

Fowlkes Decision Casts Doubt on SSA's Proposed 'Fugitive Felon' Regulations

The Social Security Administration this week published proposed new "fugitive felon" regulations for comment. 70 Fed. Reg. 72411 (Dec. 5, 2005). The regulations would: (1) establish a new § 404.471 to extend the nonpayment provision to Social Security Title II benefits; (2) replace the existing Supplemental Security Income (SSI) regulation with an entirely new § 416.1339; and (3) place in the regulations the good cause exceptions established in the Social Security Protection Act of 2004.

Court Findings

There are two extremely important changes from the existing SSI regulation. One is the elimination of the requirement in the current § 416.1339(b)(1)(i) that benefits may only be suspended or denied if there is a warrant or order from a court or authorized tribunal issued on the basis of a finding that the individual was fleeing or has fled to avoid prosecution or custody or confinement after conviction or was violating a condition of probation or parole. This fundamental change in the foundation for imposing the sanction is not even mentioned in the supplementary information accompanying the proposed rule.

'Fleeing to Avoid'

The other important change results from the agency's stated intention "to clarify our interpretation of the statutory language 'fleeing to avoid.'" The proposed regulations "clarify" this operative statutory language by making no reference to it in the text of proposed regulations themselves. Instead, the proposed regulations simply state the individual will be ineligible for SSI for any month in which there is an outstanding arrest warrant for a felony. § 416.1339(a). The proposed Title II regulation is essentially the same, stating that benefits will not be paid for any month in which there is an arrest warrant for a felony, except that in the case of Title II benefits, the warrant must have been in effect for more than 30 days. This difference is apparently the result of an anomaly in drafting the statute.

This attempt to "clarify" the meaning of "fleeing to avoid" collides head on with the decision of the Second Circuit in *Fowlkes v. Adamec*, ___F.3d___ (2nd Cir. 2005), 2005 WL 3292551 (*see related article, p. 185*). If the *Fowlkes* decision stands, it will be difficult for the agency to move forward with implementation of a regulation that has already been found to be unlawful. On the basis of the *Fowlkes* decision alone, the agency should be urged to withdraw this ill-advised regulation and reconsider its position.

Mandatory Good Cause

The criteria for good cause in the proposed regulations, which are identical for SSI and Title II, track the criteria established in the Program Operations Manual System (POMS) earlier this year. POMS SI 00530.015 & GN 02613.025. The mandatory good cause criteria follow the criteria of the statute, except that the former add a requirement (also found in the POMS) that the individual will only have 90 days in which to establish good cause once they contact the agency. Unfortunately, more often than not, this is

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insufficient time to get a warrant vacated or otherwise establish eligibility for good cause. This is especially the case for beneficiaries with serious mental impairments who are the majority of those affected.

Discretionary Good Cause

The criteria for discretionary good cause provide for two basic options and, with one exception, would remain the same as in the POMS. The Social Security Protection Act gives the Commissioner broad discretion to allow good cause "based on mitigating circumstances," except that she has no discretion to allow good cause if the underlying offense or the probation or parole violation was violent or drug-related. However, she has chosen to exercise her discretion very narrowly.

Proposed §§ 404.71(b)(2) & 416.1339(b)(2) provide for good cause when all four of the following requirements are met: (1) there is no violence; (2) there are no drugs; 3) the individual has not been convicted of or pled guilty to another felony since the date of the warrant; and 4) the law enforcement agency that issued the warrant reports that it will not extradite for the charges on the warrant or otherwise take any action on the warrant for the individual's arrest. It is this last requirement which is often difficult to meet even when law enforcement authorities have no intention to extradite.

Another option for discretionary good cause is provided by §§ 404.471(b)(3) & 416.1339(b)(3) when the individual can meet the first three requirements of the preceding paragraph as well as two additional requirements. Those two additional requirements are that the warrant was issued 10 or more years ago, and either: (a) the individual's medical condition impairs the individual's mental capability to resolve the warrant; or (b) the individual is legally incompetent; or (c) a representative payee has been appointed; or (d) the individual is residing in a long-term care facility. One positive note here is that this provision does not include the requirement found in the current POMS that the warrant be the only existing warrant.

Procedure

These proposed rules do not include the provision found in the POMS for giving advance notice of suspension to Title II beneficiaries, nor the provision for providing continued benefits for a 90 day period when an SSI recipient requests good cause. Although it would be better to include these provisions in the regulations, there is no indication that SSA intends to change these practices since they have not generally included procedural provisions in the regulations.

Practice Tip

Although the proposed rules do not explicitly state that all new Title II claims must be fully developed regardless of "fugitive felon" status, it is clear that this is the case since the Title II provision affects only payment status and not eligibility. This is important, not just for the individual claimant, but also for any auxiliary beneficiaries who later may become entitled. Advocates need to be alert to improper refusal to develop these claims.

Comments on the proposed regulations are due by February 3, 2006. For further information, contact Gerald McIntyre in the NSCLC Los Angeles office.