

STATE BAR OF MICHIGAN  
**SOCIAL SECURITY**

*A Publication of the Social Security Section of the State Bar of Michigan*



Fall 2007  
Editor: Lewis M. Seward

## DSI Scrapped for New Review Process

### In this Issue

Favorable Sixth Circuit Case has Something for Everyone.....	2
Federal Court Practice.....	3
Barbara Johnson, Administrative Appeals Judge, Speaks at the Section Meeting .....	4
Social Security Administration Attacks Disability Backlog.....	6
Grand Rapids ODAR has New ALJ.....	7
New Officers Elected.....	7
Attorney Advisor Program to be Re-implemented .....	8

DSI has been scrapped for a new type of review process that incorporates some of the aspects of DSI with new changes. As with any new proposed review process, there are some good changes and some negative changes for our claimants. Please keep in mind that there is a 60 day comment period with a deadline of December 28, 2007. The regulations for the new review process were published in the Federal Register on Monday, October 29, 2007, at 732 Fed. Reg. 61218 (October 29, 2007). They can be obtained at the Federal Register website at [www.gpoaccess.gov/fr](http://www.gpoaccess.gov/fr). Here are some of the highlights of the changes.

Apparently this new type of review will reinstitute the reconsideration step at the DDS level for states like Michigan that eliminated this step. When filing a Request for Hearing there is a requirement that there must be a statement listing all applicable medically determinable impairments which prevent work. It is unknown what the impact is of failing to list all impairments. This is problematic especially for unrepresented claimants.

Kept intact is the notice requirement of 75 days for a hearing instead of the usual 20 that we have now. The new rules allow the claimant to object to appearing at a video conference. There is also some language allowing for a telephone conference when a video conference is not possible.

Continued on page 7

## Council

### Chairperson

Matthew Taylor  
Freid Gallagher Taylor & Associates PC  
604 S Jefferson Ave  
PO Box 3305  
Saginaw, MI 48605

### Chairperson-Elect

Annette E Skinner Attorney at Law  
913 W Holmes Rd Ste 145  
Lansing, MI 48910

### Secretary

Elizabeth Warren  
Ypsilanti

### Treasurer

Tom Geelhoed  
Grand Rapids

### Term Expires 2008:

J. Gregory Frye, Ypsilanti  
Thomas A. Geelhoed, Grand Rapids  
James T. Haadsma, Battle Creek  
Mary Herr, Detroit  
Lewis M. Seward, Bay City  
Evan A. Zagoria, Bingham Farms

### Immediate Past Chairperson

D. Michael Dudley

### Ex Officios

Carl A. Anderson  
Kerry Spencer Johnson  
Diane M. Kwitoski  
Deanna J. Lee-Kaniowski  
Charles Robinson  
Lewis Seward  
Edward M. Waud

2007-2008

# Favorable Sixth Circuit Case has Something for Everyone

*Rogers v Commissioner*, 486 F.3d 234 (6<sup>th</sup> Cir. 2007). If a practitioner were to have only one case to cite as a reference, *Rogers* would be the case. This case talks about the Treating Source Rule, fibromyalgia, credibility in ADLs, severe impairment analysis, and the pain issue.

The *Rogers* case starts out citing the law, which requires the ALJ to provide good reasons for discounting a treating physician's opinion. The reasons must be sufficiently clear to any subsequent reviewer the weight the adjudicator gave to the treating source's medical opinion *and* the reason for that weight.

Intertwined with the Treating Source Rule is the fact that the ALJ did not believe the claimant had a severe impairment of fibromyalgia and rheumatoid arthritis. Rather, the ALJ characterized Ms. Rogers' "severe" impairments as "multiple arthralgias" and "degenerative cervical and lumbosacral disc disease."

This is a fairly common error of law that is separate from the Treating Source Rule. Oftentimes in a denial, the decision will minimize the claimant's impairment(s) and then tie it in with the watered-down RFC reflecting the benign impairment.

In *Rogers*, the ALJ dismissed her fibromyalgia, instead accepting the non-treating doctor's opinion. The ALJ did not discuss the standard of diagnosing fibromyalgia. The Sixth Circuit noted that there were more than 500 pages of medical evidence by two treating doctors who were documenting treatment of Ms. Rogers' pain.

During litigation, the Commissioner countered that a state agency physician and a medical examiner at the hearing suggested that there was a lack of objective findings. The court noted that in light of the unique evidentiary difficulties associated with the diagnosis and treatment of fibromyalgia, opinions that focus solely on objective evidence are not particularly relevant.

There is also a credibility issue in Ms. Rogers' case discussing the two-part analysis when evaluating a claimant's complaints of disabling pain. The court also cited SSR 96-7p, which requires the ALJ to explain his credibility determination so that it is sufficiently specific to make clear to the individual or any subsequent reviewer the weight the adjudicator gave to the individual's statements and the reason for that weight. The court specifically indicated, "In other words, blanket assertions that the claimant is not believable will not pass muster, nor will explanations as to credibility which are not consistent with the entire record and the weight of the relevant evidence."

Lastly, there is a good discussion on ADLs and credibility. How many times have you seen a case in which the decision characterized your client as being "fairly active"? That's what occurred in the *Rogers* case, with the ALJ indicating that Ms. Rogers was able to drive, clean her apartment, care for her two dogs, do laundry, etc. The court found that these are minimal daily functions and not compatible with typical work activities. Additionally, the ALJ failed to note that Ms. Rogers received assistance for many everyday activities and even personal care from her children who live close by. ☆

*Editor - Lewis M. Seward*

# Federal Court Practice

The afternoon session of the fall section meeting focused on federal court appeals. Tom Geelhoed spoke on the practical aspects of filing a federal court claim in the Western District of Michigan, and the Editor discussed the same considerations in the Eastern District. Following the practical aspects of federal court practice, Mary Meadows spoke on federal court issues.

Mr. Geelhoed covered jurisdictional requirements under 405(g) and discussed the outline of an initial complaint and the factors that are unique to the Western District.

As you are probably aware, both Eastern and Western Districts utilize electronic filing. The practitioner needs to be certified in each district, taking separate tutorials for each district. Tutorials are now available online and take approximately 90 minutes. Once complete, you will receive a log-in number and pass code, which allow access to file electronically.

Electronic filing is pretty much mandatory now, although in an emergency, if you are not registered to be an electronic filer, you can file an emergency summons and complaint with the district court, but you will have to sign up and take the tutorial and obtain your log-in and pass code.

In the Eastern District, the summons and complaints are still filed manually on paper, but in the Western District, you can e-file if the filing fee is made by credit card payment. You must be sure to scan in the summons. The Eastern District is not to the point of e-filing the initial summons and complaint.

The filing fee is currently \$350. In most cases, you can have the client file an Affidavit of Indigence. Most clients filing complaints meet the requirements for being indigent. You must be aware that the Eastern and Western Districts have their own separate forms.

Another substantial difference between both districts is that in the Western District, it is not normally permissible to file a Motion for Summary Judgment. A Scheduling Order will explain this. The Western District requires merely a Brief in Support of the reversal or remand pursuant to Sentence 4 or Sentence 6.

Mary Meadows gave an excellent presentation on practical tips for filing federal court cases. She discussed evaluating the case to determine whether it's the type that would be amenable to district court review. There are some errors of law that are very difficult to convince the court to remand or reverse. As a general rule, any issue that gives the ALJ discretion will be difficult to prevail upon in federal court. Two obvious examples are credibility and pain issues. If these are your only two issues, you will be spinning your wheels unless the issues are very compelling.

It is important to ferret out the legal versus factual errors. They should pass the harmless error test that is thoroughly discussed in *Wilson v Commissioner*, 378 F. 3d 5441 (6<sup>th</sup> Cir. 2004).

Mary spoke about the different types of issues commonly found in federal court appeals. The most common error is an improper hypothetical question, i.e., *Varley v Secretary of HHS*, 820 F. 2d 777, 779 (6<sup>th</sup> Cir. 1987), *Hyde v Barnhart*, 375 F. Supp. 2d 568, 574 (E.D. Mich. 2005), and *Bielat v Commissioner*, 267 F. Supp. 2d 698, 702 (E. D. Mich. 2003).

Another very common issue occurs in evaluating the treating physician's opinion. The *Wilson* case made substantial inroads in the 6<sup>th</sup> Circuit case law under the

---

"Electronic filing is pretty much mandatory now, although in an emergency, if you are not registered to be an electronic filer, you can file an emergency summons and complaint with the district court, but you will have to sign up and take the tutorial and obtain your log-in and pass code."

---

Continued on next page

## Our Mission

The Social Security Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the website, public service programs, and publication of a newsletter. Membership in the Section is open to all members of the State Bar of Michigan. Statements made on behalf of the Section do not necessarily reflect the views of the State Bar of Michigan.

Treating Source Rule. Basically, this case stands for the fact that the commissioner cannot ignore his own rules and regulations.

Since *Wilson*, there have been two other significant 6<sup>th</sup> Circuit cases that discuss the Treating Source Rule, i.e., *Bowen v Commissioner*, 478 F. 3d 742 (6<sup>th</sup> Cir. 2007) and *Rogers v Commissioner*, 486 F. 3d 234 (6<sup>th</sup> Cir. 2007).

As Mary pointed out, there is also good case law on fibromyalgia, i.e., *Preston v Secretary of HHS*, 854 F. 2d 815 (6<sup>th</sup> Cir. 1988) and *Rogers* (cited above). Mary also explained how the practitioner should look at the jobs listed by the vocational expert to determine whether they comport with the DOT. This is under Social Security Ruling 00-4p, which places an affirmative duty on the ALJ

to specifically ask the VE whether there is any conflict between the jobs listed and the *Dictionary of Occupational Titles*. If there is a conflict, the ALJ is required to explain in the decision how the conflict was resolved. A good example of this case is found in *Teverbaugh v Commissioner*, 258 F. Supp. 2d 702 (E.D. Mich. 2003).

Ms. Meadows summarized her presentation indicating that a winning argument has three elements: 1) a well-written and concise statement of facts, 2) focus on the application of the law to the facts in the case, and 3) an explanation as to why the appropriate remedy is justified in the particular case. ☆

*Editor, Lewis M. Seward*

---

## Barbara Johnson, Administrative Appeals Judge, Speaks at the Section Meeting

Our annual fall meeting was highlighted this year by the presentation made by Barbara Johnson, a well-read and very experienced administrative appeals judge from Falls Church, Virginia. Judge Johnson has a knack in her ability to explain the Appeals Council's point of view. She gave some very good tips on looking for potential errors and brief writing, most of which are rooted in common sense.

### Writing the Letter Brief

As an initial matter, if you are representing the claimant at the Appeals Council for the first time, Judge Johnson offered the practical tip of enclosing your 1696. If the claimant had prior representation, you should try to obtain a withdrawal so that you will be treated as the attorney of record. Without a withdrawal, things get very confusing at the Appeals Council.

To the extent possible, do not write a lengthy brief; otherwise, the important points could be buried. You want to avoid the MEGO (my eyes glaze over) effect. Do not cite

boilerplate law, and keep facts to a minimum. Highlight the information you feel is most important, and start out with the best argument first.

She cautioned the representative who states as fact something that has occurred at the hearing that is based on vague memory. The Appeals Council will audit the hearing CD, and if your vague recollection is incorrect, this will adversely effect the persuasiveness of your brief. When in doubt, ask for a copy of the recording so that you can listen to it, especially during the critical vocational or medical expert testimony.

Do not argue that a client is disabled just because a treating source says so or just because the treating source says your client can only do sedentary work. You need to cite evidence in the record to show how it is consistent with the doctor's opinion.

If you submit a medical source statement, make sure the doctor addresses the period in question, and submit the documentation that supports that statement or refers to the evidence already submitted.

## Looking for Errors in the Decision

1. Check for an age change that allows the claimant to go into a different grid rule. In some circumstances, the claimant may change in an age category from the time the hearing is held until the decision is actually written, which in some cases may be six months or more.
2. In a Step Four denial case, check whether the decision is correct in the listing of the past relevant work. Check to make sure that the past relevant work has occurred within the last 15 years and whether the monthly income meets the threshold requirement for past relevant work in the first place. A more common scenario is that the work did not last long enough to be considered past relevant work. You must look at whether the job was part-time or full-time and the length of the job. A few weeks or even a couple of months may not be considered past relevant work. If the work lasted three months or longer, it will most likely be considered PRW.
3. A claimant can be found presumptively disabled if 55 or over, with a limited education, no past relevant work experience, and a severe impairment. See 20 CFR 404.1562(b).
4. Look for a treating source opinion evidence that is acknowledged in the facts but the decision does not evaluate or explain the weight given to the opinion.
5. The decision appears to adopt the treating source's opinion, but actually only adopts part of the opinion and fails to explain why.
6. The RFC is conclusory. There is no articulation as to the basis of the RFC.
7. The decision cites the regulation on credibility but never addresses what evidence is used to determine the credibility finding.
8. The decision finds a "severe" mental impairment, but either the PRTF or RFC does not contain any mental limitations.

9. A vocational expert was not used at the hearing when a decision contains a non-exertional impairment.
10. The obesity issue is not addressed.

## Submitting New Evidence

The evidence should be both new and material, i.e., evidence that was not previously before the ALJ which is relevant, and has the potential to change the outcome of the decision. Do not submit cumulative evidence such as recent physician treatment notes, etc., unless they are new and material.

## Subsequent Allowance

These are situations in which the case is at the Appeals Council and the claimant files a new claim that is approved. DDS can go back only as far as the day after the ALJ's prior denial since they do not have jurisdiction to overturn the ALJ's decision. Judge Johnson indicated that these cases are looked at closely.

*Caveat:* Sometimes the Appeals Council will reopen and overturn the allowance. They must give notice that they are going to look at it. A lively discussion developed regarding whether the claimant has a right to withdraw his request for review, which would then leave the subsequent allowance untouched. You always need to fully discuss this with the client, along with the practical aspect of allowing the Appeals Council to look at the case versus withdrawing your request for review.

## Reason for Delays in Decisions

Judge Johnson indicated that the reasons why some cases take so long is that staff is looking for evidence such as the hearing tape or CD, or that the file is lost. Sometimes the case needs to be evaluated by a medical expert.

By following Judge Johnson's practical and timely tips, you will be more effective as an advocate for your client in those rare cases that you lose. ☆

*Editor Lewis M. Seward*



## Kick up your heels!

You can find back issues of the Social Security newsletter at  
[www.michbar.org/socsecurity/newsletter.cfm](http://www.michbar.org/socsecurity/newsletter.cfm)



# Social Security Administration Attacks Disability Backlog

By 'Vonda Vantil, Public Affair Specialist – SSA

Michael J. Astrue, commissioner of Social Security, today announced that the Social Security Administration had made progress in the 2007 fiscal year (FY) toward making faster decisions on disability claims.

“Better systems and business processes were essential to the progress we made in 2007,” Commissioner Astrue said, “but we cannot overlook the tens of thousands of overtime hours put in by the hardworking men and women of the Social Security Administration.”

Commissioner Astrue highlighted the progress made in a number of significant areas:

Social Security issued a final rule on September 5, 2007 extending nationwide its Quick Disability Determination (QDD) process. Under QDD, a predictive model analyzes specific elements of data within the electronic claims file to identify claims where there is a high potential that the claimant is disabled and where evidence of the person’s allegations can be quickly and easily obtained. In New England, where the process was being tested, about three percent of all new cases were identified as QDD cases and processed in an average of 11 days. Today, Arizona, New Jersey, and North Dakota have started using QDD as part of a staged national roll-out that will be completed early next year.

The Social Security Administration also virtually eliminated its backlog of FY 2007 “aged” disability hearing cases. “Aged” cases, defined as cases pending 1,000 days or more, were reduced from 63,770 cases at the beginning of FY 2007 to 108 cases at the end of September.

To build on this progress, the agency will redefine “aged” cases as cases pending for at least 900 days and

will again attempt to resolve all of these cases by the end of the fiscal year.

The time it takes to process initial disability claims declined 6.3 percent from 88.4 days in FY 2006 to 82.8 days in FY 2007.

Another accomplishment was that Social Security slowed the growth in its pending disability hearings cases by approximately 50 percent. While the overall number of cases pending at the hearing level increased from 715,568 cases to 746,744 cases, the increase of 31,176 cases was about half of the annual increase the agency has typically recorded in this decade.

As another key part of its plan, the Social Security Administration is establishing a National Hearing Center (NHC) so that a centralized cadre of administrative law judges (ALJs) can use video hearing technology to hear cases in the most backlogged parts of the country. The technology now is in place, and the recruiting process for the first NHC judges has begun. The agency also plans to hire about 150 ALJs and some additional hearing office support staff in the spring of 2008—the only new hiring in FY 2008, as the agency continues to contract through attrition due to many years of congressional budget cuts far below what the president has requested.

“Our goal is to build upon this year’s achievements and, with the support of Congress, continue to improve the service we provide to millions of disabled Americans,” said Commissioner Astrue. “Without adequate support from Congress, however, we will not be able to make further progress—and we may even lose ground.” ☆



## DSI Scrapped ...

*Continued from page 1*

Evidence must be submitted within five *business days* of the hearing. There is a good cause requirement for untimely filing of evidence. New evidence post hearing can be submitted if good cause is shown and there is a reasonable probability that the evidence would affect the outcome of the claim. The rule still allows the ALJ discretion to keep the record open for additional evidence.

Bench decisions are still kept intact as well as the pre-hearing and post-hearing conferences when appropriate. Failure to appear at a scheduled pre-hearing or post-hearing conference without good cause will allow the ALJ to dismiss the request for hearing.

There will be a "Review Board" similar in many ways to the Appeals Council. The claimant or the representative has the right to request a review. Likewise, the Review Board can perform its own motion review.

It appears the 60-day appeal period is also intact. Accompanying the appeal must be a written statement identifying the errors.

The rules propose that requesting copies of records or the recording will now be charged a fee for this service.

One proposed significant change is that on appeal to the Review Board, if the case is remanded, the issue will be the period before the ALJ at the earlier hearing. The intent is to make the Review Board's role "more analogous to that of an appellate court" (pg 61221). Apparently the ALJ would not be allowed to consider any subsequent new impairment or worsening of a medical condition that was present at the prior hearing, unless there is a reasonable probability that the evidence would change the outcome of the decision. That certainly could have a chilling affect on the appeals process. Since this is a proposed rule, it is too early to tell what the remedy would be on remand cases until the final rules are proposed.

We are encouraging membership to review the proposed rules. Those of you who are NOSSCR members will receive information regarding concerns of the entire membership. However, we encourage you to respond before the December 28, 2007 deadline. ☆

*Editor, Lewis M. Seward*

## New Officers Elected

Matthew Taylor has been elected our new chairperson for the Social Security Section. Annette Skinner is our chairperson-elect. Elizabeth Warren is the secretary. Tom Geelhoed is the treasurer.

We would like to thank Mike Dudley for another successful year as our chairperson. Two very informative section seminars were well attended because of an excellent panel of speakers. ☆

### Grand Rapids ODAR has New ALJ

William G. Reamon is the latest addition to the Grand Rapids ODAR. He is a Grand Rapids native, graduating from Grand Valley State University and Thomas M. Cooley Law School. He started in private practice with his father, William G. Reamon, Sr., representing clients in workers' compensation cases and social security disability. From 1989 to 1992, he was a workers' compensation magistrate and eventually was appointed as chairperson of the Workers' Compensation Appellate Commission. In 2005, he was appointed as administrative law judge, conducting hearings from western Kentucky, from which he was transferred to the Grand Rapids ODAR office.

Welcome back, Judge Reamon! ☆

# Attorney Advisor Program to be Re-implemented

Probably one of the best programs ever discontinued was the Attorney Advisor Program from 1995 to 2001. NOSSCR notes that coincidentally or not, the termination of the program marked the beginning of the current two-year-plus backlog. The new program became effective October 9, 2007.

The program authorizes attorney advisors to issue a fully favorable decision when new and material evidence is submitted, the record demonstrates an indication that additional evidence is available, there is a change in the law or regulations, or there is an error indicating that a fully favorable decision may be issued. (20 CFR 404.942 and 416.1442).

As before, the attorney advisor may also request new evidence that may lead to a fully favorable decision. The attorney may also schedule a pretrial conference if appropriate.

The Attorney Advisor Program certainly helped practitioners in getting fully favorable, on-the-record decisions without clients having to wait the two-plus years for a hearing.

More cases are also scheduled to be sent to DDS from the ODARs. The cases are flagged in Chicago via computer profiling, and a list is sent to each ODAR.

Additionally, the ODAR boundaries may be realigned. Service areas at certain district offices may have all of their cases shipped to an out-of-state ODAR. The Boston ODAR, which has a low ratio of cases per ALJ, was mentioned as a likely hearing office for Michigan cases. Stay tuned for future changes. ☆

*Editor, Lewis M. Seward*

**SBM**

STATE BAR OF MICHIGAN

MICHAEL FRANCK BUILDING  
306 TOWNSEND STREET  
LANSING, MI 48933-2012

[www.michbar.org](http://www.michbar.org)

FIRST CLASS MAIL  
U.S. POSTAGE PAID  
LANSING, MI  
PERMIT NO. 191