AMERICAN SOCIAL SECURITY PRACTICE: A PROTOTYPE FOR AUSTRALIA?

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Much of the practice of administrative law is appropriately the realm of non-lawyers and many of the forums of administrative review have, for good reasons, never been intended as lawyers' forums. Nevertheless, lawyers have a part to play but, to date, administrative law in Australia has rarely, if ever, sustained financially a viable legal practice. Even legal practitioners with a genuine wish to focus on a particular aspect of administrative law have commonly had to sustain their practice with traditional (and more lucrative) 'bread and butter' legal work.

It may be that this pattern will change, as American experience may indicate. Administrative law in the United States is a vast and variable spread. Across the range of State and federal government administration there are well-established review systems, in which legal practitioners play an integral role.

The following description of the system within which an American social security law[1] practitioner works may give some insight into what the future could hold for an Australian administrative law practitioner. Some reform proposals are also mentioned.

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The effect of contingency fees and statutory fee-shifting provisions is, of course, a matter of some speculation in Australia. The contingent fee is probably the only way private practice in social security law could be supported.

The social security appeals process

Four successive stages of administrative review are available to the American social security claimant.

The *initial application for review* of a decision is made to the Social Security Administration, which then refers the matter to a State government body which has contracted with the federal government to act as its agent and to carry out medical determinations. The usual time taken for a decision is 1-2 months. Applicants are notified of the initial determination in writing. The notice includes information about appeal rights, and usually too at least an outline of the reasons for the determination, although it may not be an adequate document on which to base an appeal. Often it tends to be rather lengthy and claimants may have difficulty in understanding all the information that is provided.

Reconsideration of the initial determination may be sought from the Social Security Administration, which again refers the appeal to a State agency. This usually takes another 1-2 months, and is the least formal of the stages of review.

Typically, neither of those stages involves a personal hearing, unless, for example, it is proposed to terminate benefits.

A hearing before an *administrative law judge* is the next step. In US practice, they are employees of the departments

which they serve. In the Social Security Administration, for example, the judge's task is to hear appeals arising out of the administration of the social security portfolio, but not otherwise to engage in the work of the Administration.

The hearing before the administrative law judge is often the only formal hearing within the administrative appeal process. It is not adversarial - no lawyers for the government participate. It is on the record and a detailed decision is generally given. Evidence presented to an administrative law judge will often be in written form - for example, medical records. Typically, the administrative law judge will call, for example, vocational experts who will testify as to the availability of jobs in an area of the transferability of a worker's skills to a lighter kind of work. It would be less usual for the judge to call a physician to the hearing.

Substantial delay may occur at this stage. An appeal might not get before a judge for 4-5 months from the date of filing, and another couple of months can elapse before a decision is handed down. The Supreme Court has ruled that interim benefits need not be paid during this time.

Review of the decision of an administrative law judge lies to the central *Appeals Council* of the Social Security Administration in Washington DC. Basically, the grounds of review by the Appeals Council are abuse of discretion by an administrative law judge, error of law, or a decision which is not supported by the evidence.[2] The effect of these grounds of review is that the facts found by the administrative law judge are binding unless they are not supported by substantial evidence. This review is conducted on the papers submitted at each of the previous stages and on the basis of the tape recordings of earlier appeals.

Medical evidence is commonly added at this stage. New evidence may be the basis of remand to an administrative law judge; this would be more usual than the case being overturned by the Appeals Council.

The appellate process from here on becomes decidedly judicial.

Once all administrative appeal rights are exhausted, an appeal may be taken to a federal court where the grounds of review are similar to those which apply to the Appeals Council (see above). First, review may be sought in the *District Court*. A de novo review of the decision of the District Court may be sought before the *Circuit Court of Appeals*. From that Court, appeals lie to the *Supreme Court*. Whether the Supreme Court hears a case is, with limited exceptions, a purely discretionary matter for the Court. It most often deals with constitutional questions or matters in which the precedents from the lower courts differ and a final determination of the issue is required. However, major differences in the rulings of the various circuit courts are a feature of the American federal appeal process and will not guarantee that a matter will be heard by the Supreme Court. For example, the evaluation of pain in social security cases varies widely from circuit to circuit as a result of different answers being given to similar questions asked of various circuit courts.

At each stage, there is a 60 day time limit for the lodging of an appeal, which runs from the receipt of the notification of the determination. At the expiration of 60 days a determination is considered final unless an appeal or a request for an extension of time has been lodged.

The practitioner's role

It is clear that the American social security law practitioner's role, and in all probability the role of any administrative law practitioner, is going to involve a lot

of paperwork. It is only the exceptional case that will call for oral advocacy. But this is nothing new for lawyers.

Regular liaison with the administering department is a must. In this way, familiarity with the practices of both the Administration and the administrators is developed. Invariably this assists the resolution of later cases and time spent in this manner is a worthwhile investment.

Funding legal assistance

One of the reasons the practice of administrative law has not developed as rapidly in Australia as it might have, is that many potential administrative law clients, such as social security recipients and housing department clients, are not in a position to fund legal assistance. Community legal centres, largely overworked and underfunded, bear the brunt of such work in Australia. Similar bodies in the US - there called legal services - also play a significant administrative law role. Their high degree of expertise can benefit clients, and make an invaluable contribution to public discussions and policy formulation.

Contingent fees

American legal practitioners have available to them in administrative law practice, as in other areas, the contingent fee. It is the only reason the private practice of social security law takes place. The essence of the contingent fee is that if a case fails or does not proceed to conclusion, there is no payment for the practitioner's time and services. In social security matters, however, the contingent fee is subject to the approval of the Social Security Administration.

Practitioners will usually negotiate a free agreement with each client at the commencement of any work. Commonly the agreement will secure the agreed fee and the practitioner's expenses by a lien on the claim and any award.

The law limits the contingent fee in social security practice to 25% of the gross amount of retroactive benefit awarded, subject to the approval of the Social Security Administration. The fee does not include out-of-pocket expenses, such as medical reports, investigative expenses, travel, telephone, copying and similar incidentals. The most common expense would be medical reports, which might amount to $20-30 per client. In the interim those expenses may have been paid by the client, or borne by the legal or medical practitioner.

Attorney-fee provisions

Social security regulations[3] provide that a representative of a social security client must file (on a standard form) a written fee request for approval, after the completion of the proceedings. A representative who is not an attorney must also describe the special qualifications which enable him or her 'to give valuable help in connection with [the] claim'.

The regulations provide that it is for the Administration to decide the amount of the fee, if any. It would not be unusual for a fee agreement of 25% to be reduced if the hours of work involved were not considered sufficient to warrant the fee. Interestingly, the regulations also provide that, where the representative is an attorney and the client is entitled to 'past-due benefits', the Administration will pay the authorised fee, or part of it, directly to the attorney out of the past-due benefits.

Where the representative is not an attorney, the Administration assumes no responsibility for the payment of any authorised fee. This does not appear to operate as a significant disincentive, as most such people already work either as para-legals with a legal firm, or as social workers, psychologists, community workers and so on in a legal services context where they would not be

charging a fee for their services in any event.

The regulations set out the factors which are taken into account in evaluating a request for fee approval. Within the framework of 'the purpose of the social security program, which is to provide a measure of economic security for the beneficiaries of the program', the following are considered:

- the extent and type of services provided by the representatives and the level of skill and competence required;
- the complexity of the case;
- the results achieved; and
- the level of review to which the claim was taken.

The regulations specifically provide that the amount of the fee authorised will not be based on the amount of the benefit alone but on a consideration of all the relevant factors. There is provision too for fees to be authorised even if benefits are not obtained, depending on the nature of the case and the efforts of the representative, but it is unlikely that this provision would operate in practice.

Once a fee determination is made, the Administration notifies the client and the practitioner. An application for review of the determination may be filed by either party within 30 days. The review is conducted by a Social Security Administration official who did not take part in the original determination. The decision on review is final.

Under comparable provisions, a court is able to authorise attorney fees for work in its jurisdiction. The Social Security Administration may pay a court-authorised fee directly to the practitioner out of any past-due amounts.

Proposals for reform

A recent report of the Federal Courts Study Committee[4] recommended (by majority) a new structure, including a Court of Disability Claims to which appeals from an administrative law judge would go. Appeals from that Court would lie to the federal courts of appeal on constitutional claims and questions of law. Few such appeals would be anticipated.

Two reasons were advanced for this proposal. In the first place, the appeals procedure is seen as 'cumbersome and duplicative' - 'inadequate administrative review [is] followed by duplicative review [by the courts]' - and disability cases are intrinsically factual and technical. As a consequence, the Committee considered that adjudicative resources should be concentrated at the administrative level. The new court could provide 'a more thorough and expert examination of the facts than federal district courts can provide'. Given that the facts found by an administrative law judge are binding unless they are not supported by substantive evidence, it would seem that the task of the proposed new court would be to review a decision for the existence of substantive evidence rather than to find facts.

In the second place, the Committee noted that the present appeal process had been criticised as vulnerable to 'unhealthy political control'. The report referred to 'controversial efforts' on the part of the Social Security Administration 'to limit the number and amount of claims granted by the administrative law judges', leading to fears that their independence was compromised. The Committee therefore suggested that an independent agency be set up to employ all federal administrative law judges, or alternatively, to insulate the administrative law judges' decisions from the influence of agency superiors.

The employment of administrative law judges by the very agencies whose decisions the judges will be reviewing is a difficult concept for Australians. At a theoretical level it is hard to see how the independence of such judges could be secured, but in practice the judges are generally perceived as independent. Indeed, administrative law judges themselves have rebelled against attempted control of their position and have even filed suit in the courts in instances where they have considered their integrity under threat. In the social security field they have, over the last decade, repeatedly upheld the rights of claimants against the government; last year alone they reversed the denial of benefits in 62% of the cases that came before them.

Proposals for reform have been made also in relation to the fee approval system. The current system that requires approval of detailed and fully documented fee requests, with a right of subsequent appeal, has been criticised as highly bureaucratic, and productive of further cost. A suggested reform is for automatic payment of a lawyer's fees up to $4,000, with a right of objection by either party. Approval would be required only for fees greater than $4,000. This proposal, if indexed for inflation, would seem to have much to recommend it. It would reduce the costs incurred by both the Social Security Administration and the social security practitioner. At the same time, the salutary effect of fee approval would be maintained, and control would not be relinquished over potential windfall cases where huge benefits might otherwise be obtained for negligible work.

Many of the recommendations of the Federal Courts Study Committee have been picked up by the Judicial Improvements Bill of 1990.[5] The recommendations discussed above and the issues with which they deal, however, have not yet been acted upon.

Postscript

In the course of writing this article it was reported that the Social Security Administration, in an effort to maintain its expenditure within budget limits, had suspended hearings for the month of September for people seeking disability benefits. The Administration monthly pays disability benefits to 4.2 million people: 2.9 million disabled workers and their spouses and children. Medicare beneficiaries, some 33 million elderly and disabled people, were also affected. Officials said that they believed this to be the first suspension of hearings ordered because of a shortage of funds. At the time, it was hoped that hearings would resume after 1 October, the beginning of the fiscal year.[6] However, money from a contingent fund was quickly released to avert the disruption of appeals hearings. The Social Security Commissioner was reported to have said that the release of money by the budget office demonstrated that the Administration was 'deeply committed to providing quality public service to the American people'.[7]

Endnotes

1 'Social Security' here refers only to retirement benefits and survivors' and disability insurance (similar to workers' compensation). It does not include other welfare-type pensions, benefits and allowances which, in the US, are administered by the States although they are funded federally.

2 See 20 CFR s404.970. (CFR stands for Code of Federal Regulations.)

3 See 20 CFR s404.1720.

4 *And Justice For All*, Brookings Institution, June 1990. The Federal Courts Study Committee was convened by Senator Joseph Biden (Dem - Delaware), Chairman of the Senate Committee on the Judiciary, to make recommendations in regard to the cheaper and more efficient running of the federal court system. The Committee comprised representatives of the major players in the federal court system in addition to members of the legislature, academics and representatives

of consumer groups. The report was a prelude to legislation introduced by Senator Biden (see f/n 5).

5 S 2648, superseding s 2027, proposed by Senator Biden, currently the subject of extensive public hearings before the Senate Committee on the Judiciary.

6 'US is Suspending Hearings on New Disability Payments', by Robert Pear *New York Times*, 1 August 1990, pp A1, B6.

7 'Budget Office Releases Funds to Restore Benefits Hearings', by Robert Pear, *New York Times*, 2 August 1990, p A14.