



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300  
Washington, D.C. 20036-4505

The Special Counsel

November 25, 2014

The President  
The White House  
Washington, D.C. 20500

Re: OSC File No. DI-12-3069

Dear Mr. President:

Pursuant to my duties as Special Counsel, enclosed please find the Social Security Administration's (SSA) investigative report, based on disclosures of wrongdoing at the SSA's Office of Disability Adjudication and Review (ODAR) made to the Office of Special Counsel (OSC). OSC has reviewed the report and, in accordance with 5 U.S.C. § 1213(e), provides the following summary of the allegations and our findings.

The whistleblower, Judge Christine P. Benagh, an Administrative Law Judge (ALJ) (now retired), assigned to ODAR's Washington, D.C. Hearing Office at the time of the disclosure, alleged that ODAR managers engaged in a violation of law, rule, or regulation, gross mismanagement, and a gross waste of funds by enabling claimants' attorneys to overcharge or improperly bill SSA for their services. Judge Benagh consented to the release of her name.

**The agency's investigation substantiated Judge Benagh's allegations that in two cases, a law firm representing a claimant submitted forms with signatures of attorneys who did not actually sign the forms and no longer worked for the firm. The investigation did not substantiate Judge Benagh's disclosures that SSA officials: reviewed ALJ decisions denying fee increase petitions filed by claimants' attorneys in violation of 42 U.S.C. § 406(a)(3); extended a 15-day deadline for review of fee increase petitions filed by claimants' attorneys by regulations and internal agency manuals, in violation of 42 U.S.C. § 406(a)(3)(A); or allowed claimants' attorneys to double-bill for work already conducted or to bill SSA for excessive fees. The agency determined that procedures are currently in place to address individual instances of wrongdoing by attorneys and representatives, and that corrective action was unnecessary.**

**I have determined that the agency report contains all of the information required by statute and that the findings appear to be reasonable. Nevertheless, report's findings suggest that there may be a high potential for abuse and therefore**

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**the agency should take steps to prevent and reduce fraud, waste, and abuse in processing Social Security claims.**

Judge Benagh's allegations were referred to then-Commissioner Michael J. Astrue to conduct an investigation pursuant to 5 U.S.C. § 1213(c) and (d). On July 19, 2013, Acting Commissioner Carolyn Colvin submitted the agency's report to OSC based on an investigation conducted by the SSA Office of Inspector General (OIG). Judge Benagh declined to provide comments on the July 19, 2013 report. As required by 5 U.S.C. § 1213(e)(3), I am now transmitting the report to you.<sup>1</sup>

**I. Judge Benagh's Disclosures**

In brief, Judge Benagh alleged that SSA management officials:

- Reviewed ALJ decisions denying fee increase petitions filed by claimants' attorneys in violation of 42 U.S.C. § 406(a)(3);
- Extended a 15-day deadline for review of fee increase petitions filed by claimants' attorneys by implementing regulations and internal agency manuals that violate 42 U.S.C. § 406(a)(3)(A); and
- Allowed claimants' attorneys to double-bill for work already conducted, bill SSA for excessive fees, and accept materially false claims and fee increase petitions from claimant's attorneys.

Judge Benagh provided multiple examples, cited several cases, and provided supporting documentation in support of her claims.

A. Review of ALJ Decisions Denying Fee Increase Petitions Contrary to Statute

Judge Benagh asserted that the Social Security Act, 42 U.S.C. § 406(a)(3), establishes two procedures for the review of petitions to increase or decrease fees for a claimant's representative. If the petition for review is filed by a claimant or a claimant's

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<sup>1</sup> The Office of Special Counsel (OSC) is authorized by law to determine whether a disclosure should be referred to the involved agency for investigation or review, and a report OSC may refer allegations of violations of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 1213(a) and (b). Disclosures must include information that aids OSC in making its determination. Disclosures must include information sufficient for OSC to determine whether referral is warranted. OSC does not have the authority to investigate disclosures and therefore, does not conduct its own investigations. Rather, if the Special Counsel determines that there is a substantial likelihood that one of the aforementioned conditions exists, she is required to advise the appropriate agency head of her determination, and the agency head is required to conduct an investigation of the allegations and submit a written report. 5 U.S.C. § 1213(c). Upon receipt, the Special Counsel reviews the agency report to determine whether it contains all of the information required by statute and that the findings of the head of the agency appear to be reasonable. 5 U.S.C. § 1213(e)(2). The Special Counsel will determine that the agency's investigative findings and conclusions appear reasonable if they are credible, consistent, and complete based upon the facts in the disclosure, the agency report, and the comments offered by the whistleblower under 5 U.S.C. § 1213(e)(1).

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representative, the ALJ who hears the underlying disability claim is tasked with the review, unless that ALJ is unavailable. According to Judge Benagh, if the fee increase petition is filed by an ALJ, the Commissioner of Social Security or his designate reviews it. Additionally, she maintained that in either case, the statute provides that “the decision of the [ALJ] or other person conducting the review shall not be subject to further review.” 42 U.S.C. § 406(a)(3)(C).

Contrary to § 406, Judge Benagh estimated that her decisions in such reviews have been subjected to further review in an average of six cases per year since 2002. For example, in one case, Judge Benagh received a petition from a claimant’s attorney for a fee increase and denied the petition in May 2008, based on her understanding of § 406(a)(3)(B)(i), after finding the firm had overbilled the claimant and submitted materially false and misleading statements.<sup>2</sup> Judge Benagh stated that her decision was overruled by then-Regional Chief Administrative Law Judge (RCALJ) Frank Cristaudo.

#### B. Extension of Filing Deadlines for Fee Increase Petitions Contrary to Statute

Judge Benagh’s understanding was that 42 U.S.C. § 406(a)(3)(A) requires that petitions for an increase in fees (*fee petitions*) must be filed within 15 days of receiving a notice of award of a claimant’s benefits and authorization of the fee payment. Judge Benagh stated that SSA promulgated regulations that extended the statutory 15-day deadline for claimants’ attorneys to file fee increase petitions after a decision on the merits of the claim, without a legal basis to do so. A *fee agreement* is a written statement signed by the claimant and his or her appointed representative specifying the fee the representative expects to charge and collect, and the claimant expects to pay, for services the representative provides in pursuing the claimant’s benefit rights in proceedings before the SSA.<sup>3</sup> A fee agreement is submitted before the date of the first favorable decision. A *fee petition* is filed if the representative does not submit a fee agreement by the required date, or if SSA does not approve the agreement or it is not approved on administrative review. Judge Benagh maintained that multiple, inconsistent deadlines in the regulations and SSA manual are in conflict with the 15-day statutory time period for requesting review of a fee petition.

#### C. Improper Allowance of Fee Petitions Evidencing Excessive Billing, and Materially False Submissions by Claimants’ Attorneys

Judge Benagh alleged that lawyers who appeared before her filed excessive and often materially false petitions for fee increases contrary to 42 U.S.C. § 406(a)(1), which SSA has taken no action to address. Section 408(a) imposes criminal penalties upon any

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<sup>2</sup> The allegedly false statements included the attorney’s failure to disclose to Judge Benagh that he had already been paid for approximately two years of work that he had included in his new fee petition, and an entry in his fee petition regarding an on-the-record decision. These allegedly false statements are also addressed in Section C below.

<sup>3</sup> [http://www.ssa.gov/representation/fee\\_agreements.htm#a0=0](http://www.ssa.gov/representation/fee_agreements.htm#a0=0), last accessed 11/5/14.

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person who makes false statements or a false representation of material fact in connection with any payments made under the Social Security Act, or who conceals or fails to disclose material information with the intent to fraudulently secure unauthorized or excessive payments.

Judge Benagh asserted that many of the petitions she received contained materially false submissions from claimants' representatives and that SSA took no action to prevent such filings or discipline the attorneys who made them. Specifically, Judge Benagh disclosed that SSA allowed claimants' attorneys to double-bill claimants for work already conducted and excessively bill for initial case reviews, clerical expenses, and travel expenses, often failing to provide adequate itemized statements of costs.

Judge Benagh alleged that a law firm representing a claimant used signatures of attorneys no longer working for the firm on claim documents, and submitted inflated claims of hours worked, including \$6,000 for 32 hours of work performed by clerical employees. Each attorney in the case also billed 3.5 hours of travel time, a charge that should have been apportioned among all the claimants whom the attorneys represented before SSA ALJs that day. After she attempted to take action on the excessive fee petition by holding an evidentiary hearing, Judge Benagh was instructed that she was not permitted to hold a hearing on this fee increase petition, as such a hearing would be contrary to Region III policy and could strain agency resources.

In one case, an attorney submitted a fee increase petition that Judge Benagh alleged contained a false entry for a specific task. She believed that the work claimed had not been performed, based on the evidence in the case file. The petition also contained an excessive claim of hours worked. Judge Benagh stated that she was admonished by the agency in this and other cases not only for applying a filing deadline, but also for removing double-billed charges, reducing fees for clerical work, and for criticizing attorneys.

In another example, an attorney elicited what Judge Benagh believed to be perjured testimony from a witness, withheld evidence, and filed false evidence about a claimant's disability. The attorney had taken testimony from her client under oath that there had never been a functional capacity evaluation in her case. Judge Benagh, however, subpoenaed records from the claimant's private disability carrier, which included a functional capacity evaluation. The records of the carrier's private investigator also contradicted the findings of the evaluation, and showed that the carrier was taking action to cut off disability benefits to the claimant. To Judge Benagh's knowledge, the attorney was not sanctioned by SSA. Judge Benagh also received a formal reprimand for finding that these attempts to withhold documents weighed against the credibility of the claimant. As such, she asserts that SSA failed to address the impact of possible misconduct by claimants' attorneys on the validity of claims. In addition, she believes

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that the agency's positions have resulted in most judges "rubber-stamping" fee petitions, encouraging multiple abuses.

## **II. The Agency's Report**

The OIG's investigation did not substantiate the majority of Judge Benagh's disclosures; however, the OIG confirmed that in two cases she cited, fee petitions were signed by someone other than the attorney whose signature appeared on the document.

With respect to Judge Benagh's allegation that an ALJ's decisions on fee petitions are not subject to further review pursuant to 42 U.S.C. § 406(a)(3), the agency report determined that her disclosures resulted from a misinterpretation of the Act. The OIG conducted multiple interviews with SSA legal experts who clarified the difference between fee petitions and fee agreements and their respective and distinct statutory and regulatory frameworks. The report explains that there is a strong record of legislative and regulatory differentiation of fee petitions and fee agreements Judge Benagh did not fully understand. The statutory provisions Judge Benagh cited regarding fee petitions actually apply to fee agreements. According to Robert Melvin, an attorney and expert in SSA statutes and regulations, the fee petition process is described in various sections of 20 C.F.R. § 404.1700 et seq. The purpose of such regulations is to "create a fee petition process that a representative would use to obtain approval of the fee he or she charged the claimant." The underlying statutory authority for the fee petition regulations can be found in 42 U.S.C. 406(a)(1). Conversely, the fee agreement process is outlined in § 406(a)(2) and (3) only; there are no regulations covering fee agreements. Additionally, § 406(a)(3) establishes two procedures for the review of fee agreements to increase or decrease fees for a claimant's representative. SSA stated that the vast majority (99.6%) of fee requests surveyed between FY 2010 and May 13, 2013, were fee agreements, as opposed to fee petitions. Thus, Judge Benagh's assertion that her decisions either on fee petitions or fee agreements were not reviewable was erroneous.

The OIG report specifically addressed Judge Benagh's allegation that her decisions in fee petition reviews were subject to further review contrary to statute in an average of six cases per year. First, OIG stated that reviews of fee petitions are expressly allowable by 20 C.F.R. § 404.1720(d), which states, "an authorized official of the [SSA] who did not take part in the fee determination being questioned will review the determination." OIG also found that there is no law that prohibits further review. Further, the statute Judge Benagh cited in support of her allegation, 42 U.S.C. § 406(a)(3), establishes two procedures for the review of fee agreements, not fee petitions. Moreover, the investigation determined that during the ten-year period starting in 2002 there have been only 30 cases from the Washington, D.C. Hearing Office in which a claimant or representative appealed to the RCALJ on a fee petition. Of these cases, only five were assigned to Judge Benagh. Additionally, OIG clarified that in one of the cases, Judge

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Benagh's fee increase petition decision was overruled by RCALJ Jasper Bede—not Judge Cristaudo.

Judge Benagh also maintained that SSA's regulations and the Hearings, Appeals and Litigation Law manual (HALLEX) impose a statutory 15-day deadline for filing fee increase petitions after a decision on the merits of the claim. She noted that she was admonished by the agency for applying such a deadline. The investigation determined that the cited 15-day deadline found in 42 U.S.C. § 406(a)(3) applies to fee agreements, not fee petitions. As such, there is no 15-day deadline for filing fee increase petitions. The report further clarified that the regulation Judge Benagh alleged was in conflict with the statute, 20 C.F.R. § 404.1720 (c)(4), "does not place a time limit on filing petitions for fee increases, it places a 30-day deadline on requesting review of the fee petition determination." The agency's policy, contained in HALLEX I-1-2-42, which Judge Benagh also cited as contradictory to the statute, applies to fee agreements. OIG cited multiple sections of HALLEX: § I-1-2-53, § I-1-2-61, and § I-1-2-53, that do apply to fee petitions, but the timeframes listed in the relevant HALLEX provisions are consistent with fee petition regulations at 20 C.F.R. § 404.1720(c).

Therefore, the agency report found that all the referenced agency rules, regulations and policies are consistent with statutory provisions. According to the report, the multiple deadlines listed in each of the various provisions apply to multiple, mutually exclusive processes. Furthermore, the report noted that there are no statutes or regulations that contain any deadline for filing fee petitions, except that HALLEX § I-1-2-53(B) provides that if a claimant wants to be paid directly out of the claimant's past due benefits, a fee petition must be filed within 60 days.

With respect to Judge Benagh's allegation that HALLEX is changed at will by SSA, SSA responded that there is a process for making changes to HALLEX, which occurs regularly in order to take into account legislative and regulatory changes and other SSA-specific administrative messages and policy changes. Proposed changes are reviewed by the associate commissioner-level components in ODAR, which then provide comments back on the draft. The draft is revised to incorporate comments and suggestions, and a background book is prepared, which is provided to the ODAR deputy commissioner for approval. The procedures for making changes to HALLEX can be found at § I-1-0-7.

With respect to Judge Benagh's allegations that, in specific cases, claimants' attorneys inflated claims of hours worked, the investigation found that the agency had taken appropriate action to reduce the fees sought. For example, in one case, the law firm representing the claimant requested a total of \$14,482.87 in four fee petitions. The investigation revealed that after Judge Benagh rejected these claims because she deemed that the petitions were late, they went to higher review with Judge Jasper Bede, who only

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authorized a total of \$3,954.10. As such, SSA maintained that the current process used by SSA to review fee petition requests is effective.

Regarding Judge Benagh's allegations of double billing by claimant representatives, the OIG interviewed Judge Cristaudo, who reported that this is an ethical issue and ALJs have the authority to strike questionable hours. Agency officials advised that there are agency policies on billing; however, the OIG report found "There is no policy or statute stating that fees should be split or divided among the claimants represented by the same representative at the hearing on the same day." An SSA official also noted that common ethical considerations govern general billing procedures of claimant representatives. Citing one example, SSA asserted that its process for reviewing fee petitions is effective because upon secondary review the \$10,079 requested was revised down to \$4,779 to take into account the amount the law firm had already been paid. With respect to Judge Benagh's allegation that in a particular case an attorney elicited perjured testimony from a witness, withheld evidence, and filed false evidence, the OIG report could not substantiate the claims due to lack of documentation.

Regarding Judge Benagh's claim of forged fee petitions, SSA officials acknowledged that the two fee petitions she cited were signed by someone other than the named attorney. However, SSA indicated that it recognized that the individuals were no longer employed with the law firm. As a result, it did not pay the fee in one case, and reduced the fee in the other. The OIG interviewed the two individuals whose signatures appeared on fee petitions in the case at issue. Both of the attorneys stated that they did not sign the fee petition forms (SSA Form 1560) even though the fee petitions bore their names. Additionally, the OIG interviewed Judge Bede. The OIG reported that Judge Bede acknowledged that forging signatures by claimant representatives on fee petitions "seems to be happening more often lately." However, Judge Bede explained that if Judge Benagh observed a potential forgery, the appropriate process to follow was to refer the matter to the SSA Office of General Counsel (OGC) for review. The OGC may hold a hearing to disallow the claimant representative from representing clients before SSA if misconduct is found to have occurred.

The OIG's report concluded that the forged signatures appeared to be a "technical violation of the policy," and further stated "it is unlikely that anyone intentionally forged the names with intent to defraud." One of the individuals whose signature was used reported that this particular law firm had a preparation team that handled all of the paperwork and the submission of forms to SSA. The interviewee told the OIG that claimants' representatives did not sign the forms most of the time and that attorneys never signed fee petitions. Additionally, the interviewee indicated that the law firm had a fee petition branch that handled all fee petition forms. The SSA stated that Judge Benagh did not report the problem she identified with the signatories in the cited cases, which is why SSA took no action against claimant representatives for potential sanctions.

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I have reviewed the original disclosure and the agency's reports. I have determined that the reports meet all statutory requirements and that the findings of the agency head appear reasonable. Notwithstanding this determination, as noted above, the findings of the report suggest that there is a high potential for abuse and the agency should consider whether additional measures can be implemented to prevent and reduce fraud, waste, and abuse in the processing of social security claims.

As required by 5 U.S.C. § 1213(e)(3), I have sent copies of the unredacted agency report to the Chairmen and Ranking Members of the Senate and House Committees on the Judiciary. I have also filed copies of the redacted agency report in OSC's public file, which is available online at [www.osc.gov](http://www.osc.gov). This matter is now closed.

Respectfully,



Carolyn N. Lerner

Enclosures