

STATE BAR OF MICHIGAN  
**SOCIAL SECURITY**

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



Fall 2004  
Editor: Lewis M. Seward

## SSA Solicits Comments on Prerequisites for Non-attorney Reps for Fee Withholding

### In this Issue

On the Horizon . . . . .	2
Sixth Circuit Publishes a Favorable EAJA Case . . . . .	3
Listing of Impairments for Skin Disorders are now in Effect . . . . .	3
Presentation at the San Diego NOSSCR Conference by Commissioner Barnhart . . . . .	4
SSI Non-Medical/Financial Considerations . . . . .	5
Practice Alert . . . . .	6
Practice Pointers . . . . .	6

The Social Security Administration would like your input on the demonstration project for non-attorney representatives in participation of the fee withholding program. The Commissioner has compiled a list of general topics that will be the focus of an examination, as well as other prerequisites for participation in this program.

They are asking representatives to comment on a rating system of potential topics listed on a scale of 1-5 and the importance of the qualifying examination.

The Commissioner is also proposing that in addition to passing an examination, the non-attorney representatives must have at least a Bachelor's Degree, professional liability insurance, undergo a criminal background check, and demonstrate completion of continuing education including education on Ethics and Professional Conduct. For a list of the topics for you to rank and details of this solicitation for public comments, please go to <http://tinyurl.com/5xdvn>.

It is important that you submit your comments now as the deadline to receive them by the Commissioners is set for **September 15, 2004**.

The list of topics is quite lengthy and it is the personal view of the Editor that many non-attorney representatives will not be able to meet the Commissioner's qualifications. Organizations may merely have a "puppet attorney" to whom the fees are payable by having the attorneys sign the 1696 and fee agreements. When commenting, please raise this question and challenge the Commissioner to prevent or at least minimize this occurrence.

You can e-mail your comments to [William.Storey@ssa.gov](mailto:William.Storey@ssa.gov), fax to Mr. William Storey at (703) 605-8261 or mail your comments to the Office of Hearings and Appeals, Suite 1608, 5107 Leesburg Pike, Falls Church, Virginia 22041-3255. Mr. Storey's phone number is (703) 605-8260.

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## On the Horizon

We were very fortunate to have Cliff Weisberg as our featured guest speaker at the Summer Section Meeting. Cliff has the unique position of being the only attorney representative that is part of a round-table discussion group who meets six times per year with SSA. The participants in this round-table discussion include the Director of DDS for the State of Michigan, the two areas' Directors, and one or more Chief ALJs from OHA, as well as representatives from the District Office. Having Cliff as our voice is extremely invaluable as Social Security realizes that implementation of new initiatives can only be possible if there is feedback from the representatives implementing the new procedures.

Here are some of the topics that Cliff discussed.

### Worker's Comp Offset

We all know about the computation using 80% of the current and past five years of wages. However, most practitioners are not aware of the alternate method according to the Regs. The alternate method is to take *any* five consecutive year periods and multiply it by 80% to get the average monthly wage. This could result in a substantial reduction to the worker's comp offset. This is especially critical in two areas: (a) when the worker's comp rep fails to amortize the award over

the claimant's lifetime, or (b) where you have a claimant who had substantial earnings sometime during their work history and during the last five years dropped down to a part-time or lower paying job. The goal is obviously to get the highest five years of earnings that will minimize the impact of the setoff.

Cliff indicated that SSA's computer is supposed to perform both calculations but he has found instances where the alternate lesser known calculation was not performed, which can save your claimant literally thousands of dollars of retroactive benefits (not to mention a like-return on the attorney fee).

### SSI Attorney Withholding

Things are still in a state of flux regarding how the SSI attorney fees are going to be implemented. Probably one of the biggest questions is what will SSA use as a starting point. We do know that SSI attorney fees will happen on March 2, 2005. It is just that there are multiple milestones in which to begin implementation of the program, such as any cases filed after that date, any cases adjudicated after that date, any cases filed at the beginning of a fiscal year or calendar year.

The other unresolved problem is the mandatory requirements that are going to be imposed on non-attorney representatives in order to obtain automatic fee withholding.

Continued on page 7

## Sixth Circuit Publishes a Favorable EAJA Case

The Editor recently received a favorable determination from the Sixth Circuit Court of Appeals on a case involving Equal Access to Justice Act (EAJA) attorney fees. *Howard v Commissioner*, \_\_\_\_\_ F.3d \_\_\_\_\_ (6th Cir. 2004). The underlying case (*Howard v Commissioner*, 276 F.3d 235 [6th Cir. 2001]), is now cited in almost all District and Circuit Court cases involving either the RFC or hypothetical to the VE.

In preparing to argue this case, the Editor had a near death experience when traveling to the Court of Appeals on the morning prior to Oral Argument when he hit a patch

of black ice, totally destroying the van he was driving. Despite the high speed impact against the guardrail and concrete barrier, the Editor emerged unscathed and was able to enlist the help of a fellow law school buddy and retired prosecutor who drove him the rest of the way from Flint to Cincinnati without missing a beat.

In denying the petition for EAJA fees, the District Court noted, “the reasonableness of the Social Security Agency’s claim is bolstered by the fact that the ALJ’s decision was adopted by the Magistrate Judge and affirmed by this Court.” The Editor indicated that prior ruling by the

ALJ, Magistrate or District Court Judge is not the bench mark standard to determine whether the Commissioner was substantially justified in defending the case. The Circuit Court agreed that the District Court reasoning “over emphasizes the significance of this fact indicating that while a string of losses or successes may be indicative of whether a position is substantially justified, the fact that one other Court agreed or disagreed with the government does not establish whether its position was substantially justified” quoting *Pierce*, 487 U.S at 569.

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## Listing of Impairments for Skin Disorders are now in Effect

SSA has finalized the listings for skin disorders under §8.00 and added a children’s listings for skin disorders under 108.00. The changes have become effective as of July 8, 2004. The listings were designed to more clearly define the level of severity required for a listing level impairment. For instance, extensive skin lesions are defined as lesions that involve multiple body sites

or critical body areas that result in a “very serious limitation.” The regulation describing an “extreme” limitation is intended to be defined in the same type of terms as used in the musculoskeletal listing for adults and children.

As practitioners, you are aware that a common factor in representing claimants is the emotional factor due to the stigma of the skin disorders

such as Psoriasis. SSA has acknowledged this in the new listings indicating that facial disfigurement or other physical deformities may also have effects that can be evaluated under the mental disorders as they can affect mood or social functioning 8.00(D)(4).

The new skin disorder listings are available at the SSA website at [www.ssa.gov](http://www.ssa.gov).

# Presentation at the San Diego NOSSCR Conference by Commissioner Barnhart

Commissioner Barnhart begins an era of a completely new Social Security system, as we presently know it. She spoke at the most recent NOSSCR Seminar in San Diego in May of this year. As Cliff puts it, she is the most progressive and most knowledgeable Social Security Commissioner he has seen in his 36+ years. Her tenure as Commissioner will mark one of the greatest changes in Social Security. She not only has good vision, but also has the expertise to know the system well enough to predict what will work and what will not work.

The two goals of the new Commissioner are to obtain the right decision as early in the process as possible, and encourage claimants to return to work. She stressed to the NOSSCR members that both goals will be done by regulation and *not* by the legislature. In other words, it is going to be her way or the highway and there will be no compromising with special interest groups.

One of her new ideas is to have a temporary allowance. In other words, the claimant will be granted a short 12 to 24 months future period of benefits and then will have to reapply at the expiration of this time frame. These time-limited benefits will give the claimant the opportunity to get the education or

retraining that they need in order to return to the work force.

Another incentive of the Commissioner is for what she terms “early intervention.” This means that for claimants who are close to having the ability to return to work, expect a full assault by Social Security or face termination of benefits. As part of this early intervention or temporary allowance strategy, there will be extended medical benefits so that there will be less incentive not to integrate into the work force due to lack of healthcare insurance for chronic health problems. These claimants are also the most difficult to insure due to their pre-existing medical condition. Also, as you are aware, many employers are either eliminating health benefits or drastically cutting them. This could be extremely expensive to a claimant entering the work force who has medications or healthcare bills that per month could equal the amount that they would net.

Barnhart is going to eliminate the Reconsideration phase for all the rest of the states. She is also proposing a system that allows a field office to identify cases that should be paid

immediately, such as end stage renal disease, TERI (terminally ill claimants), etc. All other cases will either be electronically routed to a review-

“The two goals of the new Commissioner are to obtain the right decision as early in the process as possible, and encourage claimants to return to work.”

ing unit that has potential for payment of benefits early in the stage, or be routed to the DDS unit.

The reviewing unit will be regionalized such as the regional unit we have in Chicago. There it is expected that this office will be staffed by per diem positions covering a range of specialties. No longer will there be pediatricians and dermatologists adjudicating failed back syndrome cases. The reviewing unit will also have vocational experts. If the case is triaged to DDS first, no matter what decisions they make, it will be routed back to the new reviewing unit. The reviewing unit may recommend that more evidence is necessary when it is forwarded to the OHA, or may recommend a denial. The judge is supposed to take the recommendation into consideration. If approved, the Claims Rep (CR) will pay the claim. Additionally, the CR will also be allowed to authorize the fee petition.

*Lewis M. Seward*

## SSI Non-Medical/Financial Considerations

With the advent of SSI attorney fee withholding, it is even more important than ever for attorneys to understand how the non-medical/financial considerations come into play. Cliff indicated that Commissioner Barnhart's plan is to streamline the non-medical requirements that place an onerous burden on the SSI claim reps at the field offices.

One of the biggest Title XVI reductions is the living arrangements for which SSI has the acronym of ISM, a/k/a Inkind Support and Maintenance. There is a one-third reduction for claimants who do not have to pay their own room, board, utilities or any type of financial assistance they receive from friends or relatives. The claimant must agree to repay all this assistance back in order to minimize the offset reduction. It is actually more complicated than this. We will be conducting

a seminar on the SSI offset rules in the near future. SSI has also changed the rule on a claimant's spending the SSI. The new rule extends the period from six to nine months.

When SSI performs their preauthorization effectuation computation (PERC), the claimant can exempt any car of any value as well as their house or a homestead, i.e., home with acreage, most household goods, prepaid funeral expenses, \$1,500 in cash value of life insurance, as well as liquid assets in the amount of \$2,000 for a single person and \$3,000 for a married couple.

If your client receives an adverse determination following a PERC appointment, make sure that you file a Request for Reconsideration. Depending on how important the issue is, you may want to request an in-person conference with the CR. A high majority of these adjudicated in favor of the claimant. It is just a matter of supplying more accurate information to the CR.

Stay tuned. Our Section will be offering a more in-depth seminar on learning the items that continuously trip up claimants in depriving them of their benefits. One of the biggest problems with the SSI system is the complex rules. As evidenced, every practitioner has seen how CRs apply the rules differently. Once you know the rules of the game, the playing field is effectively leveled. Many deserving SSI claimants have had their benefits reduced because they were unaware of how the system worked.

## Practice Alert

Effective immediately, the old disability report that needed to be filed with Request for Hearing has been replaced by the new Disability Report, form number SSA-3441-BK. The old one-page, two-sided form has been replaced by the new and improved four-page two-sided form that is very similar to the disability report on the initial claim.

Following SSA's theme, more is always better, this report requires the claimant or the representative to provide specific detailed information regarding their medical condition, names and addresses of medical

care providers, changes in their status as far as work or worker's compensation benefits, medications and tests performed. Additionally, this new form requires answers regarding daily activities, education and training information, and vocational rehabilitation services.

Additionally, SSA will be requiring that this form be completed electronically along with the Request for Review of Hearing, and your 1696. The tentative time set of the requirement to file these documents electronically will be March 1, 2005.

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## Practice Pointers

A mother in a child's SSI claim had the claim reduced by more than two-thirds when she allowed her separated husband to claim the children on his income tax return as dependents. He was employed, while his wife was caring for the children who was not employed and on ADC. Therefore, he needed the tax deductions while she did not.

Since this is a child's SSI case, the retroactive benefit was reduced drastically, sometimes less than \$50 per month. Out of a potential \$18,000 plus for three years of retro SSI, she received less than \$6,000.

The Claimant's representative was not informed of this arrangement until after the award letter was received. The SSI claims representative indicated that they contacted the IRS to confirm that the husband did claim

the children as dependents and therefore by IRS regulation, he is only able to do so if he is providing more than half of the support for the children even though they are living apart. A couple does not need to be married for the separated spouse to claim the children. If this is an SSI case, it could drastically reduce any retro benefits, therefore penalizing the SSI recipient to the benefit of the non-custodial parent.

On all SSI cases it would be wise to inquire as to whether the separated parent is gainfully employed and if so, warn them about the potential reduction in retroactive SSI benefits if this parent claims the children as dependents. The only person who benefits is the separated parent.

## State Bar Unveils Redesigned Website

The State Bar of Michigan website at [www.michbar.org](http://www.michbar.org) has a new look. With over 30,000 pages and a completely redesigned format, the site makes online navigation easier and faster for Michigan attorneys and the public. The last redesign was in 2001.

“This effort is part of our ongoing plan to better serve our members and to provide them with the information that they need to conduct business and research efficiently,” said John T. Berry, the executive director of the State Bar of Michigan.

The website has been reorganized under the following headings: member directory, opinions, research and links, professional standards, programs and services, the public policy resource center, publications, sections information, as well as public and media resources. Redesign improvements include:

- Web server and operating system software upgrades
- Integration of a content editor management system
- Management tools and a plan for expanded services, including e-commerce, audio, and video.

“The navigation on the website has been improved by removing frames, making it easier for our 36,000 members to research and find items of interest to them,” Berry said. “Our new State Bar logo and identity standards have also been integrated throughout the site, giving it a consistent, identifiable look. The pages are also faster loading.”

The website averages more than 6,600 visitors per day, with more than 32,800 pages viewed each day. The online membership directory is the most popular feature, averaging 30,000 views per month.



**Come see the newly redesigned homepage at  
[www.michbar.org/socsecurity](http://www.michbar.org/socsecurity)**

On the Horizon  
Continued from page 2

What we do know for sure is that the User Fee will begin effective September 1, 2004, and so any cases paid on or after that date will be subject to the new \$75 fee. Representatives can applaud this as the first real increase in attorney fees since the implementation of the \$5,300 cap several years ago. With the \$5,300 attorney fee cap as it stands now, the User Fee is \$333.90. A \$258.90 reduction is a welcome change that more fairly reflects the cost of computing and processing our attorney fees. With the advent of SSI attorney fee withholding, we can concentrate on representing claimants rather than spinning our wheels as collection law attorneys.

### Electronic File

The electronic file will come sooner than we think. As early as March 2005, it will be mandatory to file the Request for Hearing and Disability Report electronically. Social Security does have high expectations that it will become effective in March 2005. By the first quarter of 2006, the entire file will be electronic and will be implemented throughout the country. When a representative or claimant wants a file, a CD will be burned. The case will go from the initial application to DDS electronically and from there to OHA if denied.

*Lewis M. Seward*

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10 a.m. - 3 p.m.  
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Featuring Representatives and ALJs from Lansing and Flint  
OHA, the local district office and DDS.

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