

**HOW TO APPEAL A SOCIAL SECURITY/SSI DISABILITY CASE IN
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK:
A MANUAL FOR CLAIMANTS**



**Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007**

**Charles L. Brieant, Jr. Federal Building and Courthouse
300 Quarropas Street
White Plains, New York 10601**

The Southern District of New York acknowledges the Social Security Manual Working Group for this publication. The lawyers of that Working Group include representatives from the Regional Office of the Social Security Administration, the U.S. Attorney's Office for the Southern District of New York, the Legal Aid Society, Legal Services NYC and private lawyers who work in the field of social security law. These lawyers, through their work on this Manual, have demonstrated an honorable commitment to *pro bono* service and equal access to justice that reflects the tradition of the bar. This Social Security Manual is intended to help non-lawyers effectively and properly present their claims in federal court following a final decision from the Social Security Administration.

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I. INTRODUCTION

If you applied for Social Security Disability Insurance (SSD) benefits or Supplemental Security Income (SSI) and you do not agree with the Commissioner's final decision, you may file a lawsuit asking that a Judge in federal court review that decision. To file this type of lawsuit, you have to follow special procedures. This manual explains those procedures. It is intended as an informative and practical resource and guide for people who are representing themselves in court ("*pro se* litigants"). It is not a substitute for legal research or advice and assistance from a licensed attorney. The law is constantly changing, and the information contained in these pages may not be complete or up-to-date. The laws and rules to which this manual refers may have changed since the manual's publication, and there may exist new laws or rules that govern your case. It is your responsibility to verify the accuracy of any information on which you rely. In addition, this manual does not replace the Federal Rules of Civil Procedure, the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, or the Individual Practices of the Judge to whom your case is assigned, and you should review those rules before proceeding.

Before filing a Social Security appeal in this Court, you must first complete a three-step administrative review process with the Social Security Administration ("SSA"). You must (1) seek an initial determination; (2) appear at a hearing before an administrative law judge and (3) seek review from the Appeals Council. If you fail to go through these three steps, the SSA Commissioner will not have issued a "final decision." Without a final decision it is too soon to appeal in federal court. This manual assumes you have completed this administrative review process.

II. REPRESENTING YOURSELF

A. Appearing *Pro Se*

People representing themselves in court without the assistance of a licensed attorney are known as *pro se* litigants. The word “*pro se*” is Latin for “in one’s own behalf.” Under United States law, you are permitted to appeal a final decision from the Social Security Administration as a *pro se* litigant. 28 U.S.C. § 1654. (U.S.C. refers to the United States Code, which contains all federal laws.) Any individual who is before the court without an attorney is considered *pro se*. A *pro se* litigant is subject to the same rules of law and evidence as individuals represented by an attorney. The court cannot make exceptions for *pro se* litigants.

B. The *Pro Se* Office

The *Pro Se* Office acts as a central resource for the Southern District of New York on all matters for *pro se* litigants. The Office’s employees accept all papers filed in *pro se* cases and may answer general questions regarding court rules and procedures. They are not permitted, however, to give advice on legal strategy, draft papers for *pro se* litigants, fill out forms, “serve” papers, act as interpreters, notarize documents or otherwise participate, directly or indirectly, in your case. Remember that no matter how much a particular court employee may want to help you with your case, that employee cannot give you any assistance other than basic information.

1. Contact Information

The *Pro Se* Office for the Southern District of New York is located on the second floor of the Daniel Patrick Moynihan Courthouse at 500 Pearl Street in Manhattan. (There is no *Pro Se* Office in the Charles L. Brieant, Jr. Federal Building and Courthouse in White Plains but you can direct any questions to that courthouse’s Clerk’s Office.) The *Pro Se* Office is open to the

public Monday through Friday, 8:30 a.m. to 5:00 p.m. The *Pro Se* Office is closed on weekends and federal holidays. The *Pro Se* Office's mailing address is:

United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
Pro Se Office
500 Pearl Street
New York, NY 10007

If you send the *Pro Se* Office a letter, include the name of your case and docket number, as well as your current address. The telephone number of the *Pro Se* Office is (212) 805-0175. The *Pro Se* Office cannot accept collect calls. No appointment is needed to speak to *Pro Se* Office staff, in person or on the telephone.

The Court must always have your current contact information. You must immediately notify the *Pro Se* Office in writing of any change of your address. If you fail to do so, the Judge may dismiss your case.

2. Accepting Papers

The *Pro Se* Office accepts all papers submitted by *pro se* litigants, beginning with the filing of the complaint and ending with the filing of a notice of appeal. **You must submit all your papers to the *Pro Se* Office (unless the Judge directed you to submit papers directly to that Judge's chambers).** You can file papers with the *Pro Se* Office in person or by mail. The *Pro Se* Office does not accept faxes or email. The *Pro Se* Office files the original papers in the Clerk's Office and will forward any copies you enclose for the Judge.

Once your case is assigned a Judge and a case number, which is known as the docket number, you must put the docket number and the Judge's initials on all papers you submit to the *Pro Se* Office. The docket number consists of the last two digits of the year in which the case

was filed, followed by “Civ.” to designate its status as a civil case, a four or five digit number, and the initials of the Judge assigned to your case. For example, 09 Civ. 4567 (LAP).

The *Pro Se* Office is unable to accept any documents without the case number and proof of service demonstrating that the document you are filing was “served” on the government. (See Discussion at IX(D) for more information on service.) If you mail documents to the *Pro Se* Office without the case number and proof of service, the documents may be returned to you.

3. Forms Available from the *Pro Se* Office

The *Pro Se* Office publishes numerous forms, which are available to litigants free of charge, including a [Complaint for Social Security Appeals](#) (Appendix, Form A), Summonses, forms to apply for waiver of the required filing fee based on demonstrated financial need (called the [Request to Proceed In Forma Pauperis](#) (Appendix, Form B)), an [Application for the Court to Request Pro Bono Counsel](#) (Appendix, Form C), motion instructions, [sample motion forms](#) (Appendix, Form D), an [Affirmation of Service](#) (Appendix, Form E), a [Consent to Proceed Before a Magistrate Judge](#) (Appendix, Form F) and appeal forms, including a [Notice of Appeal](#) (Appendix, Form G). Many forms are included in this manual, and other forms may be obtained from the Southern District of New York’s website (<http://nysd.uscourts.gov/forms.php>), particularly the section of the website labeled “Representing Yourself in Federal Court,” by visiting the *Pro Se* Office personally, or by requesting forms by phone or letter.

III. ALTERNATIVES TO REPRESENTING YOURSELF

The law permits individuals to represent themselves in federal court in social security appeals cases. It is, however, advisable to proceed with an attorney because an attorney can greatly increase your chances of success. Also, bringing a lawsuit by yourself will require a great deal of your time. You will have to learn rules, which are difficult to follow, and will have to research the law that applies to your claim. Even if your claim is valid, the court may dismiss your case if you fail to follow the rules. Without a lawyer, your inexperience may cause you to lose your case.

A. Requesting *Pro Bono* Counsel from the Court

People who bring Social Security appeals are not automatically provided with an attorney. If you are unable to hire an attorney, you may ask the Judge to grant your request for counsel to represent you for free. You may request *pro bono* counsel at any time during the case. Lawyers who practice in this Courthouse may volunteer to represent, at no charge, parties whose requests for free counsel have been granted by the Judge. These attorneys are called *pro bono* attorneys.

You should understand, however, that there are many more people in need of attorneys than there are volunteer attorneys available to represent them. Even if the Judge grants your request for an attorney, it does not mean that an attorney will be available to represent you. There is no guarantee you will actually get an attorney. The Judge cannot force an attorney to take a particular case. Unless or until an attorney files a Notice of Appearance officially notifying the Judge and the other parties that he or she is your counsel of record, you are responsible for your own case. If an attorney does not volunteer, you must continue to represent yourself.

The Judge will not consider your request for an attorney until after you file your Social Security appeal. The Judge cannot request that an attorney represent you to discuss the possibility of filing a lawsuit.

To request an attorney, you must complete and submit an [Application for the Court to Request Pro Bono Counsel](#). The Application is included in this manual at Appendix, Form C, and is available from the *Pro Se* Office and on the Southern District of New York's website (<http://nysd.uscourts.gov/forms.php>). The Judge will consider the following factors in deciding whether to grant your request: how likely you are to succeed in your lawsuit; whether the legal issues are complex or simple; your current financial status; what attempts you have made to try to hire an attorney; your statement describing your need for an attorney, including your education background, whether you have difficulty communicating in English, any disabilities that may affect your ability to proceed on your own behalf, or family circumstances that may have an effect on your ability to represent yourself.

A copy of your request for an attorney must be sent to the opposing party and the original must be filed with the *Pro Se* Office along with an Affirmation of Service (see Appendix, Form E). The Judge will review the information and make a determination.

If your request for a *pro bono* attorney is granted, your case will still go forward while the *Pro Se* Office searches for a volunteer lawyer. There is no guarantee, however, that an attorney will volunteer to represent you, and you must continue representing yourself until an attorney files a Notice of Appearance of *Pro Bono* Counsel.

B. Hiring Your Own Attorney

If you can afford to hire your own attorney, you should ask yourself three questions before hiring a particular attorney:

1. Does the attorney practice the type of law involved in your case?

Many attorneys specialize in certain types of law only, such as criminal law, matrimonial law, landlord-tenant law, estate law or tax law. An attorney who practices a specific type of law may not be familiar with social security law and therefore may not be an effective advocate for you. In addition, many attorneys practice primarily in one particular type of court, such as state court, and may be unfamiliar with the rules and procedures in federal court.

2. How does the attorney expect to be paid?

There are two types of fee arrangements you may make with an attorney: hourly rate and contingency fee. Either way, keep in mind that under the Social Security Act, attorneys' fees are limited to 25% of your past-due disability benefits. An **hourly rate** fee allows the attorney to bill you for the number of hours the attorney works on your case. This type of arrangement may be good for you if you have money available to pay for an attorney and if the case is not too complex. Under this arrangement, at the time of your first meeting or retention of the attorney, the attorney must inform you of the hourly rate he or she intends to charge you, as well as the hourly rate for the work of any partners, associates and support staff such as paralegals. Be sure to inquire as to whether the rates are different for "in-court" time and "out-of-court" time. This arrangement usually requires a "retainer," that is, an amount of money to be paid to the attorney before work will begin on the case. A retainer is a sum of money from which the attorney will draw expenses and fee charges.

A **contingency fee** does not generally require a retainer. Instead, the attorney will receive a percentage of any money awarded to you at the end of the case; and no money if none is recovered. Be sure to ask what percentage of the award the attorney will take. For social security cases, this percentage cannot be more than 25%. Whether the case is on an hourly-fee

or contingent-fee basis, you will ordinarily be responsible for the out-of-pocket costs of the litigation, such as postage, photocopying, transcript costs, etc.

All arrangements regarding the fees to be paid to an attorney (including the percentage of any recovery) should be included in the retainer agreement or letter of engagement that you sign when you hire the attorney. Always obtain and keep a copy of the retainer agreement for your records.

Also, attorneys' fees may be paid by the SSA under a law known as the Equal Access to Justice Act, if the Social Security Administration's decision to deny your benefits was not "substantially justified." If a reasonable person would think there was enough evidence for Social Security Administration to make the decision it made, then it was "substantially justified."

3. Are you comfortable with the attorney?

The relationship between attorney and client is unique. You should feel absolutely comfortable when dealing with your attorney. You also should consider whether the attorney can accommodate you or others involved in your case, for example, a person who does not speak English, who is disabled, or who is a child.

You may wish to contact the local bar associations listed below for referrals.

New York State Bar Association
1 Elk Street
Albany, New York 12207
(518) 463-3200
www.nysba.org

New York City Bar Association
42 West 44th Street
New York, New York 10036
General: (212) 382-6600
Referral: (212) 626-7373
www.nycbar.org

New York County Lawyers' Association
14 Vesey Street
New York, New York 10007
(212) 267-6646
www.nycla.org

Bronx County Bar Association
New York State Supreme Court Bldg.
851 Grand Concourse
Bronx, New York 10451
General: (718) 293-2227
Referral: (718) 293-5600
www.bronxbar.com
info@bronxbar.com

Westchester County Bar Association
One North Broadway, Suite 512
White Plains, New York 10601
(914) 761-3707
www.wcbany.org

Dutchess County Bar Association
P. O. Box 4865
Poughkeepsie, New York 12602
(845) 473-2488
www.dutchesscountybar.org
janna@dutchesscountybar.org

Orange County Bar Association
P. O. Box 88
198 Main Street
Goshen, New York 10924
(845) 294-8222
www.orangecountybarassociation.org
orangelaw@frontiernet.net

Putnam County Bar Association
P. O. Box 44
Carmel, New York 10512
(845) 225-4904
putnamcountybar@yahoo.com
No website yet.

Rockland County Bar Association
337 N. Main Street
New City, New York 10956
(845) 634-2149
www.rocklandbar.org
office@rocklandbar.org

Sullivan County Bar Association
P. O. Box 1040
Monticello, New York 12701
(845) 794-2426
No website yet.

Other bar associations can be found in the telephone book or on the internet. In addition, organizations such as The Legal Aid Society, www.legal-aid.org, Legal Services NYC, <http://www.legalservicesnyc.org/>, and LawHelp/NY, www.lawhelp.org/ny, may be helpful. Other public interest organizations may be willing to represent you in certain types of cases without a fee.

Remember to keep a detailed record of all your efforts to find an attorney to represent you. This not only will help to organize your search but will provide support for any application for appointment of *pro bono* counsel you may make later.

IV. HOW TO START YOUR CASE

A. When You Can File Your Case

Before filing a Social Security appeal, you first must complete the three-step administrative review process within the SSA. This requires that you (1) seek an initial determination, (2) appear at an administrative hearing before an administrative law judge, and (3) seek review from the Appeals Council. If you fail to go through these three steps, the Commissioner will not have issued a “final decision.” Without a “final decision,” it is too soon to appeal in federal court.

If you want to file a Social Security appeal, you must do so within sixty (60) days after you receive the final decision from the Appeals Council in the mail. The law presumes that you received the decision five days after the date on the decision, unless you can prove that you actually received it later. When counting the 60-day period, Saturdays, Sundays and legal holidays are included unless they fall on the 60th day. If the 60th day falls on a Saturday, Sunday or legal holiday, the next regular weekday would then count as the 60th day.

1. Seeking an Extension of Time to File Your Complaint

If you missed the 60-day deadline to file your complaint, you may seek from the Appeals Council an extension of time to file your Social Security appeal. You must make this request in writing, and you must give the reasons why you did not file the complaint on time. If you show that you had good cause for missing the deadline, the time period may be extended.¹

¹ 20 C.F.R. § 404.911(b)

2. Where to Send Your Request for Extension

Send your written request to:

Appeals Council, SSA/ODAR
5107 Leesburg Pike
Falls Church, VA 22041-3255

Include the date, your address and Social Security number on the written request letter and keep a copy of everything you mail. You should send one copy of your request letter by regular mail and another copy by certified mail, return receipt requested. If you have any documents that help prove one of the reasons for missing the deadline that are stated above, then make copies and include them with your request letter.

When you receive a response to your extension request from the Appeals Council, go to the District Court and file your complaint. You may file your complaint even if the Appeals Council has denied your extension request. If the Appeals Council has denied your extension request, however, it will be difficult to obtain a reversal of that denial from the District Court. While the Court cannot review this kind of denial by the Appeals Council, it can decide to forgive your lateness in what is called an “equitable tolling of the statute of limitations.” This means that the Court can decide to accept your case as timely filed if you can show that you have been pursuing your rights diligently and that some extraordinary circumstance stood in the way of filing it within 60 days from the day you received the Appeals Council denial.²

B. What It Costs To Start Your Case

The filing fee for a Social Security appeal is \$350. You can pay the filing fee in cash, by credit card (Discover, Mastercard, American Express or Visa) or by certified check or money order, made payable to the “Clerk of Court, S.D.N.Y.” Personal checks are not accepted. Cash is not accepted in cases submitted by mail.

² Torres v. Barnhart, 417 F.3d 276 (2d Cir. 2005).

If you are unable to pay the filing fee, you can submit an application to request that the court waive the fee. This is called applying for *in forma pauperis* (IFP) status. To file for IFP status, you must submit to the *Pro Se* Office, at the time the complaint is filed, a sworn statement that details certain financial information. The determination whether to grant or deny the IFP application is made by a Judge, based on demonstrated financial need. A [Request to Proceed In Forma Pauperis](#) is included in this Manual, at Appendix, Form B, and is available on the Court's website and at the *Pro Se* Office. This is a sworn statement, and you are subject to the penalties for perjury if you make a false statement on this application.

If the Judge grants your application to proceed *in forma pauperis*, you do not have to pay the filing fee or the cost of serving the summons and complaint by the United States Marshals Service. Because a Judge must rule on each IFP application as it is received, the *Pro Se* Office cannot tell you how long this will take.

C. What You Must File in the District Court

To start a Social Security appeal, you must (1) file a complaint with original signature (a form is available at the *Pro Se* Office and on the Court's website) and submit it with two (2) identical copies and (2) pay the required \$350 filing fee or submit a Request to Proceed *In Forma Pauperis*. You should attach as an exhibit to the complaint a copy of the final decision from the Appeals Council. You must file these items with the *Pro Se* Office. You may file them in person or by mail. Regardless of how you file (by mail or in person), it is very important that you keep copies of all documents you submit.

The *Pro Se* Office will review the papers and notify you of any incomplete or missing information or documents. You also will be notified by mail on your application for *in forma pauperis* ("IFP") status. Once a complaint is filed and assigned a civil docket number, and after

a judge has been assigned, the Court will issue an order, and you will be notified on how to proceed.

V. WRITING THE COMPLAINT

Your complaint must be typed or printed legibly in English on 8½ x 11 inch paper, double spaced, using one side of the page only, and must contain your original, not photocopied, signature. You are the plaintiff. You must write your name as the plaintiff in the caption and include your social security number. The Commissioner of Social Security is the only proper defendant in an appeal from a final decision by the SSA. If you do not know the Commissioner's name, you can just write "Commissioner of Social Security."

It is best if you use the [Complaint form for Social Security Appeals](#) created by this Court. A copy is available in this manual (Appendix, Form A), on the Court's website or at the *Pro Se* Office. If you use the Court's form complaint, you must complete all sections, including listing your social security number in the caption and signing the complaint on the last page. If you draft your own complaint, be sure to include the information sought in the complaint form, including your social security number, the nature of your disability, the date your disability began, the date of your hearing and the date of the Administrative Law Judge's decision. You should attach a copy of the Appeals Council's letter (the "final decision") at the end of your complaint.

Other than the final decision, you do not need to attach any other exhibits to the complaint. But if you wish to attach exhibits to your complaint you may do so. They should be marked as exhibits (exhibit 1, exhibit 2, etc.) and referred to in the text of the complaint. Do not send the court a pile of documents that are not specifically mentioned in the complaint. If, however, the document is relevant to the facts in the complaint, you can include it and explain its relevance in the Statement of Facts section of your complaint.

VI. SERVICE OF THE SUMMONS AND COMPLAINT

The Federal Rules of Civil Procedure require that the summons and complaint be served on the Government in a particular way. This is referred to as “service of process.” These procedures must be followed exactly. If the Government is not properly served with the summons and complaint, the case may not proceed further and may be dismissed. Also, you must serve the summons and complaint within 120 days from the date the summons is issued or your lawsuit may be dismissed unless you obtain an extension from the Court.

A. Plaintiffs Who Have Been Granted *In Forma Pauperis* Status

If you have been granted *in forma pauperis* status, the Court will arrange service of process on the Commissioner through an agreement with the United States Attorney for the Southern District of New York. You will not receive a copy of the summons and will not be required to do anything to effect service unless otherwise ordered by the Court. Under this agreement, the Commissioner will respond to your complaint within approximately 100 days from the date that the Court issues an Order of Service.

B. Plaintiffs Who Paid the Filing Fee

If you paid the filing fee, you are responsible for arranging for service of process as is required under Rule 4(i) of the Federal Rules of Civil Procedure. In these cases, the Clerk of Court will issue a summons containing the Clerk’s signature and the Court’s seal. It is a federal criminal offense to change or alter a summons. Information on the summons should not be crossed out, added to, erased or whited-out.

1. Who You Need to Serve

The Federal Rules require that you serve (1) the Commissioner of the Social Security Administration, (2) the U.S. Attorney’s Office for the Southern District of New York and (3) the

U.S. Attorney General with separate *copies* of the summons and complaint. You may serve these individuals by delivering the summons and complaint personally, or by mailing them (certified mail is recommended). You can use the following addresses:

The Commissioner of the Social Security Administrative (the “Defendant”) has designated the Office of the Regional Chief Counsel to receive the summons and complaint at:

Office of the Regional Chief Counsel, Region II
Social Security Administration
26 Federal Plaza, Room 3904
New York, NY 10278-0004

The U.S. Attorney’s Office at:

United States Attorney
Southern District of New York
86 Chambers Street, 3rd floor
New York, New York 10007
Attn: Civil Process Clerk

and

The Attorney General of the United States at:

Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530

2. How to Effect Service

Any person eighteen years of age or older who is not a party to the lawsuit (that is, not the plaintiff) may serve the summons and complaint personally. Fed. R. Civ. P. 4 (c)(2). You may also hire a professional process server or ask a trusted friend or family member to serve the parties. Professional process servers are listed in the “Yellow Pages,” among other places. Such service may, however, be costly.

3. Proof of Service

After service has been made, the person(s) who served process must complete the return of service on the back of the original summons where it says “declaration of server,” affirming under penalties of perjury that service has been made and describing the details of the service. Once the original summons with return of service is completed, it must be filed promptly with the *Pro Se* Office.

VII. THE NEXT STEPS AFTER YOU FILE AND SERVE YOUR COMPLAINT

A. Assignment of Cases: Manhattan Courthouse or White Plains Courthouse

The United States District Court for the Southern District of New York has two courthouses: the Daniel Patrick Moynihan Courthouse located in downtown Manhattan, and the Charles L. Brieant, Jr. Federal Building and Courthouse located in White Plains. Social Security appeals are assigned proportionately to all Judges in the Court, whether sitting at the Manhattan or White Plains Courthouses.

B. The Assignment of a Judge to Your Case

After your complaint is filed, it will be assigned a docket number and a District Judge; a Magistrate Judge is “designated” at random as well.

C. District Judges and Magistrate Judges

There are two types of Judges in district court: United States District Judges and United States Magistrate Judges. District Judges are appointed by the President with the approval of the United States Senate for life terms. United States Magistrate Judges are appointed by the Board of Judges of the District Court, for renewable terms of eight years. All civil cases in the Southern District of New York are assigned randomly to a District Judge and a Magistrate Judge at the time the complaint is filed. A Magistrate Judge takes charge of the case only when the District Judge refers the case to the Magistrate Judge for a specific purpose or when the parties consent to proceed before the Magistrate Judge for all purposes.

D. Where to Find the District Judge’s or Magistrate Judge’s Individual Practices

The Individual Practices for the Judges of this Court are available on the Court’s website (www.nysd.uscourts.gov). The *Pro Se* Office will also provide you with one copy of your

Judge's Individual Practices. It is your responsibility to be familiar with the particular practices of the judges to whom your case is assigned.

E. The Assignment of Your Case to a Magistrate Judge

The Magistrate Judge designated to your case will not be involved in your case unless the District Judge enters an order referring all or part of your case to the Magistrate Judge. The parties' consent is not needed for the District Judge to refer the case to the Magistrate Judge. Referring cases to the Magistrate Judge is a fairly common practice and is within the discretion of the District Judge.

1. Consent to Proceed Before a Magistrate Judge

If both you and the Government agree, your case may be heard for all purposes by the Magistrate Judge. That means that the Magistrate Judge will take the place for the District Judge in deciding your case. A [Consent to Proceed Before a Magistrate Judge](#) form is included in this manual (Appendix, Form F). There are a number of benefits to consenting to proceed before a Magistrate Judge. Perhaps the greatest benefit is time. District Judges are required to give priority to felony criminal trials, which often are lengthy and complicated. If you consent to proceed before the Magistrate Judge, you will find that your lawsuit generally proceeds more quickly than if the case were before the District Judge.

2. Report and Recommendations Issued By the Magistrate Judge

In cases where the parties have consented to proceed before the Magistrate, the Magistrate Judge issues decisions and opinions, and any appeal from the Magistrate Judge's decision is filed directly with the United States Court of Appeals for the Second Circuit. See also "Appeals." If the parties do not consent to having the Magistrate Judge hear the case for all

purposes, the Magistrate Judge to whom the case has been referred will issue a Report & Recommendation to the District Judge.

3. Objections to a Magistrate Judge's Report & Recommendation

If you disagree with the Magistrate Judge's Report & Recommendation, you may object in writing to any or all of the contents of the Report & Recommendation. Any objection must be filed within fourteen (14) days of service of the Report & Recommendation. The District Judge will make a final decision, relying on the Magistrate Judge's Report & Recommendation and the parties' objections. The District Judge may adopt the Magistrate Judge's findings, in full or in part, or may decline to adopt the Report & Recommendation and issue an entirely new decision. If the District Judge's decision results in a final decision for your case, you may appeal to the United States Court of Appeals for the Second Circuit. See also "Appeals." Further information regarding the Report & Recommendation process may be found in Rule 72 of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1)(C).

VIII. THE ANSWER

A. What Is An Answer?

After you serve your complaint, the defendant (the Commissioner of Social Security) must file a written response to your complaint and send you a copy. The Commissioner can either file an answer or a motion. An answer responds to any allegations made in your complaint and usually states that the Commissioner believes that his or her decision denying you benefits was proper—that is, it was legally correct and supported by “substantial evidence.”

B. The Administrative Record

When the Commissioner files the answer, the Commissioner is also required to file an electronic Certified Administrative Record (e-CAR) and provide you with a hard copy. This collection of documents usually is several hundred pages and may be much larger. These documents are officially called the “record” in your case (though sometimes referred to as “the transcript”). The Commissioner may seek additional time to prepare the record.

The record should contain copies of all important documents in your case. These include your disability application(s), reconsideration decision(s), medical records, hearing transcript(s), the ALJ’s decision, and the Appeals Council’s decision. The court will rely on these documents to decide whether the Commissioner’s decision was proper. If you do not receive a copy of the record around the time the Commissioner’s answer is filed, contact the Assistant U.S. Attorney assigned to your case as soon as possible to ask for one. It will be very difficult to prepare your case without the record.

C. A Request for an Extension of Time to Respond to the Complaint

The Commissioner often requests an extension of time to respond because the SSA is gathering all the documents that make up the record. Before asking the Judge for an extension,

the Assistant U.S. Attorney assigned to your case (the lawyer for the Commissioner) may ask you if you agree to the extension.

The Commissioner's request may include a legal form, known as a stipulation, for you to sign if you agree to an extension. If you sign the stipulation, the Judge will likely give the Commissioner an extension. You do not have to agree to an extension and do not have to sign the stipulation. But the Judge may grant the Commissioner's request for an extension even if you do not agree to it.

D. Being Offered a Remand

You may also receive papers from the Assistant U.S. Attorney offering to "remand" your case back to the Commissioner for further proceedings. This means that you are being asked to agree to send your case back to the SSA, where you may receive another hearing before the ALJ who heard or case the first time or before a new ALJ if the previous one already heard your case twice. In either case, the SSA will then issue a new decision in your case. *You do not have to agree to a remand.* If you agree to a remand and sign the papers, your case will return to the SSA and the complaint you filed in the District Court will be dismissed.

A remand will give you a new opportunity to convince the SSA that you are entitled to benefits and an opportunity to present further evidence that you may not have presented before. Additionally, if you were not represented by an attorney before, you may have an attorney at the new hearing on remand. If your case is denied again on remand, you will have another opportunity to appeal your case to district court. If the Judge in the District Court is likely to remand your case based on the reasons given by the Commissioner, your consent to a remand will help you avoid additional delays.

IX. MOTIONS: Asking the Court to Do Something with Your Case

A. What Is a Motion and When Can a Motion Be Made?

After you have filed your complaint, both you and the Assistant U.S. Attorney representing the defendant Commissioner may make certain written requests to the Judge. These requests are called motions.

The attorney for the Commissioner may make a motion at any time in the process, and sometimes instead of filing an answer. Ordinarily, the Commissioner will file an answer and then later file a motion. If the Commissioner files a motion, you will be sent a copy of that motion and should file an opposition if you disagree with what the Court is being asked to do.

You may also make a motion. As a general rule, the Court will not consider your motion until the Commissioner has been served with the summons and complaint. Therefore, you should not make your motion until after the summons and complaint have been served. If you are unsure about what is happening in your case, review a copy of your docket sheet from the public records room in the Court (Room 260 in the Manhattan Courthouse) or go to the *Pro Se* Office. Your docket sheet lists each and every document that has been filed with the Court. You need your docket number when requesting your docket sheet or file. You must be sure that you serve the Assistant United States Attorney who is assigned to your case with a copy of any motion you file in your case. The process is described below. The Commissioner can oppose your motions just as you can oppose the Commissioner's motions.

B. Common Types of Motions

1. Motion to Remand

A motion to remand asks the Court to send your case back to the SSA for a new hearing or for further evaluation. You or the Commissioner may file a motion to remand. Such a motion

must state the reason(s) why your case should be sent back to the agency. If you make this kind of motion, you will ask the Court to reverse the Commissioner's decision and send the case back for a new hearing. You may want to make this motion if the ALJ "failed to develop the record." See "Common Legal Arguments." The Commissioner might request that your case be remanded to the SSA because the Commissioner agrees that a mistake was made at your hearing. But the Commissioner may also ask for a remand because the SSA has lost your file or cannot put into writing what was said at your hearing because the hearing recording is missing or cannot be understood.

2. Motion to Dismiss the Complaint

After you have filed your complaint, the Commissioner can make a motion to dismiss your case, rather than file an answer. For example, the Commissioner might claim that you filed your action more than 60 days from the date of the Appeals Council decision. If the Commissioner makes this motion, you should oppose that motion in writing if you have grounds for doing so and explain why the complaint should not be dismissed. As a plaintiff, you should never file a motion to dismiss the complaint.

3. Motion for Judgment on the Pleadings

You or the Commissioner may also make a motion for judgment on the pleadings. (See Forms C, D). A motion for "judgment on the pleadings" means that the party making the motion is asking the Judge to review the record and to rule in that party's favor based on the complaint, answer and administrative record. Remember, the "record" is made up of all the documents that were in your file, including the transcript of what was said at your hearing in front of the ALJ.

This is the most common motion made by the Commissioner in disability cases and, in *pro se* cases, the Court will often direct the Commissioner to file such a motion. (The Court will

often issue a scheduling order directing the Commissioner to file a motion for judgment on the pleadings so that your case can be heard quickly; not because the Court has any particular view on the merit of your case.) When the Commissioner makes a motion for judgment on the pleadings, the Commissioner is asking the Court to uphold the decision that denied or terminated your benefits. If you make a motion for judgment on the pleadings, you are asking the Court to reverse the Commissioner's decision because it is not supported by the evidence, and rather the evidence supports your claim that you are disabled and unable to work. You can make a motion for judgment on the pleadings on your own or you can seek reversal of the Commissioner's decision by filing papers opposing the Commissioner's motion to dismiss and asking for judgment in your favor (known as a "cross motion").

C. How to Draft a Motion or Oppose a Motion Made by the Commissioner

Your motion papers consist of a Notice of Motion (required only if you are filing the motion); an Affirmation and/or a Memorandum of Law or Legal Brief. Motion forms are in the Appendix, Forms D and E.

1. Notice of Motion – a Notice of Motion is required only if you are filing a motion; it is not required if you are opposing a motion made by the Commissioner. It states what type of motion you are filing. It should state the name of the motion to the right of the caption, for example: PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS. The Notice of Motion should give a brief statement of what you want the Judge to do.

2. Affirmation – If you need to bring to the Court's attention facts that are not in the record, your Notice of Motion or your opposition to the Commissioner's motion must include an affirmation, signed under penalty of perjury or before a notary public, by a person with personal knowledge about what is written (usually, you). You can attach exhibits such as medical or hospital records to the affidavit.

3. Memorandum of Law – You may also submit a memorandum of law (or legal brief) with your motion or in opposition to the Commissioner’s motion. This contains legal arguments to support your claim and explains how the law and court decisions in other cases apply to the facts of your case. See “Common Legal Arguments.” The facts you rely on must already be contained in the record in your case or be stated in an affidavit or in an attached medical report. Do not discuss new facts in a memorandum of law without having first mentioned them in an affidavit or having submitted them in some previous document.

D. Preparing and Serving Motion Papers

Whether you decide to make your own motion or are opposing the Commissioner’s motion, or both, you should go through the following steps when putting together your papers to file with the Court.

1. Write clearly and include your docket number. Try to have any legal papers you submit to the courts typed and always include the name of the case with the docket number and Judge’s initials. If you cannot type your papers, print or write them clearly on one side of the page only. Your papers must be on 8 1/2 x 11 inch paper.

2. Serve your motion papers on the U.S. Attorney’s Office. *Copies* of all papers filed with the Court or sent to a Judge must be “served” on the U.S. Attorney who is assigned to your case to represent the Commissioner. (The original is filed with the Court.) There are three ways to have your legal papers “served” on the U.S. Attorney.

a. Serving Motion Papers through the Court’s Electronic Case Filing (ECF) System

If your case is designated to the Court’s Electronic Case Filing (ECF) System, you can ask the Assistant U.S. Attorney who is representing the Commissioner to accept service through that system. To do this, you must request that the Assistant U.S. Attorney file a Waiver of Rule

5 Service with the Court. If this waiver is filed, the Assistant U.S. Attorney agrees to accept service through the Court’s ECF system, and you do not need to deliver or send a copy of your Court filings to the U.S. Attorney’s office. Instead, when you file your original documents with the *Pro Se* Office, they will be scanned and uploaded to the docket sheet. Once an electronic copy of your documents is on the docket sheet, the Assistant U.S. Attorney will be notified and can access the documents from the ECF system. A Waiver of Rule 5 Service is available on the Court’s website and at the *Pro Se* Office.

b. Serving Motion Papers by Mail

You can mail a copy of your legal papers to the U.S. Attorney. If you have already received any legal papers or mail from the office of the U.S. Attorney, your legal papers should also include the name of the particular assistant U.S. Attorney assigned to your case. You should also include that person’s name on the address when you mail anything to the U.S. Attorney’s office.

The address should look like this:

_____, Esq.
[name of Assistant U.S. Attorney]
U.S. Attorney’s Office
86 Chambers Street, 3rd floor
New York, New York 10007

Your affirmation of service states the address to which you mailed the copy to the U.S. Attorney’s office and the date you mailed it. You must attach the affirmation of service to the original of your legal papers and then bring this original with attached affirmation of service to the *Pro Se* Office. Your “original” is the one from which you made your copies. (See Appendix, Form E for a sample affirmation of service.) The *Pro Se* Office may ask if you have served the Commissioner before accepting your papers for filing. Once the clerk sees your affirmation or affidavit of service swearing that you have served the Commissioner by serving

the U.S. Attorney, the clerk will accept your papers and send them to the Judge assigned to your case. If you do not include proof of service when you file your legal papers with the *Pro Se* Office (and the Assistant U.S. Attorney has not filed a Waiver of Rule 5 Service), your papers may be rejected for filing.

c. Serving Motion Papers in Person

Another method of serving legal papers is by bringing it in person directly to the U.S. Attorney's office located at 86 Chambers Street, 3rd floor, New York, New York 10007. Make sure you also bring your original legal papers with you. Tell the guard that you are serving legal papers on the U.S. Attorney. There is a special office in the building designated to accept service of legal papers. When you deliver the copy of your papers to that office, make sure they sign and/or stamp your original copy. This stamp or signature is the equivalent of an affirmation of service, and proves that the U.S. Attorney received a copy of your papers. Afterwards, bring the original papers to the *Pro Se* Office for filing. If the clerk asks whether you have served the Commissioner, show the clerk the stamp or signature on the original.

Your affirmation of service or the U.S. Attorney's stamp or signature is called "proof of service." Only after you've submitted your papers to the *Pro Se* Office, with "proof of service," will they be forwarded to the Judge. Without this "proof of service" your papers may be rejected.

3. File your original motion papers with proof of service. File your original motion papers with the Court (through the *Pro Se* Office). Make one copy of any document you are filing (a second copy should have been served on the Assistant U.S. Attorney). Check your Judge's Individual Practices to see whether the Judge also requires that a "courtesy copy" – that is, an extra copy – be sent to the Judge directly.

The original papers that you file with the Court must be accompanied by an affirmation of service (Appendix, Form E) that shows the Court that you mailed or delivered the motion papers to the Assistant U.S. Attorney. (The U.S. Attorney's Office can stamp your original as proof of service if you hand-delivered the motion papers.)

4. Call the *Pro Se* Office to ask whether there are any other steps you need to take or deadlines that you need to meet before the Judge makes a decision. Explain that you are a *pro se* plaintiff in a Social Security disability case and that you have made a motion of your own or that you have submitted papers opposing a motion filed by the Commissioner. The *Pro Se* Office can look up your case and let you know if there is anything else you should do.

E. Requesting Relief by Letter to the Judge

If you have a request to make to the Judge or a legal or factual argument you would like to present, you should try to make it in the form of a written motion, affidavit or affirmation, or legal brief as described above. If you are unable to do so, your Judge may accept a letter. You should check your Judge's Individual Practices (or ask the *Pro Se* Office) before sending any letter to your Judge in case your Judge does not permit letter submissions. If your Judge will accept letter submissions, you should include the name and the docket number of your case at the top of the letter. You must mail, fax or deliver a copy of the letter to the U.S. Attorney. You should also state in your letter to the Judge that you mailed, faxed or delivered a copy of the letter to the U.S. Attorney's Office. You may deliver or mail your letter to the Judge by sending it to the *Pro Se* Office at the Manhattan Courthouse or the Clerk's Office at the White Plains Courthouse. You are not permitted to visit the Judge in his or her chambers.

X. COMMON LEGAL ARGUMENTS RAISED IN SOCIAL SECURITY APPEALS

There are many reasons why the Social Security Administration may have decided that you are not disabled. You have the chance to explain to the Judge, in writing, why you believe that Social Security was wrong. As the plaintiff, it is your job (you have the “burden of proof”) to convince SSA and the Judge that your medical condition keeps you from doing your “past relevant work” (any job you have had during the last fifteen years). If you are able to show that you cannot do your past work, then the burden shifts to SSA to show that there are other jobs that you can do by identifying either a specific job title or a specific category of job (sedentary, light or medium work). In response, you must be able to cite to the record and explain to the Judge what evidence shows that you can no longer meet the physical, mental or emotional demands of your former job or of any of the other jobs that SSA may have said you can do.

There are a number of legal arguments that you may make in your motion to the Judge. Some apply to adult cases, others only to children and some apply to both. Two sections follow: one for adult cases and one for child disability cases. You should read through each legal argument and see if it applies to your case. If it does, then you should use it as a guide to tell the Judge why the decision to deny your benefits was wrong.

A. Adult Disability Cases

1. The Administrative Law Judge (“ALJ”) did not give you a chance to have a representative at your hearing.

Every Social Security claimant has the right to be represented at the hearing.³ It can be very important to have a representative at a Social Security hearing.⁴ Because the right to a representative is so important, the ALJ must tell you at your hearing of your right to bring a

³ Lamay v. Commissioner of Social Sec., 562 F.3d 503, 507 (2d Cir. 2009)

⁴ Cutler v. Weinberger, 516 F.2d 1282, 1286 (2d. Cir. 1975)

representative with you to your hearing.⁵ Look at the written transcript of your case which you will receive from the US Attorney's office after you file your case. Did the ALJ tell you at the hearing that you had a right to bring a representative with you? If not, the ALJ made a mistake, and you may ask the Judge to send you case back to Social Security for a new hearing, at which time you can find a representative to represent you.

2. The ALJ did not give you a full and fair hearing.

The Administrative Law Judge ("ALJ") is obligated to let a person have a full and fair hearing of his claim for disability benefits.⁶ The ALJ has a duty to investigate and develop the facts and the arguments both for and against the granting of benefits.⁷ The ALJ is required to help a person at a Social Security hearing collect all evidence that is helpful to the case.⁸ This is true whether or not the person has a representative at the hearing,⁹ but the ALJ has an even greater duty to do this when a person is not represented at the hearing.¹⁰

Whether you were given a full and fair hearing is determined based on what is said at your hearing and the documents in your Social Security file. Look at the transcript of your hearing. Were you allowed to explain to the ALJ all of the important facts about your medical condition(s)? If you were not, and if there is information that is missing, tell the Judge in writing.

The ALJ should also find out who your doctors are and ask them for reports about your health.¹¹ If you have been treated at a hospital or clinic, the ALJ must try to get copies of your

⁵ Rutkowski v. Astrue, 368 Fed.Appx. 226, 228 (2d. Cir. 2010)

⁶ Moran v. Astrue, 569 F.3d 108, 112 (2d Cir. 2009); Cruz v. Sullivan, 912 F.2d 8, 11 (2d Cir. 1990)

⁷ Moran v. Astrue, 569 F.3d 108, 113 (2d. Cir. 2009)

⁸ Moran v. Astrue, 569 F.3d 108, 112 (2d Cir. 2009)

⁹ Moran v. Astrue, 569 F.3d 108, 112 (2d Cir. 2009)

¹⁰ Lamay v. Commissioner of Social Sec., 562 F.3d 503, 509 (2d Cir. 2009) *citing* Hankerson v. Harris, 636 F.2d 893, 895 (2d Cir. 1980)

¹¹ Eiden v. Secretary of Health, Ed. and Welfare, 616 F.2d 63, 65 (2d Cir.1980); Robinson v. Secretary of Health and Human Services, 733 F.2d 255, 258 (2d Cir.1984)

records.¹² Look at the record in your case. Does it contain reports from all your doctors? From all the hospitals or clinics where you have been treated for your condition? If not, Social Security was wrong, and you should tell the Judge, in writing, what reports or records are missing.

Look at the ALJ's decision. Did the ALJ ignore your doctor's report because it was too short, confusing or did not contain specific laboratory data or findings? This may be a legal error. If the ALJ thinks your doctor's report is inadequate, the ALJ should write to your doctor and ask your doctor to clarify or explain the report. At the very least, the ALJ should have told you at your hearing that your doctor's report was insufficient and should have given you the opportunity to get a more detailed report.

3. The ALJ's decision was not supported by "substantial evidence."

The Judge must decide in favor of Social Security, and against you, if Social Security's decision was based upon "substantial evidence." This means that the evidence must be "such as a reasonable mind might accept as adequate."¹³ While that standard is not very exact, it does mean that the federal Judge must look at all the evidence in the record and must rule in your favor if "the totality of the records would compel any fair-minded person to conclude that [you] cannot work."¹⁴ An ALJ may not disregard or mischaracterize evidence of a person's disability.¹⁵

Look through the record. Make a list of every piece of information that supports your case (and the page on which it appears). Explain to the Judge why any fair-minded person reading this information would find you disabled. In particular, you should point out to the

¹² Cruz v. Sullivan, 912 F.2d 8, 12 (2d Cir.1990)

¹³ Poupore v. Astrue, 566 F.3d 303, 305 (2d Cir. 2009)

¹⁴ Singletary v. Secretary of Health, Ed. and Welfare, 623 F.2d 217, 219 (2d Cir.1980)

¹⁵ Ericksson v. Commissioner of Social Security, 557 F.3d 79, 82 (2d Cir. 2009)

Judge any information that is helpful to your case but which the ALJ did not mention in his or her decision. The ALJ must explain why evidence that is in your favor was rejected.

4. The ALJ did not properly consider reports from the doctor or psychiatrist who treats you.

Look for the copy of your doctor's report in the record and tell the Judge what page it is on. That report is very important. This is because the ALJ must follow your doctor's opinion "if it is well supported by medical findings and not inconsistent with other substantial evidence" that is in the record.¹⁶ If there are medical records missing from your file, the ALJ is not allowed to reject your doctor's opinion without first trying to get those missing records.¹⁷

But if there is "substantial evidence" in the record that does not support your doctor's opinion, the ALJ is not required to follow your doctor's opinion. It is very important, therefore, to show the Judge how the evidence in the record supports your own doctor's opinion. Read all of the medical evidence carefully. Are there reports from Social Security's doctor or doctors who examined you? Is there other medical information in your file such as hospital or clinic records or even statements from witnesses who have observed you? Make a list of every piece of information that supports your own doctor's opinion. Include the page number on which it appears so that the Judge can find it easily. Explain to the Judge in writing that this list shows how the "substantial evidence" in the record supports your doctor's opinion and that the ALJ should have followed it.

In the same way, are there medical records that are missing that the ALJ did not try to obtain? Tell the Judge what those records are.

Because your doctor's report is so important, you must be sure that your doctor has given a report. If your Social Security record does not contain a report from your doctor, then you

¹⁶ Rosa v. Callahan, 168 F.3d 72, 78 -79 (2d Cir. 1999)

¹⁷ Burgess v. Astrue, 537 F.3d 117, 129 (2d Cir. 2008)

should ask your doctor for a report and submit that report to the Judge. Your doctor's report should explain what health problems you had during the relevant period in as much detail as possible and how those health problems kept you from working. When you submit this report to the Judge, you will need to explain in writing why you did not submit this report before now.

If the ALJ did not follow your doctor's opinion, the ALJ must give good reasons for that.¹⁸ For example, did the ALJ consider how long the doctor has been treating you and how often you go to see that doctor?¹⁹ Generally, the longer a doctor has treated a patient and the more times the patient has been seen by that doctor, the more an ALJ should listen to that doctor's opinion.²⁰ If the ALJ ignored this, you should tell the Judge this and include how long you have been going to your doctor and how many times you see that doctor.

5. The ALJ did not properly consider your testimony about the pain you have.

The general rule is that pain cannot be called "disabling" unless there is some medical evidence that you have a condition that can cause pain (such as arthritis, heart disease, asthma, back problems, etc.).²¹ Look at the ALJ's decision. If it says something like: "The claimant's claims of disabling pain were not supported by objective medical evidence," you should argue to the Judge that this is legally incorrect. It is not necessary that the pain be proven by medical evidence.²² All that is necessary is that there is some medical evidence that you have a condition that normally causes some pain.²³ (Be sure to point out to the Judge what that evidence is and the page number where it appears.)

¹⁸ Newbury v. Astrue, 321 Fed.Appx. 16, 17 (2d Cir. 2009)

¹⁹ Gunter v. Commissioner of Social Security, 361 Fed.Appx. 197, 199 (2d Cir. 2010)

²⁰ Schisler v. Sullivan, 3 F.3d 563, 570 (2d Cir. 1993)

²¹ Snell v. Apfel, 177 F.3d 128, 135 (2d Cir.1999)

²² Donato v. Secretary of Dept. of Health and Human Services of U.S., 721 F.2d 414, 419 (2d Cir. 1983)

²³ Snell v. Apfel, 177 F.3d 128, 135 (2d Cir. 1999)

The ALJ's decision may also say something like, "during the hearing the claimant was able to stand and rise without difficulty"; or "the claimant sat through the hearing without signs of discomfort." They are commonly referred to as the "sit and squirm" test, meaning that the ALJ was watching you during the hearing to see if you squirmed with pain. An ALJ can consider your movements at your hearing, but ALJs are not allowed to rely only on their observations in order to decide if your pain is disabling.²⁴ They are supposed to consider the other evidence to a much greater degree than their own observations.²⁵ If you think the ALJ relied too much on his or her own observations at your hearing, you should point this out to the Judge. You do not have to be completely helpless²⁶ to be found disabled.²⁷ You can be considered disabled even if you do "a lot of reading and watching television," occasionally attend church, help with the household shopping, drive a car,²⁸ listen to the radio, sometimes ride the bus or subway,²⁹ or care for your children.

You should look for evidence in the record that will help your claim. First, let the Judge know if the records show you take pain medication. If so, tell the Judge the name and dosage of the pain medication. You should also tell the Judge about physical therapy or any other treatment you receive for pain.³⁰ Let the Judge know which page numbers in the records have medical records that show this. Second, the fact that you worked for many years and quit or were fired because you could no longer work may help your case.³¹ Third, the fact that your lifestyle is very restricted because of your pain may also support your case.

²⁴ Rivera v. Schweiker, 717 F.2d 719, 724 (2d Cir. 1983)

²⁵ Schaal v. Apfel, 134 F.3d 496, 502 (2d Cir. 1998).

²⁶ Gold v. Secretary of Health, Ed. and Welfare, 463 F.2d 38, 41 (2d Cir. 1972)

²⁷ Williams v. Bowen, 859 F.2d 255, 260 (2d Cir. 1988)

²⁸ Balsamo v. Chater, 142 F.3d 75, 81-82 (2d Cir. 1998)

²⁹ Carroll v. Secretary of Health and Human Services, 705 F.2d 638, 643 (2d Cir. 1983)

³⁰ Martin v. Astrue, 337 Fed.Appx. 87, 90 (2d Cir. 2009)

³¹ Horan v. Astrue, 350 Fed.Appx. 483, 485 (2d Cir. 2009)

6. The ALJ did not consider the combination of your impairments.

If you have more than one medical problem that affects your ability to work, Social Security must consider the combined effect of all of your problems. If you have a problem that limits your ability to work but does not completely disable you, Social Security must still consider that problem in combination with all of your other problems. The ALJ must state specifically how the combination of your problems affects your ability to work.

Start with your worst problem first. Explain to the Judge how that limits you. You should make references to information in the record and page numbers wherever possible. Explain what, if anything, you could still do if this were your only medical problem. Now explain your second condition. Tell the Judge how that second condition limits the few things that you can do despite your first condition. Continue your explanation for all of your other conditions, showing the Judge how all these problems together make it impossible for you to work.

7. The ALJ did not properly evaluate your residual functional capacity.

In the decision, the ALJ likely stated whether you are still able to do to a job that you had in the past. The ALJ also might have stated whether there is any other job you are still able to do. The ALJ is supposed to make this decision by figuring out what is the most activity you can still do even with your medical problems. This is called your “residual functional capacity” or “RFC.”³² RFC is your maximum remaining ability to work full-time, 8 hours a day, for 5 days a week.³³ This includes how much weight you can lift and carry and how long you can sit, stand and walk.³⁴ These abilities are medical conclusions and must be made by a doctor. While the ALJ may choose between different doctors’ opinions on your ability to lift, carry, sit, stand and

³² 20 C.F.R. §§404.1545, 416.945

³³ SSR 96-9P, POLICY INTERPRETATION RULING TITLES II AND XVI 1996 WL 374185 (S.S.A.)

³⁴ 20 C.F.R. §§404.1545, 416.945

walk, the ALJ is not allowed to substitute his or her own opinion for that of the doctor's.³⁵ If the ALJ drew conclusions different from those made by any doctor who gave an opinion about you, then the ALJ may have incorrectly substituted his or her medical judgment for the judgment of a doctor.

There are four different RFC's for people with disabilities:

- **Sedentary work**: requires the ability to sit for "long periods of time,"³⁶ that is, at least six hours out of an eight-hour work day³⁷ and to stand and walk at least two hours out of an eight-hour day.³⁸ It also requires the ability to lift up to ten pounds occasionally.³⁹
- **Light work**: requires the ability to stand for six hours a day, lift up to 20 pounds, and frequently lift or carry up to 10 pounds.⁴⁰
- **Medium Work**: requires the ability to stand for six hours a day, lift up to 50 pounds, and frequently lift or carry up to 25 pounds.⁴¹
- **Heavy work**: required the ability to stand for 8 hours a day, lift up to 100 pounds, and frequently lift or carry up to 50 pounds.⁴²

Look at the ALJ's decision. What level of work did the ALJ say you can do? If your abilities do not match what the ALJ said your abilities are, then you should explain to the Judge how the ALJ was wrong.

8. The ALJ did not properly apply the "Grids."

Sometimes, an ALJ may base a decision about disability on things other than just medical factors. In these cases, an ALJ must also look at a person's age, education, and prior work experience. In fact, sometimes an ALJ can find a person disabled even if that person can do

³⁵ Rosa v. Callahan, 168 F.3d 72, 79 (2d Cir. 1999)

³⁶ Balsamo v. Chater, 142 F.3d 75, 80 (2d Cir. 1998)

³⁷ Diaz v. Shalala, 59 F.3d 307, 315 (2d Cir. 1995)

³⁸ SSR 96-9P, POLICY INTERPRETATION RULING TITLES II AND XVI 1996 WL 374185 (S.S.A.)

³⁹ 20 C.F.R. §§ 404.1567 (a); 416.967(a)

⁴⁰ 20 C.F.R. §§ 404.1567 (b); 416.967(a); SSR 83-10: TITLES II AND XVI, 1983-1991 Soc.Sec.Rep.Serv. 24, 1983 WL 31251 (S.S.A.)

⁴¹ 20 C.F.R. §§ 404.1567 (c); 416.967(a); SSR 83-10: TITLES II AND XVI, 1983-1991 Soc.Sec.Rep.Serv. 24, 1983 WL 31251 (S.S.A.)

⁴² 20 C.F.R. §§ 404.1567 (e); 416.967(a)

some kind of work. This is more likely to happen when a person can no longer do his past job, and is older, has little education, and no work skills.

Social Security has a series of tables known as “Medical Vocational Guidelines,” which are nicknamed “The Grids.” See 20 C.F.R. Pt. 404, Subpt. P, App. 2. If a person has medical conditions that affect only her ability to sit, stand, walk, lift or carry, then the ALJ can use the Grids to decide whether or not that person is disabled. If the Grids say the person is disabled, the ALJ should grant the benefits. If the Grids say the person is not disabled, the ALJ can deny the benefits. This is because problems with sitting, standing, walking, lifting and carrying are all “exertional” impairments.

All other impairments, like problems using your hands or feet, or bending or climbing, breathing problems, skin problems, or mental problems like poor memory or concentration, are called “non-exertional impairments.” If you have “non-exertional impairments” that significantly reduce your ability to work, then the ALJ should not use the Grids to deny your claim.⁴³ Instead, the ALJ should ask a vocational expert to testify as a witness at your hearing.⁴⁴ That expert would tell the ALJ whether a person with your limitations can work.

Also, the ALJ cannot use the Grids to find you “not disabled” if your limitations do not fit exactly into one of the categories of sedentary, light, medium, or heavy.⁴⁵ For example, if you are limited to doing work at the light level, but you have trouble bending or stooping, then you would not fit into either the sedentary or light tables in the Grids.⁴⁶

You can look at the list below to see if the ALJ should have found you disabled using the Grids. If so, you should tell the Judge in writing. The Grids require a finding of disability if, and

⁴³ *Calabrese v. Astrue*, 358 Fed.Appx. 274, 275-276 (2d Cir. 2009)

⁴⁴ *Zabala v. Astrue*, 595 F.3d 402, 410 (2d Cir. 2010)

⁴⁵ SSR 83-14, 1983-1991 Soc.Sec.Rep.Serv. 41, 1983 WL 31254 (S.S.A.)

⁴⁶ SSR 83-14, 1983-1991 Soc.Sec.Rep.Serv. 41, 1983 WL 31254 (S.S.A.)

only if, you can no longer do your former job and if you fall into one of the following categories:⁴⁷

a) You are physically able to do sedentary work and you are:

i) 50 years old or older and did not complete high school and, during the past 15 years, you did either no work or unskilled work or skilled work that cannot be transferred to other jobs;

or

ii) 50 years old or older and you graduated from high school with no vocational training and, during the past 15 years, you did either no work or unskilled work or skilled work that cannot be transferred to other jobs;

or

iii) 45 years old or older, illiterate or unable to speak English and, during the past 15 years, you did either no work or unskilled work or skilled work that cannot be transferred to other jobs.

b) You are physically able to do light work and you are:

i) 55 years old or older and did not complete high school and, during the past 15 years, you did either no work or unskilled work or skilled work that cannot be transferred to other jobs;

or

ii) 55 years old or older, and you graduated from high school with no vocational training and, during the past 15 years, you did either no work or unskilled work or skilled work that cannot be transferred to other jobs;

or

iii) 50 years old or older, illiterate or unable to speak English and, during the past 15 years, you did either no work or unskilled work.

c) You are physically able to do medium work and you are:

i) 60 years old or older and did not complete eighth grade and, during the past 15 years, you did either no work or unskilled work;

or

ii) 55 years old or older and did not graduate from high school and, during the past 15 years, you did no work.

⁴⁷ 20 C.F.R. Pt. 404, Subpt. P, App. 2 (2008)

9. There is medical evidence that you have now that you were not able to get before the ALJ made its decision.

Normally, the District Court may not accept additional evidence, such as hospital records, medical reports or statements, from you or your witness. The Judge must decide your case based upon what appears in the record already. But, if you have new evidence to submit that is important to your case and you have a good reason for not having submitted it to the ALJ, you may submit the evidence to the Judge. The Judge may then send your case back to the Social Security Administration in order for it to decide whether the new evidence proves that you are disabled.⁴⁸ There may be a good reason why evidence might not have been submitted at a hearing. For example, (1) you did not understand the need to present the evidence at the hearing⁴⁹ or (2) the evidence did not exist at the time of the hearing.

10. The ALJ did not give you a chance to question the medical expert or vocational expert at your hearing.

Sometimes there will be a medical expert and/or a vocational expert who testifies at disability hearings. When experts testify at your hearing, you have a right to ask them questions. If experts testified at your hearing but you were not given the chance to do so, it is an error by the ALJ. You can ask the federal Judge for a new hearing so that you can ask the expert questions.⁵⁰

⁴⁸ Raitport v. Callahan 183 F.3d 101, 104 (2d Cir. 1999)

⁴⁹ Jones v. Sullivan, 949 F.2d 57, 61 (2d Cir. 1991)

⁵⁰ Fernandez v. Schweiker, 650 F.2d 5, 8-9 (2d Cir. 1981); Gullo v. Califano, 609 F.2d 649, 650 (2d Cir. 1979).

B. Child Disability Cases

If you are appealing a case for a child, you can use many of the same arguments listed in the legal arguments' section for adult cases. For instance, the following arguments can also apply to a child's case:

- The ALJ did not give the child a chance to have a representative at the hearing;
- The ALJ did not give the child a full and fair hearing;
- The ALJ's decision was not supported by substantial evidence;
- There is medical evidence that you have now that you were not able to get before the ALJ made its decision due to good cause; or
- The ALJ did not give you a chance to ask questions of the medical expert or vocational expert at your hearing.

You should read those sections in this manual and let the Judge know in writing if they apply to your child's case

1. Domains

One argument that applies only to children's disability cases is the following: your child has "marked" limitation in at least two "domains" or an extreme limitation in at least one "domain." The following explains this. Read it carefully to see if any of it applies to your child's case.

Under Social Security's rules, a child's daily activities and functioning are divided into six areas called "domains." They are:

- 1) acquiring and using information;
- 2) attending and completing tasks;
- 3) interacting and relating with others;
- 4) moving about and manipulating objects;
- 5) self-care activities; and

6) health and physical well-being.⁵¹

In order to be found disabled, your child has to have “marked” impairments in at least two of those domains or an “extreme” impairment in at least one of them.⁵² An “extreme” impairment is worse than a “marked” impairment. “Marked” means that the child’s condition interferes “seriously” with his or her ability to independently begin, stick with, or complete activities.⁵³ An “extreme” impairment is one that “very seriously” interferes with these abilities.⁵⁴ To decide this, the ALJ should look at all of the evidence including any statements, test results or reports from doctors, teachers, and therapists who work with your child, as well as your statements about your child and the child’s own statements, if any. The ALJ must look at how your child is functioning in each of these “domains” compared to other children his or her age who do not have problems. The ALJ should look at your child’s activities including everything your child does at home, at school, and in the community to see how well your child does them.⁵⁵

Remember that just because your child has trouble doing certain activities does not always mean that the child has a “marked” impairment in that “domain.” Still, if there is some activity that your child has difficulty doing, tell the Judge in writing what that is, and what services or treatment or medication, if any, your child is getting to help with that problem. Let the Judge know what records in the file show these difficulties (for example, reports from doctors, teachers, school records and report cards, IEP’s, medical records) and the page number.

⁵¹ 20 C.F.R. § 416.926a(b)(1)

⁵² 20 CFR § 416.926a

⁵³ 20 CFR § 416.926a

⁵⁴ 20 CFR § 416.926a

⁵⁵ 20 CFR § 416.926a; SSR 09-1p: Title XVI: Determining Childhood Disability Under the Functional Equivalence Rule — The “Whole Child” Approach

To understand how the activities your child has a hard time doing might be part of one of the six “domains,” read the description below.

2. What activities and behaviors are covered by each of the “domains”

These are the kinds of activities and behavior each of the “domains” covers:

a. acquiring and using information

This domain looks at a child’s thinking and learning skills. A baby would not be expected to be able to do the same things as a teenager. Therefore, it is important to look at how old your child is and whether your child is able to do what would be expected at that age. For example, you should tell the Judge in writing if the record shows that your child has problems:

- playing with toys the way other children do (for very young children);
- speaking or understanding when someone speaks to the child;
- remembering what was learned in school the day before;
- reading, writing, or doing arithmetic at the grade level for the child’s age;
or
- following simple instructions.⁵⁶

If the record shows that your child has a low IQ, or failing grades in school, was held behind a grade in school, has a language delay and trouble reading even with any services the child gets in school, the child may have a marked impairment in acquiring and using information.

⁵⁶ SSR 09-3p

b. attending and completing tasks⁵⁷

This domain has to do with how well a child can “focus, maintain attention, and complete” activities throughout the day that you would expect a child of that age to be able to do.⁵⁸ You should let the Judge know if the record shows that your child has difficulty in this area. Some examples are that the child:

- is easily startled, distracted or overreacts to everyday sounds
- is slow to focus on activities or does not complete activities, even ones that the child likes to do;
- gives up easily;
- repeatedly becomes distracted or frequently interrupts others (doesn’t sit still in class, doesn’t pay attention to the teacher);
- needs extra supervision and reminders to stay on task; or
- cannot plan, manage time or organize him/herself in order to complete assignments or chores.⁵⁹

You should tell the Judge what documents (reports, evaluations, IEP, etc.) and page numbers in your child’s file show this.

c. interacting and relating with others

This domain has to do with to a child’s ability to have relationships with other people, including family, friends, teachers and people the child has just met.⁶⁰ You should tell the Judge where in the record it shows any problems your child has in his or her relationships with people at home, at school and in the community.⁶¹ Some examples are that your child:

- (if the child is a baby) does not reach out to be picked up, touched and held by a caregiver;

⁵⁷ SSR 09-4p; Title XVI: Determining Childhood Disability – The Functional Equivalence Domain of “Attending and Completing Tasks”

⁵⁸ SSR 09-4p

⁵⁹ SSR 09-4p

⁶⁰ SSR 09-5p

⁶¹ SSR 09-5p

- has no close friends or has only friends who are older or younger;
- avoids or withdraws from people he or she knows;
- is overly anxious or fearful of meeting new people or trying new experiences;
- has difficulty cooperating with others;
- has difficulty playing games or sports with rules; or
- has difficulty speaking to or being understood by others.

d. moving about and manipulating objects

This domain has to do with how well a child moves from one place to another and how well the child can move and manipulate things.⁶² These activities may require what are known as “gross” or “fine motor skills.” Gross motor skills are involved in walking, running and jumping. Fine motor skills have to do with how well a child uses its hands to grasp, catch and use scissors. Of course, a child’s age makes a big difference in what the child should be able to do. For example, a teenager would be expected to run without difficulty, but a toddler would not. A child with problems in this domain can include:

- muscle weakness, joint stiffness or loss of feeling in the hands or feet – this might make the child drop things a lot or fall down;
- trouble climbing up and down stairs, uncoordinated ways of moving, or poor balance;
- trouble doing things like bending, kneeling, crawling, running, jumping rope or riding a bicycle;
- difficulty using hands or fingers like using a knife and fork, buttoning a shirt, holding a toy; or
- poor eye-hand coordination when using a pencil or scissors.

⁶² SSR 09-6p

e. caring for oneself

This domain has to do with how well a child is able to help him or herself stay healthy both emotionally and physically.⁶³ This includes how well a child can do things like dress and clean him/herself and take care of his or her things. It also looks at how well a child deals with stress and manages anger and frustration.⁶⁴ As with all of the domains, what is expected depends on how old your child is. For example, school-age children would be expected to bathe themselves, but toddlers would not; and young children may put things in their mouths a lot, but older children would not be expected to do this.⁶⁵ Some examples of problems in “caring for self” are:

- comforts herself with activities that only a younger child would do, for example, an older child who sucks his thumb;
- does certain behaviors over and over again like head banging or body rocking;
- does not do enjoyable activities on his or her own like listening to music or reading a book;
- hurts him- or herself by refusing to take medication, cutting himself or making suicidal gestures;
- ignores safety rules by, for example, running out into the street;
- does not feed, dress, bathe or toilet himself/herself appropriately for age;
- has disturbances in eating or sleeping patterns;
- puts non-food items in his or her mouth (for example, dirt, chalk);
- acts out of anger and frustration instead of using words to let others know what he or she is feeling; or
- does not ask for help when she or he needs it.

⁶³ Pollard v. Halter, 377 F.3d 183, 194 (2d Cir. 2004)

⁶⁴ SSR 09-7p

⁶⁵ SSR 09-7P

You can tell the Judge in writing what the record shows about problems your child has in this area and if the ALJ left out information. For instance, the ALJ may have talked only about how your child takes care of him- or herself physically – that the child can dress and keep clean – but the ALJ may not have paid attention to whether your child is able to deal with anger, stress or frustration. For example, a child may have a marked impairment in this domain if the child acts in dangerous ways, like opening the emergency exit on the bus, biting his nails down to the quick or banging and biting objects.⁶⁶

f. health and physical well-being

This domain has to do with how things like illness, the side effects of medication and the need for ongoing treatment affect a child's body, that is, the child's health and sense of physical well-being.⁶⁷ This includes a child who:

- has generalized symptoms caused by a medical condition, for example, a child with depression who feels tired a lot;
- has physical complaints related to a medical condition, like epilepsy;
- has medication side effects, like dizziness or fatigue;
- needs frequent treatment or therapy, for example, multiple surgeries, emergency room visits or chemotherapy;
- has a medical condition that gets worse and then better and then worse again like pain crises in sickle cell anemia or asthma attacks; or
- needs intensive medical care as a result of being medically fragile.

So, for example, a child who has asthma and has had to go to the emergency room many times but not often enough to be found disabled under the rules for asthma, may be found to have a marked impairment in health and physical well-being.

⁶⁶ Pollard v. Halter, 377 F.3d 183, 194 (2d Cir. 2004)

⁶⁷ SSR 09-8p

Again, if your child has problems in any of these areas, tell the Judge in writing what pages in the record demonstrate these problems.

XI. THE COURT’S DECISION

A. When a Decision May Be Expected

It may take several months to receive a final decision, sometimes called a “Decision & Order,” “Memorandum Opinion & Order” or “Order & Judgment,” in your case. The federal court will mail a copy of the decision to you. If you are concerned that perhaps the decision was mailed but that you did not receive it, you may call the *Pro Se* Office to find out if a decision has been issued.

B. What the Decision Says

The Court’s decision will review the ALJ’s decision and discuss the applicable legal principles and authorities. It is likely that the decision does one of two things:

1. Grants the Commissioner’s motion and dismisses your case.

If the Commissioner has made a Motion to Dismiss or a Motion for Judgment on the Pleadings, the District Court may have granted that motion. In this case, typically, near the end of the document, the Order will state something like: “the Defendant’s [*i.e.*, the Commissioner’s] Motion for Judgment on the Pleadings is GRANTED, and Plaintiff’s Complaint is dismissed WITH PREJUDICE.” This means that the ALJ’s decision is affirmed and you have lost your appeal.

2. Vacates the ALJ’s decision and remands your case to the Social Security Administration.

If the District Court vacates the ALJ’s decision and remands your case, then you are entitled to a new hearing on issues the District Court Judge believes require more investigation or correction.⁶⁸

⁶⁸ On very rare occasions, a District Court or a Court of Appeals reverses the Commissioner’s decision outright, concluding that the record clearly establishes disability—despite the determinations to the contrary by the

C. A Final Decision vs. Report & Recommendation

Your decision is final if (1) it is issued by a District Judge, (2) it is issued by a Magistrate Judge and you and the Assistant U.S. Attorney consented to having the Magistrate Judge decide your case.

If your decision is issued by a Magistrate Judge, and it is labeled a “Report & Recommendation,” it is not final but rather is a proposal being made to the District Judge. The District Judge still has to make the final decision regarding your claim.

You can object to the Magistrate Judge’s Report & Recommendation as long as you file your objections within 14 days of the date the Report & Recommendation was served upon you. Often the last page of the Report will discuss the procedure for filing objections. If you do not file objections on time, you will not be permitted to challenge the Report, either before the District Judge or before the Court of Appeals. If you need more time to file your objections, you should first ask the Assistant U.S. Attorney to agree to your extension. You should then file a motion for an extension of time with the District Judge and indicate whether the Assistant U.S. Attorney has consented already to the relief you seek. Be sure to file this motion within the 14 days that you have to file your objection. If you are unsure how to proceed, ask the *Pro Se* Office for assistance.

In drafting your objections, you should study the Magistrate Judge’s Report carefully. You should look for anything and everything you believe the Magistrate Judge got wrong in describing the record or the hearing before the ALJ. For example, you may believe that important things happened in the hearing that the Magistrate Judge’s Report ignored. Or you

Commissioner and ALJ—and sends the case back to the SSA solely for calculation of benefits, without an additional hearing in the SSA. See Williams v. Apfel, 204 F.3d 48, 50 (2d Cir. 1999); Rosa v. Callahan, 168 F.3d 72, 82-83 (2d Cir. 1999) citing Balsamo v. Chater, 142 F.3d 75, 82 (2d Cir. 1998); Parker v. Harris, 626 F.2d 225, 235 (2d Cir. 1980).

may believe the Magistrate Judge's Report did not correctly describe the medical records.

You should write out all of your objections, referring, where appropriate, to particular things the Magistrate Judge wrote, and giving your specific reasons for disagreeing, with citations to pages of the Administrative Record if you can. You should not simply restate things you have already said.

You should write your objections in a document entitled: "Plaintiff's Objections to the Magistrate Judge's Report and Recommendation." File the document with the *Pro Se* Office and include proof that you sent a copy to the Assistant U.S. Attorney who is representing the Commissioner. If the judges require it, you should also send courtesy copies to the chambers of the District Court Judge and the Magistrate Judge. The Commissioner will likely file an opposition to your objections within 14 days.

The Commissioner may also file objections to the Report & Recommendation. You will be served with a copy of any such objection(s) within 14 days of the Report having been served. If you disagree with anything the Commissioner says, you should oppose in writing, explaining why you disagree. You should file your opposition to the Commissioner's objections with the *Pro Se* Office within 14 days of being served with the Commissioner's objections. Be sure to include proof that you sent a copy to the Assistant U.S. Attorney.

Some months may pass before you receive the District Court's final decision. The final decision will probably end with one or more orders. One of them may say something like: "The Magistrate Judge's Report and Recommendations is hereby APPROVED, ADOPTED and RATIFIED by the Court in its entirety."⁶⁹ This means that the District Court has turned the Magistrate Judge's Report into an order of the District Court itself. But the District Judge has the legal authority not just to "accept" but also to "reject, or modify, in whole or in part,"

⁶⁹ See, e.g., Cruz v. Sullivan, 912 F.2d 8 (2d Cir. 1990).

anything in the Magistrate Judge's Report.⁷⁰ You have to read the document carefully to learn what the Judge has done.

⁷⁰ 28 U.S.C. § 636(b)(1)(C).

XII. APPEALS

The final decision may be reviewed by the U.S. Court of Appeals for the Second Circuit if the losing party files a Notice of Appeal. The rules and procedures for appeals are set forth generally in the Federal Rules of Appellate Procedure.

You have sixty (60) days from the date that the final order or judgment was entered on the docket to file a Notice of Appeal in the Southern District's *Pro Se* Office. If that 60-day period to appeal has ended, the District Court "may" (but is not required to) extend the time for filing a Notice of Appeal if the motion for an extension of time is filed within sixty (60) days of the expiration of the time to file notice of appeal, and if you can show excusable neglect or good cause for not filing on time.⁷¹

A Notice of Appeal is a one-page document containing your name, a description of the final order or judgment being appealed, and the name of the court to which the appeal is taken (the Court of Appeals for the Second Circuit). A [Notice of Appeal](#) form is available on the Court's website or at the *Pro Se* Office and is attached at this end of this Manual (Appendix, Form G). Once you file a Notice of Appeal, the District Court no longer has jurisdiction over your case, and all questions regarding the case or the Court of Appeals' procedures should be addressed to the Clerk of the Court of Appeals for the Second Circuit.

The Court of Appeals can reverse a District Court if its decision contains a legal error⁷² and/or it is not supported by substantial evidence.⁷³ For purposes of deciding whether the Commissioner's decision was supported by substantial evidence and applied the correct legal standards, the Court of

⁷¹ Fed. R. App. Proc. 4(a)(5).

⁷² See, e.g., *Tajada v. Apfel*, 167 F.3d 770, 773 (2d Cir. 1999) quoting *Townley v. Heckler*, 748 F.2d 109, 112 (2d Cir. 1984).

⁷³ 42 U.S.C. § 405(g); *Moran v. Astrue*, 569 F.3d 108, 112 (2d Cir. 2009) quoting *Kohler v. Astrue*, 546 F.3d 260, 264-65 (2d Cir. 2008); *Veino v. Barnhart*, 312 F.3d 578, 586 (2d Cir. 2002); *Johnson v. Bowen*, 817 F.2d 983, 985-86 (2d Cir. 1987).

Appeals looks at the entire record again, just as the District Judge or the Magistrate Judge did. If there was a Magistrate Judge's Report & Recommendation, the Court of Appeals, like the District Judge, will limit its review to the specific, timely objections you made. If one of the issues is whether the District Court was correct to remand or refuse to remand, the Court of Appeals will ask whether, under the circumstances, this was an "abuse of discretion."⁷⁴

In preparing your appeal papers, you should review the District Court's final decision to identify everything you believe the Judge got wrong. You may make the same arguments to the Court of Appeals that are identified earlier in this manual as "Common Legal Arguments Raised in Social Security Appeals."

⁷⁴ Butts v. Barnhart, 388 F.3d 377, 384-85 (2d Cir. 2004).

XIII. REMAND TO THE SOCIAL SECURITY ADMINISTRATION

If the District Court granted you a remand to the Social Security Administration, you will be entitled to a second hearing or other proceeding in the SSA. If you object to any aspect of the result, you should follow the normal process of review in the SSA, which generally allows an appeal to the Appeals Council. If you are dissatisfied with the Appeals Council's decision, you may again seek review in the District Court. If your previous Remand Order stated that the District Court retained jurisdiction, you do not need to file a new complaint with the *Pro Se* Office.⁷⁵ You will receive from the U.S. Attorney's Office a record of the remanded proceedings in the SSA. You should call the *Pro Se* Office to ask when or if you need to file further papers.

If the previous Remand Order did not state that the District Court retained jurisdiction, you should file a new complaint within 60 days from the date of the Appeals Council decision. If you believe that your case should be considered by the same District Judge who first considered and remanded your case, then you should discuss this with the *Pro Se* Office. It is possible to make a motion to ask that District Judge to accept the case as a "related" case to your earlier case. If you do this, you should attach to your motion a copy of the Remand Order and the latest Appeals Council decision. If you have any questions about appealing the Appeals Council decision, bring that decision, along with the Remand Order (or at least the name of the District Judge who remanded your case), and the docket number of your earlier case in the District Court to the *Pro Se* Office.

⁷⁵ If the case is remanded, it was remanded under one of two rules: either under sentence six of 42 USC 405(g) or under sentence four of the same law. If it was under sentence six, the Court retains jurisdiction. Under sentence four, the Court does not. Shalala v. Schaefer, 509 U.S. 292 (1993); Raitport v. Callahan, 183 F.3d 101 (2d Cir. 1999). Retaining jurisdiction means that if you have a new hearing and lose, and the case will go back to the same federal Judge and you will not have to file a new federal appeal. If the court does not retain jurisdiction, then if you lose the remand hearing, you will have to file an appeal the Appeals Council and then if you lose there, file a new complaint in the federal court within 60 days.

APPENDIX

FORM A

Complaint in Social Security Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

:

COMPLAINT

_____,
[insert your name and social security number] :

Plaintiff, :

____ Civ. _____ ()

v. :

COMMISSIONER OF SOCIAL SECURITY,
:

Defendant.
----- x

Plaintiff respectfully alleges:

1. This is an action seeking court review of the decision of the Commissioner of Social Security pursuant to section 205(g) and/or section 1631(c)(3) of the Social Security Act, 42 U.S.C. § 405(g) and/or 1383(c)(3).

2. Plaintiff resides at _____.

3. Defendant is the Commissioner of Social Security.

4. Plaintiff became entitled to receive disability insurance benefits and/or Supplemental Security Income benefits because of the following disability _____.

5. The disability began on this date: _____.

6. The Social Security Administration disallowed plaintiff's application for disability insurance benefits and/or Supplemental Security Income benefits.

7. Subsequently, plaintiff requested a hearing, and on _____ [date of hearing], a hearing was held, and the Administrative Law Judge denied plaintiff's claim on _____ [date of ALJ decision].

8. Thereafter, plaintiff requested a review by the Appeals Council, and after its consideration, on _____ [date of Appeals Council letter], the Appeals Council denied the request for review, making the Administrative Law Judge's decision the "final decision" of the Commissioner, subject to judicial review pursuant to 42 U.S.C. § 405(g) and/or § 1383(c)(3). Plaintiff received this letter on _____ [date of receipt of letter]. **IMPORTANT: ATTACH A COPY OF THE APPEAL COUNCIL'S LETTER TO THE COMPLAINT.**

9. The decision of the Administrative Law Judge was erroneous, not supported by substantial evidence in the record, and/or contrary to law.

WHEREFORE, plaintiff respectfully requests that:

- (a) A summons be issued directing defendant to appear before the Court;
- (b) Defendant be ordered to submit a certified copy of the administrative record, including the evidence upon which the findings and decisions complained of are based;
- (c) Upon such record, this Court modify the decision of the defendant to grant plaintiff maximum monthly disability insurance benefits and/or Supplemental Security Income benefits,

retroactive to the date of initial disability, or in the alternative, remand the case to the Commissioner of Social Security for reconsideration of the evidence; and

(d) The Court grant such other and further relief as may be just and proper.

Dated: _____, New York
[insert city]

_____, 20____
[insert date]

Plaintiff's Signature

Area Code and Telephone

FORM B

Request to Proceed ***In Forma Pauperis***

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

___ Civ. ____ () ()

**REQUEST TO PROCEED
IN FORMA PAUPERIS**

I, _____, (print or type your name) am the plaintiff/petitioner in the above entitled case and I hereby request to proceed *in forma pauperis* and without being required to prepay fees or costs or give security. I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

1. If you are presently employed:
- a) give the name and address of your employer
 - b) state the amount of your earnings per month

2. If you are NOT PRESENTLY EMPLOYED:
- a) state the date of start and termination of your last employment
 - b) state your earnings per month

YOU MUST ANSWER THIS QUESTION EVEN IF YOU ARE INCARCERATED.

3. Have you received, within the past twelve months, any money from any source? If so, name the source and the amount of money you received.

a) Are you receiving any public benefits? ☐ No. ☐ Yes, \$_____.

b) Do you receive any income from any other source? ☐ No. ☐ Yes, \$_____.

4. Do you have any money, including any money in a checking or savings account? If so, how much?

☐ No. ☐ Yes, \$_____.

5. Do you own any apartment, house, or building, stock, bonds, notes, automobiles or other property? If the answer is yes, describe the property and state its approximate value.

☐ No. ☐ Yes, \$ _____.

6. Do you pay for rent or for a mortgage? If so, how much each month?

☐ No. ☐ Yes, _____.

7. List the person(s) that you pay money to support and the amount you pay each month.

8. State any special financial circumstances which the Court should consider.

I understand that the Court shall dismiss this case if I give a false answer to any questions in this declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Signed this _____ day of _____, _____.
date month year

Signature

FORM C

Application for the Court to Request *Pro Bono* Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

*(In the space above enter the full name(s) of the
plaintiff(s)/petitioner(s).)*

-against-

____ Civ. ____ () ()

**APPLICATION FOR THE
COURT TO REQUEST
PRO BONO COUNSEL**

*(In the space above enter the full name(s) of the
defendant(s)/respondent(s).)*

I, _____, *(print or type your name)* am a party in this case and cannot afford an attorney. I ask the Court to request *pro bono* counsel to represent me in this action. **I understand that even if the Court grants this application, I will receive *pro bono* counsel only if an attorney through Court's Pro Bono Program volunteers to take my case and that there is no guarantee that an attorney will volunteer to represent me.**

1. In support of my application, I provide the following information: *(Use additional paper if necessary.)*

A. Have you asked the Court to request *pro bono* counsel in this case before? If yes, when were your prior applications filed and what has changed in the status of your case since you last asked the Court to request *pro bono* counsel?

B. Requests for *pro bono* counsel are rarely granted at the early stages of a case and usually not before the Court has issued a decision on the merits of the case. What has happened in your case that demonstrates the potential merit of your case?

C. Explain why you need an attorney in this case.

D. Explain what steps you have taken to find an attorney and with what results.
(Please identify the lawyers, law firms or legal clinics you have contacted and their responses to your requests. If you have limited access to the telephone, mail, or other communication methods, or if you otherwise have had difficulty contacting attorneys, please explain.)

E. If you need an attorney who speaks a language other than English, state what language(s) you speak:

2. In further support of my application, I declare that (check appropriate box):

- ☐ I have previously filed a Request to Proceed *In Forma Pauperis* in this case, and it is a true and correct representation of my current financial status.
- ☐ I have not previously filed a Request to Proceed *In Forma Pauperis* in this case, and now attach an original Request to Proceed *In Forma Pauperis* detailing my financial status.
- ☐ I have previously filed a Request to Proceed *In Forma Pauperis* in this case, however, my financial status has changed. I have attached another Request to Proceed *In Forma Pauperis* showing my current financial status.

3. I understand that if an attorney volunteers to represent me and that attorney learns that I can afford to pay for an attorney, the attorney may give this information to the Court.

4. I understand that if my answers on this application are false, my case may be dismissed.

5. **I declare under penalty of perjury that the foregoing is true and correct.**

Dated: _____

Signature

FORM D

Motion Papers

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

____ Civ. _____ () ()

- against -

NOTICE OF MOTION

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

PLEASE TAKE NOTICE that upon the annexed affirmation of _____,
 (name)
affirmed on _____, 20____, and upon the exhibits attached thereto *(delete if no*
 (date)
exhibits), the accompanying Memorandum of Law in support of this motion *(delete if there is no*
Memorandum of Law), and the pleadings herein, plaintiff/defendant will move this Court, before
 (circle one)
_____, United States District/Magistrate Judge, for an order
 (Judge's name) (circle one)
pursuant to Rule _____ of the Federal Rules of Civil Procedure granting *(state what you want the*
Judge to order): _____

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____, _____
 (city) (state)
_____, 20____
 (month) (day) (year)

Signature _____
Address _____

Telephone Number _____
Fax Number *(if you have one)* _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

____ Civ. _____ () ()

- against -

**AFFIRMATION IN
SUPPORT OF MOTION**

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

I, _____, **affirm under penalty of perjury** that:
(name)

1. I, _____, am the plaintiff/defendant in the above entitled action,
(name) (circle one)
and respectfully move this Court to issue an order _____.
(state what you want the Judge to order)

2. The reason why I am entitled to the relief I seek is the following (state all your reasons
using additional paragraphs and sheets of paper as necessary): _____

WHEREFORE, I respectfully request that the Court grant this motion, as well as such
other and further relief as may be just and proper.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____, _____
(city) (state)
_____, 20____
(month) (day) (year)

Signature _____
Address _____

Telephone Number _____
Fax Number (if you have one) _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

- against -

____ Civ. ____ () ()

AFFIRMATION OF SERVICE

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

I, _____, **declare under penalty of perjury** that I have
(name)
served a copy of the attached _____
(document you are serving)
upon _____ whose address is _____
(name of person served)

(where you served document)
by _____.
(how you served document: For example - personal delivery, mail, overnight express, etc.)

Dated: _____, _____
(town/city) (state)
_____, 20____
(month) (day) (year)

Signature

Address

City, State

Zip Code

Telephone Number

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

- against -

____ Civ. _____ () ()

**AFFIRMATION IN OPPOSITION
TO MOTION**

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

I, _____, **affirm under penalty of perjury that:**
(name)

1. I, _____, am the plaintiff/defendant in the above entitled action, and
(name) *(circle one)*
respectfully submit this affirmation in opposition to the motion dated _____, 20____,
(date of motion)
made by _____ asking that the court order the following relief:
(name of moving party)

(state what the moving party wants the Judge to order)
_____.

2. I have personal knowledge of facts which bear on this motion because _____

(state the basis on which you learned of the relevant facts)

3. The motion should be denied because *(state your reasons using additional paragraphs and sheets of paper as necessary)*

_____.

4. In view of the foregoing, it is respectfully submitted that the motion should be denied.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____, _____
(city) *(state)*
_____, 20____
(month) *(day)* *(year)*

Signature _____
Address _____

Telephone Number _____
Fax Number *(if you have one)* _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

- against -

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

____ Civ. ____ () ()

AFFIRMATION OF SERVICE

I, _____, **declare under penalty of perjury** that I have
(name)
served a copy of the attached _____
(document you are serving)

upon _____ whose address is _____
(name of person served)

(where you served document)

by _____.
(how you served document: For example - personal delivery, mail, overnight express, etc.)

Dated: _____, _____
(town/city) (state)
_____, 20____
(month) (day) (year)

Signature

Address

City, State

Zip Code

Telephone Number

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

- against -

____ Civ. _____ () ()

**REPLY AFFIRMATION
IN SUPPORT OF MOTION**

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

I, _____, **affirm under penalty of perjury** that:
(name)

1. I, _____, am the plaintiff/defendant in the above entitled action, and
(name) *(circle one)*
submit this affirmation in further support of my motion to this Court for an order
_____.
(state what you want the Judge to order)

2. The reason why I am entitled to the relief I seek is the following *(state your additional reasons using additional paragraphs and additional sheets of paper as necessary; you should not repeat information from your original affirmation):* _____

WHEREFORE, I respectfully request that the Court grant my motion, as well as such other and further relief as may be just and proper.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: _____, _____
(city) *(state)*
_____, 20____
(month) *(day)* *(year)*

Signature _____
Address _____

Telephone Number _____
Fax Number *(if you have one)* _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

- against -

____ Civ. ____ () ()

AFFIRMATION OF SERVICE

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

I, _____, **declare under penalty of perjury** that I have
(name)
served a copy of the attached _____
(document you are serving)
upon _____ whose address is _____
(name of person served)

(where you served document)
by _____.
(how you served document: For example - personal delivery, mail, overnight express, etc.)

Dated: _____, _____
(town/city) (state)
_____, 20____
(month) (day) (year)

Signature

Address

City, State

Zip Code

Telephone Number

FORM E

Affirmation of Service

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

- against -

____ Civ. ____ () ()

AFFIRMATION OF SERVICE

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

I, _____, **declare under penalty of perjury** that I have
(name)
served a copy of the attached _____
(document you are serving)
upon _____ whose address is _____
(name of person served)

(where you served document)
by _____.
(how you served document: For example - personal delivery, mail, overnight express, etc.)

Dated: _____, _____
(town/city) (state)
_____, 20____
(month) (day) (year)

Signature

Address

City, State

Zip Code

Telephone Number

FORM F

Consent to Proceed Before a Magistrate Judge

UNITED STATES DISTRICT COURT

for the

_____ District of _____

_____	)	
<i>Plaintiff</i>	)	
v.	)	Civil Action No.
_____	)	
<i>Defendant</i>	)	

NOTICE, CONSENT, AND REFERENCE OF A CIVIL ACTION TO A MAGISTRATE JUDGE

Notice of a magistrate judge's availability. A United States magistrate judge of this court is available to conduct all proceedings in this civil action (including a jury or nonjury trial) and to order the entry of a final judgment. The judgment may then be appealed directly to the United States court of appeals like any other judgment of this court. A magistrate judge may exercise this authority only if all parties voluntarily consent.

You may consent to have your case referred to a magistrate judge, or you may withhold your consent without adverse substantive consequences. The name of any party withholding consent will not be revealed to any judge who may otherwise be involved with your case.

Consent to a magistrate judge's authority. The following parties consent to have a United States magistrate judge conduct all proceedings in this case including trial, the entry of final judgment, and all post-trial proceedings.

<i>Parties' printed names</i>	<i>Signatures of parties or attorneys</i>	<i>Dates</i>
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Reference Order

IT IS ORDERED: This case is referred to a United States magistrate judge to conduct all proceedings and order the entry of a final judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73.

Date: _____

District Judge's signature

Printed name and title

Note: Return this form to the clerk of court only if you are consenting to the exercise of jurisdiction by a United States magistrate judge. Do not return this form to a judge.

FORM G

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(In the space above enter the full name(s) of the plaintiff(s)/petitioner(s).)

____ Civ. _____ () ()

- against -

**NOTICE OF APPEAL
IN A CIVIL CASE**

(In the space above enter the full name(s) of the defendant(s)/respondent(s).)

Notice is hereby given that _____
(party)

hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment

(describe the judgment)

entered in this action on the _____ day of _____, 20____.
(date) (month) (year)

Signature

Address

City, State & Zip Code

DATED: _____, 20____

() - _____
Telephone Number

NOTE: To take an appeal, this form must be received by the *Pro Se* Office of the Southern District of New York within thirty (30) days of the date on which the judgment was entered, or sixty (60) days if the United States or an officer or agency of the United States is a party.