but if you don't know the judges contact someone who has a lot of experience in federal court in that district. One of the first things that you need to do is to register for CM/ECF and petition for admission. CM/ECF stands for case management, electronic case filing and petition for admission.

Again, if you email me, I will send you a copy of the appendix. The appendix has some information about it. Much of the materials and the appendix deal with DC practice, District of Columbia, because I did a presentation for them a year ago. It's going to be similar in virtually any district. Since we have a nationwide audience, I didn't think it would... I wasn't sure how to prepare for a nationwide audience, so I just left it as DC. It is important that you register for the CM/ECF early. I was involved in one case. I did not file the case, but it was filed after the deadline because the attorney was not registered for CM/ECF, tried to register like the last day, the day it was due. Had problems, and filed it late. I worked on that case and assisted with the briefing, but we lost.

There are some exceptions but equitable tolling, but don't count on equitable tolling. Count on filing it on time. And to do that, if you've not done it before, make sure you sign up for the case management and electronic case filing before your deadline. In addition, you should submit your petition for admission early and be admitted. Not all districts require a certificate of good standing, but they may... Often there is a... Well, I think everyone that I'm familiar with requires a sponsorship declaration from usually two attorneys who are already admitted to that court to say that you are of good moral character and all that.

In DC you are required to attend the ceremony. I went out there a year ago in March when I was admitted to the bar for the District of Columbia. One thing to keep in mind is most districts have a procedures manual online. They have their local rules which will tell you what you need to do to be admitted and they often have a CM/ECF procedures manual and that tells you how to file everything. Well, if you have a case, you're trying to decide do I appeal? Do you use your head? Do you use your heart? Or do you use both?

I guess I like to think that you use a little of both. Often you don't have to have a sympathetic case, but it sure helps. I think it makes everything a lot easier if you have a sympathetic case, but you need to have some kind of legal argument that you can raise in court. That's what the Rule 11 sanctions are all about. I find that if I have an experienced attorney or a representative and says, "This is a good case. We lost, but I don't think we should have." I am very much inclined to filing that case in court because there's probably an issue in there somewhere, but I do want to identify an issue before I walk into court, before I file in court.

One thing to keep in mind as you're evaluating issues, legal issues are much more likely to prevail than factual issues. There is a standard of review that is set out in 42 U.S.C. Section 405(g). For SSI, it's 42 U.S.C. Section 1383c(3). The standard of review, everyone refers to it as the substantial evidence standard. That is the shorthand standard. But that's not quite right. That's not quite accurate. Substantial evidence just means relevant evidence that a reasonable mind would accept as adequate to support the commissioner's conclusion. And under substantial evidence standard, all you're looking at is what evidence supports the commissioner's decision. What the standard really is is substantial evidence on the record as a whole. Substantiality of evidence must take into account whatever in the record fairly detracts from its weight. It's a balancing act. It's something that can make a huge difference.

You look at... Oh, I just worked on a brief. It's 4,500 pages of medical records to start with, but there was so much in there that the ALJ just didn't talk about. And the primary argument that we raised is what we call logical bridge. The ALJ decisions tend to spit out, recite the facts of the case and then have their conclusions, but typically they don't explain how they got from A to B. That's called logical bridge. We'll come back to that. But when you're talking about the standard of review and substantiality of evidence, you look at that logical bridge. You look at the evidence in the record that detracts from the judge's decision, not just the evidence that supports the agency's decision.

A couple other things about the standard of review. Review is limited to the evidence presented to the agency. There is a way to submit additional evidence. We'll talk a little bit about that later. But in general, and I would say in more than 90 easily, probably 98, 99% of the time, review is limited to the evidence presented to the agency. Now one issue that does come up is evidence that is submitted to the appeals counsel. You need to make sure that that is considered. If it's rebuttal evidence for what happened at the hearing or if there is good cause for not submitting it earlier and the evidence is material or extremely relevant, you may be able to get additional evidence considered either at the appeals counsel or in court.

But as a rule, the vast majority of the time review is limited to the evidence presented to the agency. If you do file in court, sometimes the appeals counsel will not include all of the evidence that was submitted to the appeals counsel, which makes the appeal harder to process. You also have to look at the relevant time period. It depends on whether you're talking about a Title II, Social Security disability insurance or a Title XVI, SSI application. For SSI, the alleged onset date is generally going to be the date of the SSI application. For the SSD or the Title II, it can be up to 17 months prior to the SSD

application. Then it ends with either the date of the ALJ's decision or the claimant's date last insured. If it's Title II only, if it's disability insurance only. If it's SSI only or a concurrent claimant, it does not end with the date last insured.

One issue that comes up repeatedly is who's the judge? As much as I like to think that if I'm handling a case my client has a better chance than usual to win in court. I have long ago figured out that even more important than that is who is the judge. If you don't know the judge, find out. That's generally... I think I have this under pre-filing considerations. I guess, technically, that's not really a pre-filing consideration, but you should at least know the panel of judges and whether they're generally friendly. We'll talk a little more about whether to proceed in front of a district judge or a magistrate judge. The difference is generally is that a district judge is nominated by the president, confirmed by the Senate under Article III.

A magistrate judge is selected by the district judges and is appointed to a term of years. We'll talk about this again later, but different districts do it differently. Often you'll get a report and recommendation from the magistrate judge. You may or may not, depending on whether you consent to the magistrate judge entering final judgment, you may be able to file objections and have the district judge make the final decision and enter judgment.

Again, you want to identify at least one tenable issue before filing, and when I've talked to attorneys over the years of what I consistently have heard is... This was before 2017 when they gutted the treating physician rule, I hear, "Oh, well, they didn't accept the opinion of the treating physician." Well, that's not a tenable issue. That is the prerogative of the ALJ under certain circumstances. A tenable issue is going to be that they didn't follow the requirements, they didn't follow the procedures. You have to have a substantive issue. There are factors even under the current regulations 404.1520(c) and 416.920(c), it is possible for an ALJ to justify the rejection of a treating or examining treating source, a medical provider. They can reject those opinions. The question is whether it's supported and consistent with the evidence.

One thing to keep in mind is that a denial of reopening is not a reviewable issue, but dismissal of an allegedly untimely request for review after hearing is reviewable. That was the Smith case from I think 2019. Prior to that time, I would've said you do not walk into court at least for very long, you're going to get dismissed. If you lose a hearing and the appeals counsel denies the request for review as untimely... I've not had any of these cases, but what I've seen is that the courts are going to look at whether the appeals counsel gave the representative or evaluated any good cause statements. If the appeals counsel doesn't evaluate the good cause statements, you may be able to get the case remanded for appeals counsel review and, hopefully, at that point it'll be remanded for a new hearing.

Always keep in mind your local rules. This is not quite as important. In December 2022, the courts adopted supplemental rules to the federal rules of civil procedure. The supplemental rules apply specifically to social security cases. You need to know those rules and you need to know your local rules. You always need to check your local rules.

Local rules will address issues like admission, briefing guidelines, what needs to be included in the brief. Page or word limits, certificate of compliance.

Minnesota, for example, has a word limit of 13,000, so we have to submit with our brief a certificate of compliance saying that according to Microsoft Word version, whatever this document has 10,476 words. And you also, in Minnesota, at least have to include the type font and the type size. Some districts require a certificate of service, Minnesota does not. Last I filed one in Iowa. I still had to file a certificate of service down there. When you're filing everything electronically through CM/ECF, I don't understand why you need a certificate of service, but if the court wants one, you should file it.

Another thing often addressed in local rules is meet and confer. If I want an extension of time in Minnesota, I send an email to the US Attorney's Office or the OGC attorney, and say, "Hey, I need another 30 days." I don't know that they've ever said no. Then when I file my motion for an extension of time, I tell them, "On such and such a day, I send an email. Opposing counsel responded and said they do not object." I file it as an unopposed motion and submit a proposed order. That makes life a little easier for the court, not that much more difficult for the attorney. That reminds me, that makes life a little easier for the judge and the attorney's goal. I learned this in law school and I still remember it. The attorney's job is to make it as easy as possible for the judge to rule in favor of your client.

Yeah, comply with some of these local rules and don't be afraid to ask for help from experienced attorneys. The clerk is often not a good place to ask because clerks cannot give legal advice. You can try there though. One of the first things you should do, again, before filing is obtain a signed retainer agreement. I think most of you or legal services attorneys are required to have one. I think it's a good idea to have a retainer agreement. Among other things, it talks about the filing fee. Often we can get it waived, but it should at least be addressed in the retainer. Another thing that should address is whether there'll be other attorneys working on the case or maybe working on the case, and who gets the attorney's fees. Under the statute attorney's fees, under the EAJA Equal Access to Justice Act, they belong to the claimant. In the retainer agreement you have the client assign the fees to the attorney.

When I was in private practice, the retainer agreement also provided for Section 406(b) fees which are fees out of back benefits. But if you're doing it pro bono, you won't need that. You also need to... Most of the time it's about... I've not paid the filing fee for a long time. I'm thinking it's $405 now. Most of my clients... When I was in private practice, I would say no more than a fourth of my clients would pay the filing fee. When I say it, they would pay it. I advanced it and didn't often get it reimbursed if we lost. I didn't ask for it to be reimbursed if we lost, but I'd get reimbursed by the government if we won. But most of the time we would file a motion to waive prepaying fees. That's going to be on the court's website. There's a short form and a long form. One's two pages, one's six.

In Minnesota, I typically use the six page. In Iowa, I use the two page. You might want to check with local practitioners to see what they use. Now to actually file the complaint,

again, since December 2022, we have the supplemental rules to the Federal Rules of Civil Procedure that addressed the procedure for Social Security cases in federal court. Look at the rules. The rules include a form complaint, a PDF online. You can just download it, fill in the blank kind of thing. Pretty easy to fill in. The appendix has a complaint that I filed in a case a few years ago.

Let's see. The venue is one issue that comes up. Venue is where the plaintiff lives at the time the case is filed. If the client moves, if the plaintiff moves to another state after it is filed, case stays where it was filed. The case does not move. But it's where the plaintiff resides. If somebody's visiting another state, no, that's not good enough. It's where they reside or where they live at the time the case is filed. That's the court where you file it. If you've done much administrative work, you're familiar with this. The deadline is 60 days from receipt of the appeals counsel denial of review. There's five days for mailing. In the Eighth Circuit at least the court looks at the date that the attorney received it or the claimant received it and it's the earlier of the two.

If you file within 65 days... I've never heard of anyone having a case dismissed because they actually received it in three days and they filed on the 65th day. I don't know, theoretically it could happen. But more importantly, why wait until the 65th day? Why even wait till the 60th day? It's pretty simple to file. It's like a three-page form for the complaint. A couple page form for the [inaudible 00:30:37], a one-page civil cover sheet. It's easy to file. Do it early.

Yeah, it's notice pleading. The form is in the appendix. Again, email me if you want it, the appendix. Very simple, it's basically name... And a lot of courts are going with Tom K instead of Tom Krause. It's basically name and date of the ALJ's decision and date of the appeals counsel denial and all that. But the form is in the appendix. The form is online, fairly simple. Okay, I think we've covered that. One thing that's interesting and that changed in 2022 is that you no longer need to serve the summons and complaint on the federal government. Under rule 4, if you're suing the federal government, you have to serve the local US Attorney's Office. You have to serve the attorney general in DC and you have to serve the Commissioner of Social Security, and you have to send it by certified mail.

That's no longer the case. That was more hassle than anything else. Now all you do is file the complaint with a civil cover sheet. And it's funny, most of the district's now familiar with that at least. You have to file a PDF of a civil cover sheet which basically asks what's the jurisdiction. Is it diversity? A federal question, federal defendant? Those kinds of questions. What statute are you proceeding under? They require that you do both the civil cover sheet and then they ask you basically the same questions online. But after you file it, you'll get a notice of electronic filing or an NEF and there will be an NEF to SSA. There's a sample of that in the appendix. You can check the docket online, but it'll say something like, "summons not issued. Electronic notice has been provided." And that is the only service.

You do nothing to serve the case. The clerk will take care of it. What typically has to be done before Social Security files and answers, you have to decide whether you want to

proceed in front of a magistrate judge or if you want to go with the district judge. Again, you need to know the judges. There's a couple different ways where if all parties consent, a magistrate judge can enter the order and judgment. In Minnesota, if you don't enter that kind of consent, the magistrate judge issues a report and recommendation. Both sides have 10 days to object and then the district judge issues an order accepting, rejecting, or modifying the report and recommendation, and then the district judge enters the judgment as well.

In Southern District of Iowa, and I'm not sure this is still the case, but it was when I practiced down there, the case would automatically be assigned to a district judge and they affirmatively discouraged people from trying to refer it to the magistrate judges. Briefing is the fun part of the case. The answer is due 60 days after that notice of your electronic filing. And I say answer, there is no answer anymore. There used to be. The administrative record is due 60 days after notice and they call it an ECAR, electronic certified administrative record. And the administrative record includes all medical records, SSA forms, decisions, appeals counsel denial of review and the hearing transcript.

That one case I recently worked on, the entire administrative record included four administrative hearings, 4,500 pages of medical records. The record was 5,400 pages long. I just got one in yesterday that is 1,400 pages long. But it's basically everything from the administrative process. After you get that... There's a lot of things you can do with the record. It will often come broken up into several pieces. You can combine it. You can OCR it, optical character recognition, OCR, where you can make it searchable and all that. There's different things that you can do with the administrative record to make it easier to review.

For example, I usually do an Excel spreadsheet and every doctor visit I'll have the date, the doctor, the clinic, and then a summary of that record. After I've gone through everything, I have a column where I rate the importance, like a medical source statement or a really important MRI. I'll assign a five. And if it's a duplicate, I give it a zero. If somebody goes in because they have a runny nose, that's a one. If it's an infection and they have an autoimmune disease, maybe I'd give the infection a two, stuff like that. But I assign it a number and then I can sort through the records and find what I think is the most important.

Then you just write the brief. There is a sample brief in the appendix. Again, email me if you want to copy. 30 days after filing the record, your brief is due 30 days after that. The commissioner's brief is due 14 days after that. A reply brief, if you want to file one, it's not required. I suggest you file it. We went over at least some of this earlier. But yeah, the local rules will tell you what you have to have in the brief. Some common arguments. Logical bridge, I really like that. It's an argument that is, I think, as far as I know at least started in the Seventh Circuit and has spread to many districts and circuits around the country. I know the Fourth is using it. The Eighth Circuit, where I practice, generally has not addressed the issue of logical bridge. But a lot of the district court judges and magistrate judges in Minnesota, for example, have addressed logical bridge.

That is to me a very strong argument that the ALJ can't simply regurgitate thousands of pages of medical records and then come up with a conclusion. They have to explain how they came up with that conclusion, with the residual functional capacity assessment. Another common issue that comes up is evaluation of medical opinions. The current rule is found in 20 C.F.R. 404.1520c for Title II and 416.920c for SSI. One issue that really interests me is the potential revival of treating source rule. I think the Second and Ninth Circuits are hopefully a good place to start. I'm not too anxious to argue it in the Eighth Circuit, but who knows? Eighth Circuit is really bad, but there's a number of arguments. For example, the 2017 regulations which are the ones that are cited on the slide, they narrowed the definition of what is a medical opinion.

Prior to 2017, it was anything that addressed the nature and severity of the impairment. Now, a medical opinion is only something that addresses functional limitations. If you've got a nice letter from the doctor saying, "Well, this claimant has this, this, and this for impairments, and they interact in such a way. And the combined effect of these three or four different impairments is much worse than any of them standing alone." You get a really nice letter like that from a doctor. And under the 2017 regulations, that's not a medical opinion. Anyway, there's also in the 2017 regulations, they took off any extra weight for treating physicians saying that most people now don't have a regular treating physician where they go in and they see the same provider every time, time after time, and build the kind of rapport with that treating doctor, the way that was originally contemplated by the treating physician role.

Well, the obvious answer to that is, well, should you have kept it for those who do have that kind of relationship with their doctor? Anyways, there are several different challenges that may be available to the 2017 regulations on medical opinions, and that's a little bit off-topic. The bottom line is a lot of times if you've got a medical opinion, that's going to be one of your major articles in your brief. Symptom evaluation is always a good one.

That's 404.1529 and 416.929 and Social Security Ruling 16-3p. Again, especially when you combine symptom evaluation with logical bridge, you often get a winning argument. Another issue that I've been raising in most briefs, if I can, is a vocational issue. Things change some with Social Security Ruling 24-3p, but you still find a lot of vocational experts relying on the dictionary of occupational titles. That hasn't been published since 1991. They added about a dozen jobs in 1998 but didn't publish it. I don't know, NOSSCR, National Organization of Social Security Claimants Representatives has a lot of stuff on vocational evidence, vocational issues, cross-examination of vocational experts. I would suggest that you look at some of their materials. And the way to win a lot of these cases is to do it at the hearing. You have to win these cases at the hearing. And at the very beginning I said, why do you do these appeals? So you know what you need to do at the hearing. Well, that's part of it. You have to know what you need to do for cross-examining vocational experts submitting post-hearing briefs with additional vocational evidence.

Those are all good things that you need to do at the hearing. When you do the brief, make it as easy as possible for the judge to rule in their client's favor. I did a lot of work

in Northern and Southern Districts of Iowa. If you file a brief there more than five pages long, you need a table of contents. In Minnesota, it's not required. But I'll tell you, I use the table of contents and I outlined my entire argument there. To a certain extent it's a summary of the entire brief. It's often two pages. It doesn't say a lot about what the medical evidence is, but it will tell you what the arguments are going to be.

Here's just an example of a relatively recent case. ALJ must consider the claimant's symptoms. It just outlines exactly where you're going and tells the judge what you're doing. There's a standard for symptom evaluation. The judge has to build a logical bridge, and then they basically didn't do it. Then the second argument was they failed to assign any functional limitations relating to a well-established impairment of diabetic neuropathy. He testified that he had limits. We didn't have a medical opinion on specifically saying how much he could use his hands, but we had his testimony and we also had some objective testing from physical therapy that supported his testimony, so we relied on that. Then the ALJ failed to address a lot of the issue and failed to explain it. Then one thing that you'll always come up with, number four, is basically saying it warrants remand, almost every time that you come up with an argument. Social Security is going to say harmless error, no blood, no foul, whatever.

And here's another more extended argument as far as the number of jobs that are actually available. This was... After the hearing we submitted a lot of... I think it was 90 pages of Bureau of Labor Statistics evidence from the Occupational Requirement Survey, and this and that. That was all in the record right after the hearing. Then we built a whole argument on how the vocational expert's testimony didn't add up. We got a voluntary remand on that case, and my understanding is, this is still true, commissioner seeks remand and somewhere around 20% of cases that will probably vary from one OGC, Office of General Counsel, attorney to another in the district and things like that. You can ask for a remand and set forth the reasons in an email prior to the brief. Usually, it's after you file your brief, they'll look at it and say, "Oh, I don't want to write this brief."

You'll often find the commissioner's brief is full of post hoc rationalizations. Under SEC v. Chenery Corp, the court has to rely on the decision made by the agency and does not consider post hoc rationalization. But again, you're going to come up with Social Security saying, "It's harmless error. It's harmless error." You have to show that it's not harmless error. Reply briefs, allowed, not required. I suggest you do it. It can't raise new issues. And one thing, I had pretty much a stock reply brief talking about Chenery and how they can't rely on post hoc rationalizations of counsel.

Most judges do not permit oral argument. It's at the judge's discretion. You can ask the court. If it's allowed, it's generally one hour. There was one judge in the Southern District of Iowa who would give you about 10 or 15 minutes for both sides to complete their oral argument. One judge in the Northern District of Iowa used to set aside two hours for oral argument. There's a magistrate judge in Minnesota who would schedule the oral argument for an hour, would hear argument for half an hour, would go back to chambers and come out and issue an oral decision from the bench, and then follow it up with a very short written order. That was a docket control feature that that magistrate

judge used. Instead of writing a long detailed order, they announce it orally and then have just a short one.

We're almost out of time. Sentence for remand. This is 95 plus percent of the cases. It's after a plenary review of the entire record. It's a decision on the merits. The judge can affirm, modify, or reverse and remand. If it's reversed, then remand it. It can either be for calculation and payment of benefits or further proceedings. About 58%, something like that, last year were remanded for further proceedings and 1 or 2% for payment of benefits. And at that time the clerk enters the Rule 58 final judgment. There's a little bit about sentence six. It's really not... Just doesn't come up that much. Used to have a lot more when they had the physical recordings and the physical files, it was a lot easier to lose the file.

If you want to appeal, it's 60 days from the entry of the Rule 58 judgment. You don't get the five days for mailing. I don't know what circuit you're in, but at the Eighth Circuit, the rule of thumb is don't appeal. Legal services programs can petition for and keep fees under the Equal Access to Justice Act. Private attorneys often get 406(b) fees from past due benefits, but you can't do both. You have to refund the smaller to the claimant. There is a sample, I believe, in the appendix. Again, email you if you want it. This is basically what you need to submit in addition to your motion. It's just a summary of the fee calculation, change in the cost of living. Itemized time records, if you are doing this kind of case, you have to keep itemized time records. Here's some additional resources. This is a great book. It's available through Westlaw.

NOSSCR has a lot. NOSSCR conferences address it. NOSSCR has like one-hour seminars online. There's the NOSSCR listserv that talks a lot about judicial review. Those are all things that all resources... And somebody locally, if you know someone locally. I can also be a resource. If you have a question, you can email me at that address and we can see what's up and see if I can help you. Thank you very much for your time. Kate, do we have questions?

Kate Lang: We do have a couple of questions since we have time. I'll bring up a couple of questions here. There was one participant who mentioned that in the Ninth Circuit, particularly in the Northern District of California, there was a decision that the denial of reopening could be reviewed in mental health cases. So that's just something to keep in mind for the Ninth Circuit, that generally denial of reopening is not reviewable, but that might be an exception there in the Ninth Circuit. Then this participant asked about the briefing schedules. Are judges able to modify the briefing schedules differently than what we see in the supplemental rules? And does it ever happen by mistake that the briefing schedule is modified?

Tom Krause: I don't know that I've ever seen it modified by mistake. Usually it's intentional. You get a few days or a week before the brief is due and you start panicking. Then you contact, send an email to the opposing attorney and say, "Hey, do you object?" It can be modified. I guess I don't know of any district that has, as a matter of local rule, tried to modify the supplemental rules. But yeah, deadlines are often extended at the request of either the plaintiff or the government.

Kate Lang: Great.

Tom Krause: I'm sorry. And I think there is a Social Security Ruling 91-9p or 6P. I think it was from 1991 that talks about mental impairments. If someone misses an appeal deadline because of a mental impairment that Social Security is supposed to take that into account. But I had not heard a court applying that. I've heard of courts ruling on Social Security not applying it properly, but I've not heard that a court would apply that directly.

Kate Lang: Then you had mentioned early on that the administrative record is closed and that if you submit supplemental records to the appeals counsel that those records might not be included in the record at the court. Is there any way to request that that evidence be added to the administrative record at the federal court?

Tom Krause: Yeah, I personally don't recall having had a case like that. But I have heard of people that... As with everything else, you send a copy of it to the government's attorney and ask them if they would either supplement the record or remand. And a lot of times the cases where I have handled it is where the appeals counsel would say, "The claimant submitted these records to the appeals counsel. They're dated after the date of the ALJ's decision, so we're not going to consider them." But they include them in the record. Then we argue that, "Well, okay, so there's an MRI dated the day after the ALJ's decision and this MRI explains everything." Then you can just make that argument that the whole thing is at the appeals counsel and the ALJ are supposed to be looking at evidence relevant up to the date of the ALJ's decision. The appeals counsel has a history of saying, "Relevant means up to the day of." And they won't consider anything after the ALJ's decision.

Kate Lang: Great. Helpful. There's a question, if you can talk through a little bit about what you would consider if you had a client who had gone through a medical cessation after a CDR and had lost at the ALJ hearing, would you take that to federal court or should you advise the client just to reapply? What would you consider in those situations?

Tom Krause: To a great extent, it would depend on the merits of the case. But I've certainly taken CDR's continuing disability reviews to federal court. Sure, go ahead and do that. The statutory benefit... Well, Heather Freeman and I did a presentation on that, February of last year. And one of the big issues there is the missing file. One thing that you do have to think about and look at is what are the dates that the claimant was receiving benefits? Basically they get benefits up until the date of the ALJ's decision, if they choose statutory benefit continuation. They can file the new application. I think the way that we often handled it was the day after the ALJ's decision or shortly after you file the new application. I think it's Social Security Ruling 11-1p, something like that. It was about 2011.

Generally, you can't file a new application while you've got a claim pending at the appeals counsel. One of the exceptions is for the continuing disability review cases. We would often have somebody file the new application right away. It means there's very

little gap in benefits. On the other hand, it's just wrong. I guess that comes in here somewhere. It's just wrong.

Kate Lang: Yeah.

Tom Krause: It depends in part on how much time you have? How strongly you feel? What the client wants to do? All those kinds of things. But I have no problem filing the federal appeal as well as the new application.

Kate Lang: Great. Somebody put in the Q&A, hopefully that 1991 SSR is 91-5p. Thanks to that participant for giving us that citation, so everybody has it. And that's all the time we have for questions today. Thanks to Tom, and we really appreciate you all your knowledge with our audience today. And folks have Tom's email address here on this slide, in case they want to follow up with him for the appendix or any other guidance. Thanks everybody for joining us today.

Tom Krause: Thanks, Kate. Thanks, Justice in Aging. Thanks to the interpreters and thanks to everyone for being here. Thank you.