

**“Fugitive Felons”: Clark
v. Astrue Implementation
for SSI & Social Security
and Similar Provisions in
Other Benefit Programs**



Gerald A. McIntyre, Directing Attorney
National Senior Citizens Law Center

Jessica Hiemenz
National Consumer Law Center

September 25, 2013



National Elder Rights Training Project for the National Legal Resource Center.
Sponsorship for this Webinar is provided by the National Consumer Law Center and a
grant from the Administration for Community Living/ Administration on Aging .

©National Consumer Law Center 2013



Providing Legal Support to the
Aging Advocacy Network

- <http://www.nlrc.aoa.gov/>
- Collaboration developed by the Administration for Community Living/ Administration on Aging between the National Consumer Law Center, National Senior Citizens Law Center, American Bar Association Commission on Law and Aging, Center for Elder Rights Advocacy, and the Center for Social Gerontology
- See upcoming trainings, conferences, and webinars
- Request a training
- Request consulting
- Request technical assistance
- Access articles and resources



Presenter –Gerald McIntyre

- Directing attorney at the National Senior Citizens Law Center in Los Angeles, CA where he has worked on Social Security and SSI issues since 1993.
- Gerald McIntyre has more than 30 years of experience in legal services advocacy.
- He has worked as a staff attorney at Bronx Legal Services; as Executive Director of Southern Tier Legal Services in Bath, NY; and as a lecturer and staff attorney at Cornell Law School.





NSCLC

National Senior Citizens Law Center

Protecting the Rights of Low-Income Older Adults

The top of the page features a collage of five blue-tinted photographs. From left to right: a woman's face, two people in a doorway, a woman holding a cat, an elderly man's face, and two elderly women embracing. The NSCLC logo is overlaid on the first photo.

NSCLC

National Senior Citizens Law Center

The National Senior Citizens Law Center is a non-profit organization whose principal mission is to protect the rights of low-income older adults. Through advocacy, litigation, and the education and counseling of local advocates, we seek to ensure the health and economic security of those with limited income and resources, and access to the courts for all. For more information, visit our Web site at www.NSCLC.org.

September 25, 2013

“FUGITIVE FELONS:” *CLARK v. ASTRUE* IMPLEMENTATION FOR SSI & SOCIAL SECURITY AND SIMILAR PROVISIONS IN OTHER BENEFIT PROGRAMS

GERALD MCINTYRE, DIRECTING ATTORNEY
NSCLC

PROGRAMS AFFECTED

- Social Security (OASDI)
- Supplemental Security Income (SSI)
- Supplemental Nutrition Assistance Program (SNAP or Food Stamps)
- Temporary Assistance to Needy Families (TANF)
- Veterans Benefits
- Special Veterans Benefits (SVB)
- Housing Assistance

STATUTES

Social Security (OASDI) 42 U.S.C.
402(x)(1)(A)(iv)

SSI 42 U.S.C. 1382(e)(4)

SNAP (Food Stamps) 7 U.S.C. 2015(k)

Veterans Benefits 38 U.S.C. 5313B

TANF 42 U.S.C. 608(a)(9)

Housing Assistance 42 U.S.C. 1437f(d)(1)(B)(v)

Special Veterans Benefits 42 U.S.C. 1004(a)(2)

COMMON CORE OF STATUTES

They Penalize:

- “Fleeing to avoid prosecution, or custody or confinement after conviction” for a felony or attempt to commit a felony
- “Violating a condition of probation or parole imposed under Federal or State law.”

SOCIAL SECURITY ADMINISTRATION IMPLEMENTATION

- Existence of outstanding felony warrant means you are “fleeing to avoid prosecution”
- Existence of outstanding warrant for alleged violation of probation or parole means you are “violating a condition of probation or parole.”

OTHER AGENCIES

- Followed example of SSA
- USDA FNS variation – Individual must know about warrant.
- FNS – If agency tells individual about warrant, then that person is “fleeing.”

MARTINEZ v. ASTRUE

- Nationwide class action on behalf of Social Security, SSI and SVB beneficiaries
- Approximately 200,000 class members
- Enjoins suspensions or denials of benefits for “fleeing to avoid prosecution” except when warrant is issued under one of 3 National Crime Information Center (NCIC) offense codes
- Does not deal with alleged probation or parole violations

MARTINEZ v. ASTRUE

- NCIC offense codes for which benefits can still be suspended or denied:
- 4901 – Escape
- 4902 - Flight to avoid (prosecution, confinement, etc.)
- 4999 - Flight – escape
- Combined these three codes account for tiny fraction of offenses

CHALLENGES TO SSA POLICY

FLEEING TO AVOID PROSECUTION

- *Fowlkes v. Adamec* 432 F.3d 90 (2nd Cir. 2005)
Plain language of statute & regulation preclude determination of “fleeing to avoid prosecution” solely on basis of warrant
- *Garnes v. Barnhart*, 352 F.Supp.2d 1059 (N.D. Cal. 2004). “SSA’s contention that there is ... no intent requirement ... is unsupportable.”
- Other cases with same result in Maine, Michigan, Oregon, Tennessee

CLARK v. ASTRUE

602 F.3d 140 (2nd Cir. 2010)

- Court ruled SSA practice of treating warrant alleging violation of probation as sufficient and irrebuttable evidence that person is violating condition of probation or parole is inconsistent with plain meaning of statute.
- Remand to district court for relief

Counsel in Clark

- National Senior Citizens Law Center
- Proskauer, Rose, LLP
- Urban Justice Center Mental Health Project

WHO WERE CLARK PLAINTIFFS?

- Elaine Clark – received SSDI after end stage renal disease diagnosis. Unable to pay restitution. Warrant issued. SSDI suspended
- Tony Gonzales – Old age benefits suspended for warrant issued when he was teen-ager for unauthorized use of motor vehicle.
- Problems in transfer of probation from one state to another

RESULTS IN CLARK

- Benefits restored for tens of thousands of people
- Hundreds of millions in retroactive benefits
- Benefits going back up to 7 years or more
- In many cases retro is more money than people will ever see again

CLARK v. ASTRUE

Class certified consisting of:

“All persons nationwide for whom an initial determination to suspend or deny SSI and/or OASDI benefits was made and/or an initial determination of overpayment of such benefits was made and such initial determination was based solely on the existence of a warrant for an alleged violation of probation or parole, provided: (i) the initial determination was made during the period from October 24, 2006 to and including such time in the future when final relief is entered in this action; or (ii) a timely administrative appeal of such initial determination was pending on or after October 24, 2006.”

CLARK v. ASTRUE

PROSPECTIVE RELIEF

- Enjoins suspensions and denials of OASDI & SSI based solely on an outstanding probation or parole violation warrant
- Enjoins overpayment determinations for OASDI & SSI based solely on an outstanding probation or parole violation warrant.

CLARK v. ASTRUE

REMEDIAL RELIEF

- If benefits suspended, must reinstated retroactive to date of suspension and on ongoing basis.
- If another basis for suspension during part of retroactive or ongoing period, SSA may suspend benefits with appeal rights in conformity with SSA regulations.
- All payments subject to regular payment, non-payment & reduced payment provisions of Act

REMEDIAL RELIEF (cont.)

- Overpayments - Initial determinations of overpayment for probation or parole violation reversed and all money already collected must be returned
- Exception – If another unrelated outstanding overpayment for which notice was provided as required by 20 C.F.R. 404.904 & 416.1404.
- SSI Denials – If otherwise fully developed, reopen & determine benefits based on original application date.

REMEDIAL RELIEF

Special SSI Considerations

- Subsequent application – If person previously found to be disabled files later application after suspension or denial, SSA must vacate determination of non-disability unless made in continuing disability review (CDR).
- Installments – Any retroactive payment more than 3x applicable SSI benefit rate subject to SSI installment payment rule.
- OASDI & SSI retros do not count toward resource limit for 9 months.

NOTICES

- General informational notices have been sent to all class members identified by SSA.
- Individualized notices when relief provided.
- OASDI payments should be complete by end of month with 2 exceptions – a) deceased, b) those who lost Medicare Part B
- SSI individual notices & payments underway – SSA projects completion by March 31, 2014.

ADVOCACY TIPS

- Many class members have moved and never received notice of relief
- 17,853 informational notices returned as undeliverable
- Need to explore Clark eligibility with homeless and others who were receiving or were denied SSI in past

ADVOCACY TIPS (cont.)

- Inquire about possible pre – 10/24/2006 appeals that were never processed
- Pre- 10/24/2006 overpayments still being collected - Request waiver – against equity and good conscience when SSA's actions ruled unlawful.
- Incarcerated class members – cannot receive retros until release – No Social Security Benefits for Prisoners Act of 2009.

ADVOCACY TIPS (cont.)

- Need for planning on use of large SSI retros
- Advice on hazards of SSI Transfer penalty

CLARK & MEDICARE PART B

- Some class members lost Part B coverage for failure to pay the premium as a result of OASDI suspension
- Others were unable to enroll when they first became eligible for Part B because of OASDI suspension
- Some re-enrolled in Part B after OASDI resumption, but were subject to lifetime premium penalty

PART B RELIEF FOR CLASS MEMBERS

- Automatic enrollment with no premium surcharge for all Part B eligible class members not currently enrolled
- Class members who re-enrolled during a general enrollment period subject to a premium surcharge will have surcharge removed
- Any Clark-related surcharge already paid will be refunded

PART B RELIEF (cont.)

- Class member can choose Part B coverage retroactive to date of Part B termination
- Class members who became eligible for Part B during OASDI suspension period, can choose coverage retroactive to date of eligibility

PART B – RETROACTIVE PREMIUMS

- Retroactive premiums due for entire retroactive period
- But can request payment of retroactive amount in monthly installments
- And can request waiver of retroactive premium – but should consult with knowledgeable Medicare advocate for waiver

VETERANS BENEFITS

- Only other nationally administered program
- Policy identical to SSA policy before Martinez & Clark
- Applies to health & education as well as cash benefits
- Penalty applies to dependents as well as veteran with warrant. No other program does this.

VETERANS BENEFITS (cont.)

Probation & Parole Violations

- For all other programs, penalty applies for violating condition of probation or parole in connection with conviction of any offense.
- For veterans benefits, the underlying conviction must be for a felony

VETERANS BENEFITS (cont.)

- Is Dept. of Veterans Affairs reexamining its policy in light of Martinez & Clark?

SNAP BENEFITS

- Penalty applied by removing person with the warrant from food stamp household
- USDA policy requires intent to flee which is determined by knowledge of warrant
- But individual does not form his or her intent; state agency does

2008 Farm Bill

- Adds requirement that law enforcement be “actively seeking” the individual
- Requires USDA to define “fleeing” and “actively seeking”
- NPRM 76 Fed. Reg. 51907 (Aug. 19, 2011)

FOR FURTHER INFORMATION, CONTACT:

- Jennifer Choi
- jchoi@nsclc.org