ATTORNEYS' FEES—MAXIMUM ATTORNEY'S FEE ALLOWABLE FOR REPRESENTATION OF DISABILITY CLAIMANT UNDER SOCIAL SECURITY ACT LIMITED TO TWENTY-FIVE PERCENT OF CLAIMANT'S ACCRUED BENEFITS; DEPENDENTS ACCRUED BENEFITS EXCLUDED FROM COMPUTATION OF FEE. *Hopkins v. Gardner* (7th Cir. 1967).

Raymond Hopkins received disability insurance benefits under the Social Security Act[1] in 1961 and 1962; his wife and children received benefits as the wife and dependents of an individual entitled to disability benefits.[2] The United States Department of Health, Education and Welfare notified Hopkins that it considered him fit for work and that the benefit payments would terminate in December, 1962. In 1964, after exhausting administrative remedies, Hopkins brought an action for recovery in the district court, which reversed the decision of the Secretary of Health, Education and Welfare[3] and ordered the Department to pay the accrued benefits from December, 1962. The Department notified Hopkins that since it had been decided that he was still disabled, he *and* his family would continue to receive benefit payments along with their past-due payments.[4] The district court awarded Hopkins' attorney a fee of 25 percent of the past-due benefits payable to Hopkins *alone*.[5]

On appeal[6] to the Seventh Circuit Court of Appeals on the issue of the amount of the attorney's fee, *held*, affirmed: A reasonable

1 42 U.S.C. §§ 416(i), 423 (1965).

2 42 U.S.C. § 402(b), (d) (1965).

3 Hereinafter referred to as Secretary.

4 Hopkins received individual past-due benefits through December, 1965, totalling $3,744.80, his wife received $1,287.80, and the children $3,463.50.

5 Social Security Act 42 U.S.C. § 406 (1965), *as amended*, (Supp. I 1966).

. . . .

(b)(1) Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may, notwithstanding the provisions of section 405(i) of this title, certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

(2) Any attorney who charges, demands, receives, or collects for services rendered in connection with proceedings before a court to which paragraph (1) is applicable, any amount in excess of that allowed by the court thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not more than $500, or imprisonment for not more than one year, or both.

6 This appeal was, in actuality, brought by Hopkins' attorney, Mr. Allen Sharp, of

attorney's fee is to be determined by the district court. The maximum fee allowable is 25 percent of the claimant's accrued benefits. In computing this fee, past-due benefits received by the claimant's dependents are not considered. *Hopkins v. Gardner*, 374 F.2d 726 (7th Cir. 1967), *cert. granted*, 88 Sup. Ct. 71 (U.S. Oct. 9, 1967) (No. 276).

The *Hopkins* case brings into focus the conflict between the circuit courts in the interpretation of the 1965 amendment to the Social Security Act which limits an attorney's fee to 25 percent of a favorable judgment.[7] The Fourth Circuit interprets the amendment to include 25 percent of the past-due benefits payable to both the primary claimant *and* his dependents,[8] while the Sixth and Seventh Circuits hold that the fee base can be established only on the *primary* claimant's past-due benefits.[9]

Prior to the enactment of 42 U.S.C. Section 406(b)(1), there was no provision in the Social Security Act determining allowable attorneys' fees for representation of a claimant before the district court. Since the Social Security Act was silent in this respect, the courts had determined that whenever the matter was properly presented to a court, it had the authority to determine the amount of counsel fees.[10]

It had also been decided that a contract between an adult claimant and his attorney would not be set aside because the adult claimant could obligate himself to pay for the representation.[11] These contracts were usually contingent-fee arrangements under which the attorney received a percentage of the accrued benefits if the case was conducted to a successful conclusion.

Moreover, before the enactment of the 1965 amendment there was no legislative requirement that the Secretary pay fees directly to attorneys. However, the courts which determined the amount of fees in proper cases ordered the fees paid by the Secretary.[12] This was

Williamsport, Indiana. See Sims v. Gardner, 378 F.2d 70 (6th Cir. 1967), *petition for cert. filed*, CCH U.S. S. Ct. BULL., 1967-1968 Term, at 7007, where the attorney also brought the appeal for review of the fee awarded.

7 42 U.S.C. § 406(b)(1) [hereinafter referred to as amendment].

8 Redden v. Celebrezze, 370 F.2d 373 (4th Cir. 1966).

9 Hopkins v. Gardner, 374 F.2d 726 (7th Cir. 1967); Sims v. Gardner, 378 F.2d 70 (6th Cir. 1967).

10 Folsom v. McDonald, 237 F.2d 380 (4th Cir. 1956). In the *Folsom* case, the proper presentation was brought by counsel in an action by an infant suing by guardian ad litem; the court directed the Secretary of Health, Education and Welfare to pay the counsel from the infant's claim.

11 Gonzalez v. Hobby, 213 F.2d 68 (1st Cir. 1954).

12 Celebrezze v. Sparks, 342 F.2d 286 (5th Cir. 1965). The government contested

considered necessary to assure attorneys that they would receive their fees from claimants who were often in poor financial conditions.

Section 406(b)(1) was recommended to the Senate Finance Committee by the Department of Health, Education and Welfare.[13] The Department proposed this amendment not only for the claimant's benefit in reducing the attorneys' fees, but also to provide the manner whereby attorneys would be paid directly by the Department. Such direct payment would insure the collection of the fee, thus attracting more attorneys to represent social security claimants. To accomplish this purpose, Congress expressly exempted the payment of attorneys' fees from the certification restriction of section 405(1).[14] Although there is a dearth of material from which to draw, apparently the Legislature's primary intent was to reduce the amount of the fees that the attorneys were charging under contingent-fee contracts.[15] However, Congress did not express its intent to accomplish this by limiting the fee base solely to the primary claimant's accrued benefits.[16]

The Fourth Circuit interpreted the amendment in *Lambert v. Celebrezze*,[17] and *Redden v. Celebrezze*,[18] which were joined for

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the power of the court to order the Secretary to withhold the fee awarded the attorney from the claimant's back award on the basis that it violated section 205(i) (now § 405(i), of the Social Security Act). *See* 42 U.S.C. § 405(i) (1965). CERTIFICATION FOR PAYMENT.

> Upon final decision of the Secretary or upon final judgment of any court of competent jurisdiction, that any person is entitled to any payment or payments under this subchapter, the Secretary shall certify to the Managing Trustee the name and address of the person so entitled to receive such payment or payments, the amount of such payment or payments, and the time at which such payment or payments should be made, and the Managing Trustee, through the Division of Disbursement of the Treasury Department, and prior to any action thereon by the General Accounting Office, shall make payment in accordance with the Certification of the Secretary. . . .

[13] *Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess. pt. 1, at 513 (1965).

[14] *Id.*

[15] S. REP. No. 404, 89th Cong., 1st Sess. 122 (1965), U.S. CODE CONG. & AD. NEWS 1965, at 2062.

> It has come to the attention of the committee that attorneys have upon occasion charged what appear to be inordinately large fees for representing claimants in Federal district court actions arising under the social security program. Usually, these large fees result from a contingent-fee arrangement under which the attorney is entitled to a percentage (frequently one-third to one-half) of the accrued benefits. Since litigation necessarily involves a considerable lapse of time, in many cases large amounts of accrued benefits, and consequently large legal fees, are payable if the claimant wins his case.

[16] *See Hearings on H.R.* 6675, *supra* note 12.

[17] 361 F.2d 677 (4th Cir. 1966) (where the attorney had a 50 percent contigent-fee contract and the court awarded 25 percent of the accrued benefits of both the primary insured and his dependents).

[18] 361 F.2d 815 (4th Cir. 1966) (where the attorney also had a 50 percent con-

rehearing,[19] by deciding that the "past-due benefits to which claimant is entitled by reason of such judgment"[20] meant the entire benefits payable to the primary claimant *and* his dependents.[21] In considering the question the court stated:

> In the absence of particularized questions . . . all of the claims are of a part. In these cases . . . the only real issue is the disability of the insured individual. Once that is established, allowance of the claims of the other qualified members of the family is substantially automatic.[22]

Additionally, the court reasoned that Congress would not have intended the fee base to be limited to the primary claimant, while at the same time providing the attorney with a means to avoid the statute by making all dependents named parties to the administrative and judicial proceedings.[23]

Reaching a contrary conclusion in the instant case, the Seventh Circuit considered "claimant" the key word in the statute, and asserted that no one could be a claimant unless he was a plaintiff in the action. This factor would exclude "from the base on which the maximum attorney's fee would be computed"[24] the past-due benefits of dependents not joined in the action. The court admitted, however, that this was a procedural detail which the attorney could avoid by joining all the parties as plaintiffs. Therefore, it turned to the question of:

> [W]hether "claimant" under this statute includes all persons whose entitlement to benefits is established by the resolution of the issue before the court, * * * or whether "claimant" * * * means only the applicant for primary benefits in any case where [the applicant's] entitlement is the issue.[25]

The *Hopkin's* court settled this issue by limiting the base to past-due benefits payable to the primary claimant when his entitlement is the only issue.

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tingent-fee contract and the district court established the fee base to include the primary claimant and his dependents).

19 Redden v. Celebrezze, 370 F.2d 373 (4th Cir. 1966).

20 42 U.S.C. § 406(b)(1).

21 370 F.2d at 375.

22 *Id.*

23 42 U.S.C. § 405(b) (1965) establishes a dependent's right to become a formal party to the administrative hearings after an administrative decision, and under 42 U.S.C. § 405(g) (1965) a dependent, who has become a party to the administrative hearing, can obtain judicial review of the primary claim of the insured individual.

24 374 F.2d at 729.

25 *Id.* at 730.

The Seventh Circuit recognized that the Fourth Circuit had chosen the broad interpretation by establishing the fee base from all past-due benefits payable to primary claimants and dependents. But in electing the narrower interpretation, it reasoned that the intent and concern of Congress was the reduction of excessive fees charged by attorneys. The court also decided that Congress assumed that the individual applying for primary benefits would be the only claimant before the court.[26]

Subsequently in *Sims v. Gardner*,[27] the Sixth Circuit aligned itself with the Seventh Circuit's ruling in *Hopkins* by deciding:

> Even if the district court could be certain that the question of the insured's disability was the only precondition to the receipt of benefits by the dependents, we would refrain from holding that a court judgment determining the question of disability in favor of the insured would permit the dependents' benefits to be used in fixing the attorney's fee.[28]

Thus, the *Sims* court would not allow a dependent's recovery to be included in the fee base unless the attorney was required to expend additional effort.

The circuit courts that have interpreted the statute narrowly have depended upon Congress's repetitious use of the word "claimant" in the singular form, and on the "expressed" intent of Congress to limit "inordinately large fees."[29] These courts extended their reasoning by explaining that only if the attorney is required to raise issues necessary to meet the dependent's requirements to qualify for benefits,[30] should dependent's benefits be used in fixing the attorney's fee. The argument follows that an attorney should not receive a larger fee for representing a married claimant with dependents than for representing a single one, unless there is an additional expenditure of time and labor on the attorney's part.[31]

The Fourth Circuit in *Redden* realized the interdependency of the disability claims under the Social Security Act and for this reason

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26 *Id.*

27 378 F.2d 70 (6th Cir. 1967).

28 *Id.* at 72.

29 *See* 374 F.2d at 730; 378 F.2d at 71-72.

30 Issues necessary might be age, dependency, or relationship to the insured. 42 U.S.C. §§ 402(b), 402(d).

31 *See* 374 F.2d at 730; 378 F.2d at 72. This argument contradicts the reasoning behind an ordinary contingent-fee arrangement where the fee of the attorney is strictly contingent upon the size of the total recovery. Factors of time and energy expended, or issues raised and met do not have to be shown, because all that is necessary is for the attorney to bring the cause of action to a successful conclusion.

interpreted the statute to include the benefits to the entire family unit.[32] The limitations on a dependent's receipt of benefits are uncomplicated. The wife of the disabled insured, under the Social Security Act, is not entitled to benefits if she is under the age of 62 and has no children under the age of 18 who qualify for benefits.[33] A child, to be entitled to benefits, must be under the age of 18 and dependent for support upon the insured parent.[34] Accordingly, once the primary claimant is found to be entitled to benefits, the wife's and dependent's claims follow almost automatically. Therefore, since the primary insured's claim was granted "by reason of a favorable judgment," the dependent's claim flows from the same judicial determination.[35]

Although the expressed intent of Congress was to limit "inordinately large fees,"[36] there was no expression that "a judgment favorable to a claimant"[37] referred only to the primary insured's benefits to the exclusion of the accrued benefits of the dependents. Both the interpendency of disability claims under the Social Security Act, and the fact that once the insured's claim is awarded it is customary for the dependents to receive their benefits automatically, must have been clearly known to Congress. It then would follow that Congress intended to establish the maximum fee base on the entire claim to benefits to which the family unit is entitled.

Thus, the United States Supreme Court should interpret section 406(b)(1) to include the accrued benefits to which the primary insured *and his dependents* are entitled in determining the fee base for the attorney.

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32 370 F.2d at 375.
33 42 U.S.C. § 402(b).
34 42 U.S.C. § 402(d).
35 370 F.2d at 375.
36 S. REP. No. 404, 89th Cong., 1st Sess. 122 (1965). U.S. CODE CONG. & AD. NEWS 1965, at 2062.
37 42 U.S.C. § 406(b)(1).