

STATE BAR OF MICHIGAN  
**SOCIAL SECURITY**

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



Fall 2005  
Editor: Lewis M. Seward

## SSA Proposes Drastic Changes in the Review Process

### In this Issue

- Genitourinary Listings Revised . . . 3
- Enter the Maze of DDS . . . . . 4
- Annual Meeting in Grand Rapids 7

The Commissioner's proposed changes on the adjudication of disability claims remove many of the procedural safeguards that have been in place. For instance, despite the widespread disdain for the Appeals Council, still one in four cases gets snared in the net and remanded back for a new hearing. The new proposal plans to eliminate the Appeals Council forcing Claimants to go to Federal District Court. With four out of ten Claimants unrepresented and the large majority of attorneys who do not file appeals in Federal Court, a substantial number of Claimants will be foreclosed from proceeding any further.

With the elimination of the Appeals Council, there will be an obvious increase in the Federal Court filings. In Michigan this comes at the worst possible time since the Court has had their budget slashed and 24 positions have been eliminated in the 2005 fiscal year alone.

Obviously limiting the forum to Federal District Court will have a negative impact on Claimants who were not represented at the hearing. Equally impacted would be the Claimants who are represented by counsel who do not practice in Federal Court.

The natural consequence would be a large increase in cases filed in Federal

Court at the same time that their budget has been significantly reduced.

The Appeals Council finds itself in this predicament due to their failure to perform adequate review of an ALJ's decision. Practitioners are encouraged to submit comments no later than October 25, 2005.

### Reviewing Official

SSA has added another bureaucracy level called the "Reviewing Official" (RO), which would be an intermediate appeal step prior to a hearing with an ALJ. The Claimant would have to file an appeal following the DDS denial where the case will go to the Reviewing Official.

The RO decides whether additional evidence is necessary. If additional evidence is necessary, the RO may remand the case back to DDS for a redetermination. If this happens, the RO still retains jurisdiction of the claim.

Whether the RO approves the claim or the case is remanded back to DDS, it still must be sent to the Federal Expert Unit (formerly known as Department of Quality Assurance, which is in Chicago) for a final determination to see if they concur.

Continued on next page

## Social Security Section

# Council

### Chairperson

Kerry Spencer Johnson  
Weisberg & Walkon, PC  
21650 W. 11 Mile Road, Suite 202  
Southfield, MI 48076

### Chairperson-Elect

Charles Robison  
Robison Law Office, PC  
911 N Eaton St  
PO Box 750  
Albion, MI 49224

### Secretary

D. Michael Dudley  
East Lansing

### Treasurer

Matthew Taylor  
Saginaw

### Term Expires 2005

Thomas A. Geelhoed, Grand Rapids  
James T. Haadsma, Battle Creek  
Mary Herr, Detroit  
Annette E. Skinner, Grand Ledge  
Evan A. Zagoria, Bingham Farms

### Term Expires 2006

Elizabeth W. Eddins, Ypsilanti  
Kenneth F. Laritz, Clinton Township  
Timothy M. McAree, Rockford

### Immediate Past-Chairperson

Thomas M. Stellard

### Ex-Officios

Carl A. Anderson  
Diane M. Kwitoski  
Deanna J. Lee-Kaniowski  
Lewis Seward  
Edward M. Waud

**2004-2005**

## Proposed Changes

Continued from page 1

### Evidence Submission is Restricted

There is another proposed change that will adversely affect Claimants. Evidence must be submitted within 20 days of the hearing. The same ALJs who routinely try to restrict the evidence, discourage testimony, and fail to play by the rules will be the same ALJs that will embrace this new rule. It will make it easier for this type of an ALJ to deny the claim legally precluding critical evidence from being entered in the record.

The proposed regulations give the ALJ discretion if the evidence is submitted after that 20-day window. There are no standard procedures to guide the ALJ's decision-making.

This rule ignores the fact that medical care is not static. Tests such as MRIs, EMGs, or surgery are certainly critical to the Claimant's case. Section members are encouraged to object to this evidence-restrictive proposal. The record should be kept open up to the time the decision is made.

There is a provision by SSA to submit records, but only within 10 days after the ALJ's decision if the Claimant shows (a) there was an unforeseen and material change in their medical condition that occurred after the hearing, or (b) the ALJ agreed to keep the record open for a certain period of time and there was good cause for not submitting the evidence within the rigid 20-day window prior to the hearing.

### Decision Review Board

An additional agency will be created called the Decision Review Board (DRB). Claimants will not have a right to appeal to the DRB with the exception when a case is dismissed. The function of this Board is to review both favorable and unfavorable decisions, although the majority of the cases

reviewed will be favorable ones.

The problem with any decision-maker who does not have the opportunity to observe the demeanor of the Claimant, ask questions of the Claimant or witnesses, always results in a higher disapproval rate. This is evident in any circumstance or peer-review setting. Social Security is well aware of this, which is the underlying reason for two more bureaucratic levels of review without the Claimant. The net result will be a substantial increase in unfavorable decisions second-guessing the trier-of-fact who has the benefit of observing the Claimant and the ability to ask follow-up questions at the hearing.

Social Security has indicated they will initiate a profiling database to screen favorable cases where there are "problematic issues or fact patterns that increase the likelihood of error."

The regulations propose that the DRB review will take place before the ALJ issues his/her decision similar to what is being done now in Chicago for DDS decisions. The DRB has 90 days to make a decision. If they do not make a decision within 90 days, the ALJ's decision is mailed out to the Claimant. The fallout of this new level of bureaucracy means that Claimants will have to wait even longer before a decision is issued.

Section members are strongly encouraged to write their objections to the DRB proposal. There already is a review process in place called the "Own Motion Review" at the Appeals Council that screens favorable "problematic" cases. Social Security is proposing to screen the majority of ALJ decisions in this manner. Members are encouraged to voice their displeasure with the elimination of the Appeals Council and the DRB proposal.

Equally disturbing is that the DRB "trumps" the ALJ's decision. When a case is remanded, the ALJ must take the action specified by the DRB. The door may be opened just a crack when the

DRB reverses an ALJ. The regulations allow the ALJ to take any action that is not inconsistent with the DRB's remand order. However, if the DRB rules to reverse for a denial of benefits, there is no remedy that would prevent this from occurring. Therefore the Claimant must go to Federal Court.

The DRB will notify the representative and Claimant that the case has been selected for review. The DRB will not allow a written brief or letter of explanation unless requested by the Board. Submitting a brief or letter of explanation without permission will not be considered. The brief will merely be returned without being made a part of the record.

The lack of accessibility to the DRB by Claimants or representatives, coupled with the discretionary power of whether to submit a legal argument supporting the ALJ's decision, is a step back into the dark ages. At least every dissatisfied Claimant had an appeal of right to the Appeals Council. Now Claimants must defend not only unfavorable decisions by the ALJ but favorable decisions reversed by the DRB as well.

Deserving Claimants will be astonished to find out that the Commissioner has added two additional steps to the review process, i.e., Reviewing Official and Decision Review Board. The natural consequence of additional layers of bureaucracy will be an even greater delay for most Claimants.

The Claimant's only remedy following the DRB's decision is to file a Federal Court Appeal on a case they thought they had won. It is obvious that these new procedures seek to limit submission of evidence and deny access to proper evaluation of a claim while limiting appeals to the Federal District Court (which has not been friendly to Claimants). With the increase in case load, the passive aggressive nature of the District Court will be more pronounced.

## Re-Openings are more Restricted

SSA also proposes to restrict re-openings. The one-year allowance for reopening for any reason is proposed to be eliminated. This is significantly egregious due to the simple fact that your typical Claimant will file more than one claim. Oftentimes these Claimants have associated mental impairments that impair their ability to press forward with their appeal.

## The Social Security Section Needs Your Help

Practitioners are encouraged to write and forewarn of the consequences of longer processing time and an increase in inappropriate denials along with a lack of due process in evidence submission.

Many of SSA's proposed regulations have been modified or not implemented at all due to comments from the public. The Commissioner has an expanded window of commentary knowing how significantly the review process will change (resulting in a substantial increase in the number of cases that will be denied).

The pendulum has swung too far under the guise of a speedier decision. The added two layers of bureaucracy will actually increase the processing time until a final decision is made due to the Reviewing Official and Decision Review Board. The only time frame that will be shortened would be the time it takes to go into Federal Court.

As practitioners, we are all aware that one of the strongest forces known to mankind is bureaucratic self-preservation. Many practitioners do not want to see the demise of the Appeals Council as it is a safety net despite its inadequacies. We can harness this force by advocating the preservation of the Appeals Council. However we should also advocate that the Appeals Council actually performs the job the way it should be rather than

the inconsistent hit-or-miss approach that is the standard today. The nature of Federal Court decisions that historically is not Claimant- friendly, is a poor alternative.

For a complete list of the proposed changes, consult the NOSSCR July 2005 Newsletter. A Federal register is also available online for these proposed changes. at [www.gpoaccess/fr/index.html](http://www.gpoaccess/fr/index.html) Fed.Reg. 43589 (7/27/05). The deadline to file comments is October 25, 2005.

Email your objections, comments and suggestions to [www.regulations.gov](http://www.regulations.gov), fax them to (410) 966-2830, or you can also mail comments to: Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland, 21235-6401. Please send a copy to NOSSCR. *Editor*

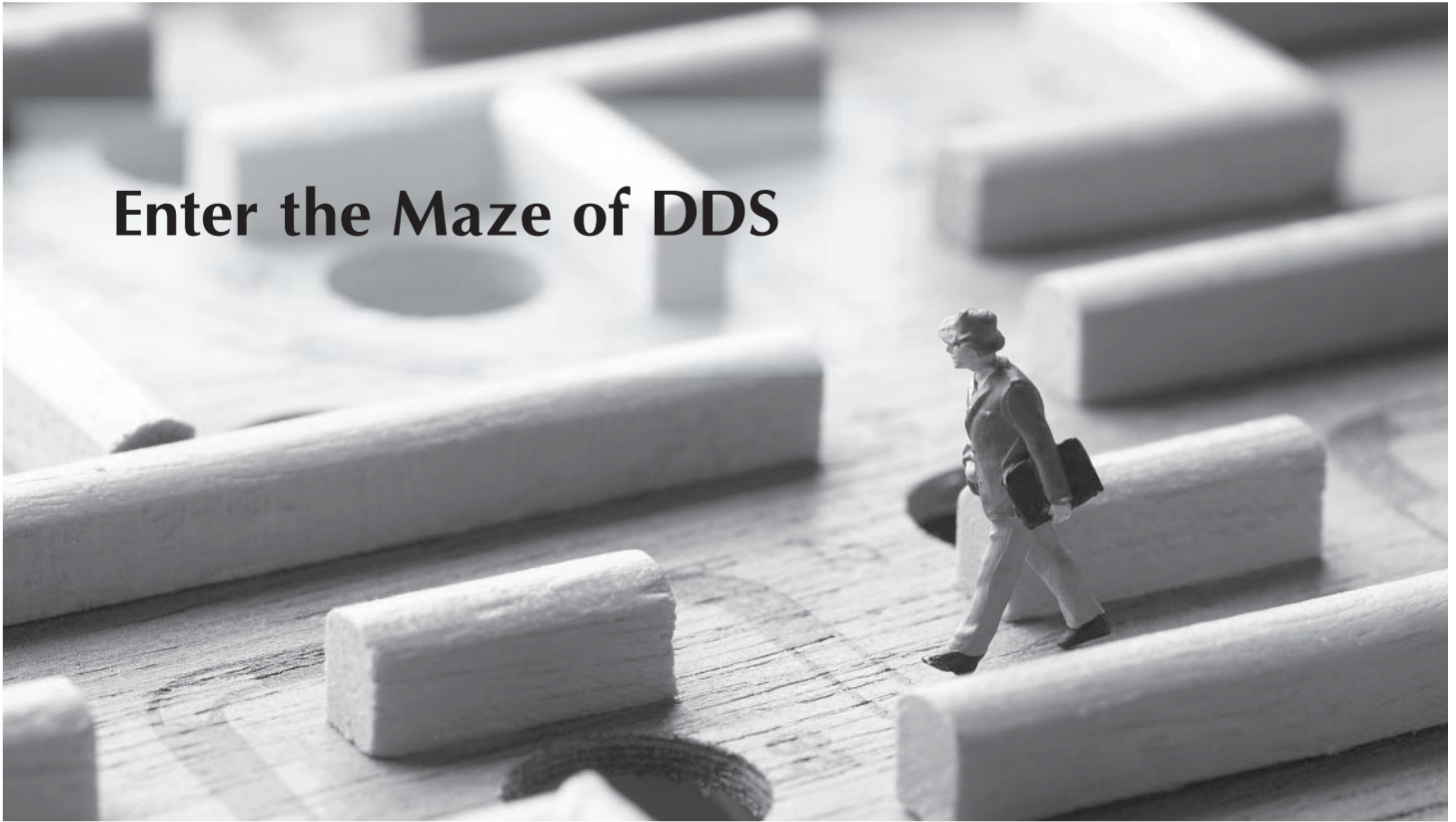
## Genitourinary Listings Revised

The final rules revising the genitourinary impairment listings under 6.00 in adults and 106.00 in children have become effective September 6, 2005. Under 6.02(B) the Claimant will be presumed disabled for 12 months after surgery of the kidney transplant. In 6.02(C) persistent hematocrits of 30% or less was deleted.

Additionally, introductory tests in the preamble of this listing were expanded and more fully explained in this relatively complicated listing.

For more information and to download the new listings, go to [www.ssa.gov](http://www.ssa.gov). The Federal register number for the changes are found at 70 Fed. Reg. 38582 (7/5/05). *Editor*

## Enter the Maze of DDS



*The following is an excerpt from a presentation at the Washington Seminar in May 2005. This NOSSCR Seminar had a DDS physician and three groups of office supervisors from Texas, North Carolina, and Michigan.*

One of the DDS office supervisors stressed the importance of developing a relationship with DDS. This supervisor suggested that you should contact the Examiner and introduce yourself. Discuss what records or anything else that is needed, such as completion of forms. The supervisor reminded the audience that you can always draw more bees with honey than vinegar. One of the other supervisors agreed with this, indicating that it *absolutely* makes a difference in the outcome of the case.

It is important for the practitioners to understand the intense pressure from time constraints that is on the Disability Examiner. The Examiner needs to process three or four cases per day. Therefore, there is only a minimum amount of time to develop the record. Examiners are required to obtain treating source records with two requests; i.e., two strikes and you are out.

Also important to know is that the performance evaluation of Examiners is based upon processing time. There is a

significant amount of pressure on a Disability Examiner to process cases quickly and accurately. The accuracy of the decision is based upon *favorable decisions*, not unfavorable. Therefore, there is a built-in incentive in “gray area” cases that the case not be approved. Approximately one-half of approved cases must go to the Federal Department of Quality Bureau (Chicago in our area).

DDS also does an internal evaluation and must look at an additional 70 denials and 70 allowances per office per month. Examiners' potential merit increases are based upon getting cases out timely as well as the accuracy of the approval. According to one of the supervisors on the panel, the Disability Examiners who move faster up the ladder are the ones who deny more cases than they approve. In fact, this supervisor indicates that this is such a high-pressure job that the turnover in some offices is up to 50% per year. Most DDS Disability Examiners will try to transfer to a different state position because of this pressure.

According to the physician present, SSA did a poor job training Disability Examiners as well as physicians. There is also no requirement for on-going training. The inadequate training in the beginning naturally leads to an increased rate of denials.

The physician indicated that the focus of training is on processing claims and discussing definitions without any integration between the terminology and the disability process. In the doctor's experience there is not enough medical record development, especially for psychological cases. They need to look at a more longitudinal picture. From the practitioner's standpoint on cases where there is repeat psychiatric admissions prior to onset, it would be helpful for the Disability Examiner to have at least five years of prior hospitalizations to show a pattern on those particular cases.

The doctor also indicated the importance for the practitioner to update the Examiner about any new medical information. Medical care is always ongoing and chances are your client will have important tests that the Examiner knows nothing about unless notified by you. Because of the constraints of time that a Disability Examiner has, if at all possible, you or the client should obtain the test results and fax them to the Examiner. The bottom line is the easier you can make their job, the easier you make it for them to make a finding of disability.

The driving force behind DDS is a term called Productivity Per Work-Year or PPWY. SSA simply takes the amount of full-time employees and the amount of cases adjudicated and computes the ratio of cases processed per full-time employee. Like the Disability Examiner, everything is driven by the processing time of cases.

The practitioner needs to be aware that quite often it is the Disability Examiner who fills out the physical

RFC. That's right – just check the handwriting on the RFC form. This was confirmed by a former supervisor who worked at the Michigan DDS (although the Disability Examiner has the *option* to complete it). If the doctor does not agree, he can give his input and change it accordingly.

Disability Examiners are handed 15 to 17 new cases per week. The Examiner needs to review the file, draft the record request, and send a letter to the Claimant explaining what records were requested. The Examiner also needs to send forms to the Claimants depending on their impairments. The case is written, an RFC completed, and then given for the doctor's review.

A typical caseload for a Disability Examiner is between 80 and 130. Because new cases are coming in all the time, if the Disability Examiner's caseload exceeds 180, he/she is in trouble of being disciplined.

The physician indicated that eDib is clogging down the system. That is because you can only look at one page at a time in the sequence in which it appears in the computer. You cannot fast forward from one screen to the next. Thus, it takes longer for a physician to review an electronic file as opposed to a paper one.

The doctor indicated that Claimants who have subjective symptoms, that are not backed up by objective findings, are going to lose. Therefore, it is important for the practitioner to make sure that all pertinent tests are submitted, even if a few years old, to back up the subjective complaints.

There are two quality assurance branches. One is the Federal Branch called the DQB (Chicago, Illinois) and the other is the DQA, which is the internal Quality Assurance Branch for the DDS.

Fifty percent of the approvals at DDS are evaluated by DQB in Chicago. The accuracy rate is also used to evaluate that particular DDS as well as the particular Disability Examiner. One might question why only *favorable* decisions are reviewed. The doctor explained this is a cost containment matter. A mistake by DDS denying the claim does not cause the Agency any-

thing. A Claimant mistakenly approved could cost literally tens of thousands of dollars.

The doctor said "you learn by return." You begin to get a feel for what DQA likes and dislikes and you style your evaluation of cases to conform with DQB's review. The physicians at DDS must maintain a 94% accuracy. This high goal is rather easy if you only approve the most ill or disabled. In other words, err on the side of caution and deny the claim to keep your accuracy rate high.

The physician gave a description of how he reviews a Social Security file. He starts out by looking at the alleged impairments, age, and work history to see where the Claimant would grid out. He then reviews the 3368 or ADL forms, and then reads the entire file, tabbing pertinent physical exams and other medical data. If the information is insufficient, it is returned to the Examiner with directions on further case development.

Once the file is complete, the doctor uses a combination of medical knowledge of disease states and their impact on function plus common sense to attempt to make the right decision. As the doctor explained earlier, it is critical that the subjective complaints are backed up by objective test results or other findings by the treating or examining physician. There appears to be a heavy emphasis on ADLs. This is always a flaw in the system because Claimants and third parties do not understand the question. Claimants frequently write what they *used* to do, not what they are able to do currently. The doctor indicated that by comparing the ADLs with the medical evidence he can get a feel for the Claimant's limitations. He indicated that white lies, exaggeration and fraud are not uncommon in Social Security Disability claims.

With the pressure from SSA to obtain accurate and speedy decisions, it is no wonder the initial level is prone to approve only the most disabled. *Editor*

# Thomas W. Cranmer is Sworn in as 71st State Bar President



Thomas W. Cranmer

Thomas W. Cranmer has become the 71st president of the State Bar of Michigan and will lead the over 37,500 member organization for the next year. He was sworn in September 22, 2005 by Michigan Supreme Court Justice Stephen J. Markman in East Lansing. The ceremony took place in conjunction with the State Bar of Michigan 70th Annual Meeting at the Kellogg Hotel and Conference Center.

Mr. Cranmer has practiced law for 30 years and is a principal at the Detroit law firm of Miller, Canfield, Paddock and Stone, practicing both criminal and civil litigation. He has been a member of the Bar's Board of Commissioners since 1997 and is also a past member of the Board of Directors of the Oakland County Bar Association, as well as a past president of the Oakland County

Bar Foundation and the Eastern District of Michigan Chapter of the Federal Bar Association.

Mr. Cranmer is listed in *The Best Lawyers in America*, *Who's Who in American Law*, and *Chambers USA: America's Leading Business Lawyers Guide*. He is a fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, the International Society of Barristers, and the American Board of Trial Advocates. In addition, he is a fellow of the American Bar Foundation, a Life fellow of the Michigan State Bar Foundation and a Charter fellow of the Oakland County Bar Foundation. He is also a past recipient of the Federal Bar Association's Leonard R. Gilman Award, presented to an outstanding practitioner of criminal law.

Mr. Cranmer has a passion for teaching litigation skills and trial advocacy. His experience includes teaching for one of the preeminent trial advocacy programs in the United States, the National Institute for Trial Advocacy, along with the Institute for Continuing Legal Education. He is a co-author of a legal treatise, *Michigan Civil*

*Trials and Evidence* published by West Publishing, and he is currently teaching evidence as a visiting professor at the Thomas M. Cooley School of Law. He received his law degree from Ohio Northern University in 1975, and his Bachelor of Arts degree from the University of Michigan in 1972.

Also serving as officers for 2005-2006 are president-elect Kimberly M. Cahill of Center Line, vice-president Ronald D. Keefe of Marquette, secretary Edward H. Pappas of Bloomfield Hills and treasurer Charles R. Toy of Lansing.

The State Bar of Michigan was established in 1935. All practicing Michigan attorneys and judges must be active members in good standing. The purpose of the State Bar, as set forth by the Michigan Supreme Court, is to "aid in promoting improvements in the administration of justice and advancements in jurisprudence, in improving relations between the legal profession and the public, and in promoting the interests of the legal profession in this state."

## Social Security Section Mission:

The Social Security Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the Section webpage, 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.

# Annual Meeting in Grand Rapids this Year

Our annual meeting will be held Friday, October 7, 2005 in Grand Rapids at Grand Valley State College in downtown Grand Rapids. The time is 9:00 a.m. until Noon. Representatives from the Grand Rapids Hearing Office, Disability Determination Service and the District Office will be present to discuss the current state of affairs including the latest on electronic filing.

This is the time to voice your questions or concerns regarding the proposed regulation changes in the disability process, the confusion caused by California transfer cases, or any other concern you wish to bring up that can help our organization to better serve Claimants.

You should have received a flyer already. If not, use the registration form at right for this free event.

## Social Security Section Presents the Annual Summit Meeting with the Social Security Administration



October 7, 2005  
9:00 am - 12:00pm  
Grand Valley State University  
Eberhard Center  
301 West Fulton  
Grand Rapids, MI 49504



### Speakers:

Administrative Law Judge Douglas Johnson,  
Grand Rapids Office of Hearings and Appeals  
Sue Gilbert, Hearing Office Director,  
Grand Rapids Office of Hearings and Appeals  
Tom Ward, Professional Relations Officer, Kalamazoo DDS  
Pam Guinn, Technical Expert, Grand Rapids SSA Field Office

### Some points of interest are:

- \* Disability Statistics for Michigan
- \* Electronic Records Update
- \* Commissioner Barnhart's New Approach to the Disability Process
- \* Proper Forms at Proper Levels
- \* OHA Statistics


Free parking for conference guests in the Fulton Street lot just South of building. Lot is labeled Conference Guest Parking. Conference is on the 2nd floor of the Eberhard Center.

### Registration Information

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone Number: \_\_\_\_\_

 Mail registration to :  
Vonda VanTil  
Social Security Administration  
50 College Ave. S.E.  
Grand Rapids, MI 49503

## 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)

# SBM

STATE BAR OF MICHIGAN

MICHAEL FRANCK BUILDING  
306 TOWNSEND STREET  
LANSING, MI 48933-2083

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

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