



**U.S. Department of Justice**

Office of the Solicitor General

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The Solicitor General

*Washington, D.C. 20530*

October 24, 2018

Honorable Scott S. Harris  
Clerk  
Supreme Court of the United States  
Washington, D.C. 20543

Culbertson v. Berryhill, No. 17-773  
(Oral argument scheduled for November 7, 2018)

Dear Mr. Harris:

Pursuant to Rule 32.3 of the Rules of this Court, the government proposes to lodge with the Court three categories of non-record materials totaling 30 pages: (1) the May 2015 disability and attorney's fee decisions of an administrative law judge (ALJ) in this matter, (2) the agency decision upholding the May 2015 fee decision, and (3) petitioner's June 2016 fee petition seeking fees for his work in agency proceedings. The materials are relevant to, and provide useful information about, the application of the statutory and regulatory framework governing attorney's fees under 42 U.S.C. 406(a) and (b) in this case. The government provided the materials to petitioner and the Court-Appointed Amicus Curiae (Amicus) in response to questions by the Amicus about the administrative attorney's fee proceedings in this matter. Neither petitioner nor the Amicus objects to the proposed lodging.

This case concerns court approval of attorney's fees under 42 U.S.C. 406(b)(1)(A) for petitioner's representation of Katrina Wood on judicial review of a decision by the Social Security Administration (SSA) that denied Wood's application for social security disability benefits. Both courts below concluded that such fees approved under Section 406(b) are subject to a cap that limits the aggregate amount of fees that may be charged for representing a disability claimant both in agency proceedings and in court. The briefing in this case accordingly addresses (1) the statutory and regulatory framework governing SSA's approval of fee petitions under Section 406(a)(1) and fee agreements under Section 406(a)(2), both of which govern fees in agency proceedings; (2) the framework governing court approval of fees under Section 406(b) for fees for court proceedings; and (3) the relationship between the relevant provisions. The materials that the government proposes to lodge show how SSA applied Section 406(a)(1) and (2) in this case. Although the materials are not strictly necessary for the Court to resolve the question presented involving the approval of fees under Section 406(b), they will provide the Court a more complete and useful basis for understanding how the relevant provisions operated in practice in this case.

First, the government proposes lodging the decisions of an ALJ dated May 15, 2015 (12 pages), which granted Wood disability benefits but declined to approve a fee agreement covering

the representation of Wood before SSA. The fee decision, which accompanies the favorable disability decision, shows that the ALJ declined to approve a Section 406(a)(2) fee agreement for representing Wood in SSA proceedings, because Wood had appointed more than one representative to represent her before the agency and “all [those] representatives did not sign a single fee agreement” or “waive charging and collecting a fee.” 5/15/2015 ALJ Fee Order 1; see POMS, GN 03940.003D.1 (Sept. 25, 2018) (current relevant POMS provision). The administrative record in this case contains the November 2008 fee agreement between Wood and her first attorney in agency proceedings (Keith Warnock). Admin. Record 44 (D. Ct. Doc. 14). But the record in this case, although it does include petitioner’s fee agreement for representing Wood in district court (J.A. 8-10), does not include petitioner’s December 2010 and November 2013 fee agreements for representing her in agency proceedings.

Second, the government proposes lodging the agency’s decision on administrative review (two pages, including a transmittal letter), which upholds the ALJ’s decision not to approve a fee agreement on the same grounds invoked by the ALJ. The agency’s one-page order on review also states that “[b]ecause [SSA] cannot process the representative’s fee under the fee agreement process, the representative must file a fee petition in order to charge and collect a fee.”

Finally, the government proposes lodging petitioner’s June 2015 fee petition (16 pages), which sought administrative approval of fees for petitioner’s representation in agency proceedings and was governed by Section 406(a)(1). The fee petition sought approval of \$7717.25 in attorney’s fees for petitioner’s representation of Wood before SSA. The fee petition also contains as attachments the December 2010 and November 2013 fee agreements referred to above, regarding that representation.

The ALJ’s subsequent decision dated July 20, 2015, which granted petitioner’s fee petition in part by authorizing petitioner to charge Wood \$2865.00 in attorney’s fees for representing her in SSA proceedings, is contained in the record of this case and is reproduced at J.A. 25-27. The other related fee materials that the government proposes to lodge, however, are not.

Sincerely,

Noel J. Francisco  
Solicitor General

cc: See Attached Service List

17-0773

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