

STATE BAR OF MICHIGAN
SOCIAL SECURITY

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



Fall 2006
Editor: Lewis M. Seward

Changing of the Guard - Barnhart Speaks at the NOSSCR Phoenix Conference

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Barnhart has not been reappointed by the president and therefore this was her last time addressing NOSSCR. The President has nominated Michael Astrue, bureaucrat-turned-pharmaceutical CEO. Barnhart is not a fan of privatization with social security. Michael Astrue is. Since Barnhart's term expires in January after the November election, the president is waiting until the elections to begin the confirmation process, hoping that there will be a majority of Republicans on the panel to appoint Astrue.

At the NOSSCR seminar, Barnhart spoke of her accomplishments between 2001 and the end of SSA's fiscal year 2006. Namely, productivity at SSA has increased 12.8 percent and 25 percent at the hearing office. There were 140,000 more dispositions in 2006 than in 2001. The Appeals Council's average time waiting for a disposition went from 447 to 203 days. That was easy to accomplish since the denials were affirmed at a faster rate.

She spoke of the implementation of the new DSI system that began August 1 in the Boston region. They have over 15,000 cases in the pipeline at this time. Two hundred and fifty of those were flagged by the computer

as quick disability (QDC) cases (such as cancer or AIDS cases). The average processing time for those cases has only been 10 days.

There is an independent audit unit (IAU) which has been monitoring the QDC dispositions. The IAU reports a 98 percent accuracy of agreement in the QDC decisions.

Forty-three new administrative law judges (ALJ) will be added this year, although Barnhart requested 100. Due to budget cuts, the hearing office will replace only one out of three workers who leave. Even a more devastating impact is at the district office. Only one employee will be replaced for every eight that leave.

The next region to be implemented for DSI will be Denver, then Seattle, and then Kansas City. Barnhart does not expect to have Denver begin the DSI program until there has been at least one year of evaluation for the Boston region. Her goal is to have DSI rolled out completely in five years.

The reviewing officials just completed their eight weeks of training. Out of the 120 that have been hired, Barnhart was proud to say that 10 were hired outside of the government agency. Many of the reviewing officials hired were from the

Continued on next page

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Changing of the Guard . . .

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Appeals Council. That means 92 percent of ROs will be programmed to affirm DDS denials.

As discussed in a previous article in this Newsletter, one of the strongest forces known to mankind is bureaucratic self-preservation. As the Appeals Council phases out, the Appeals Council's employees will merely work for the RO instead. The goal is to have between 1,500 and 2,000 ROs when fully implemented. Each RO will have at least one clerical staff and one to two analysts. The analyst's position apparently satisfied union demands that represents DDS (which strongly lobbied for non-attorney ROs).

With the new DSI rolled out in the Boston region, there has been one major complaint; that is hearings are not being scheduled because of the training and other logistical changes that need to be made with the new DSI program. Barnhart insists that this is only a temporary problem, and hopefully by the end of this year, the hearing office can begin to wrap up its scheduling of cases.

A new agency was established, called the Disability Policy and Program Council (DPPC). Apparently, this agency is going to analyze what changes need to be made with the new DSI system. Regulations that are not effective will be tweaked to be more effective to ensure an increase in denials.

Other important changes are happening with the new DSI program. A group of medical examiners and VEs is being assembled in Baltimore. It is anticipated that as part of the DSI system, these experts will be located in one area to analyze cases throughout the entire nation. Social Security is also setting up a national standard for CEs so that the physicians doing examinations will be more uniform in their superficial evaluations.

Social Security has also implemented an electronic case analysis tool (ECAT) that is supposed to assist DDS examiners in the new DSI region to address all is-

sues in any case. The same type of system will be set up for the reviewing officials. Additionally, Social Security has devised a Decisional Tool that is used for all decision writers in the new DSI system.

William Taylor, executive director of the Office of Appellate Operations, spoke briefly to discuss the new Disability Review Board (DRB). His goal is to have the DRB up and running by the end of the year. He expects to have cases to the DRB by this spring. He said that one of the goals of DRB is to do a post-mortem analysis of cases. In other words, there will be an analysis in the DRB to determine how the case got there in the first place. The analysts will look at why DDS denied the case and why the RO did not approve the case.

At this juncture, the DRB will review all decisions by the ALJ, whether favorable or unfavorable. The eventual goal is to only review the favorable decisions. Right now, they want to analyze every single case to tweak the DSI system in order to maximize the number of denials.

In answer to one of the questions by one of the NOSSCR attendees, Mr. Taylor indicated that the DRB will be looking at the favorable ALJ decisions as a higher priority than the unfavorable decisions to speed up the process to get those claimants into pay status.

There is a 10-day deadline to submit a written statement to the DRB. The DRB must make its decision within 90 days, or the ALJ's decision becomes final. The factual issues are decided under the Substantial Evidence Standard, while issues of law will be evaluated under the de novo review standard.

Michigan will be one of the last states to be implemented under the DSI system. DSI is not expected to be changed in any substantial way, although there will definitely be some tweaking to the program.

Editor

New Ruling Clarifies Acceptable Medical Source Regulations

A new Social Security Ruling, SSR 06-03p, effective August 9, 2006, clarifies the distinction between acceptable and non-acceptable medical sources in adjudicating disability claims. This ruling is timely from the standpoint that medical care is becoming more decentralized than ever. Claimants who have Medicaid or other needs-based medical insurance will find themselves being treated more and more by physician's assistants, nurse practitioners, or mental health professionals. Although the ruling doesn't give these medical caregivers equal footing with M.D.s, D.O.s and Ph.D.s, it requires the adjudicator to apply the same six factors under the treating source rule of 404.1527(d) and 416.927(d), i.e., length and frequency of treatment, consistency of the opinion with the evidence, specialty, explanation of the opinion, and any other factors.

In other words, if your client's main treating source is a nurse practitioner or physician's assistant and they give an opinion as to the nature and extent of your client's impairment, it is incumbent upon the ALJ to apply the six factors described above. Failure to do so would be reversible error.

By way of further explanation, this ruling also indicates that an opinion from a medical source who is not an "acceptable medical source" may outweigh the opinion of an "acceptable medical source," including medical opinion from a treating source. The Commissioner apparently feels very strongly about this, as this is repeated in two other places in this ruling.

This new ruling gives the example that a non-acceptable medical source may be given more weight "if he or she has seen the individual more often than

the treating source and has provided better supporting evidence and a better explanation for his or her opinion." The ruling also lists other sources, such as teachers, counselors, and social workers, who are non-medical professionals but still must be evaluated under the 1527 six-step analysis when they give their opinions about your client's medical condition.

In light of dwindling funds earmarked for healthcare for the poor, more and more of our clients are being treated exclusively by a P.A. or nurse practitioner. This ruling gives Social Security more guidance in evaluating these valuable opinions and assists the attorney if it becomes an issue in the claimant's case.

To access this ruling, go to the Social Security website at "Our Program Rules" and click on Rulings. It is also found in Federal Register Volume 71, #45593 August 9, 2006.

Editor

Case Backlog is at an All-time High

We just received the statistics for the fiscal year ending August 31, 2006. Michigan is disproportionately backlogged due to the high number of receipts compared to the nation.

Due to reductions in SSA's budget, the administration is replacing only one worker in three at the hearing office and one worker in eight at the local district office. There is a sense among the office employees that the president's agenda is to close down many of the district offices. This certainly is a good way of doing it by letting the local offices "die on the vine." Reduction in staffing comes at a time when there are increased demands on personnel, both in electronic filing, which has increased the workload at ODAR, and new SSI rules which place

a higher work level burden on the claims rep.

Nationally, there are 725,000 cases pending as of October 1, 2006. Of those cases, there are 51,000 pending in Michigan.

The most telling statistic is the cases per ALJ in Michigan. The national average is 672. Michigan is almost double the national average at 1,128. Of the 51,000 pending cases in Michigan, 3,000 are comprised of the Upper Peninsula and cases pending at other hearing offices throughout the country.

At right are the pending cases before each individual ODAR.

Compared to 20 years ago when the backlog was about one-third of what it is

	Cases Pending	ALJs
Detroit	10,300	11
Lansing	7,000	7
Oak Park	11,600	12
Flint	8,300	6
Grand Rapids	11,250	7
	48,450	43

today, we had the same number of ALJs in Michigan. When combined with the reduction in staffing, the picture looks very bleak.

The Commissioner asked for 100 new ALJs this year and was only able to budget 43 positions. It is unknown how many of those new ALJs will be assigned to Michigan.

News of Note

I Didn't Know That

The editor recently had a case in which there was a lengthy delay in obtaining a decision in federal court, so the claimant filed a new claim since he had just turned 50. He was granted at the initial level on the new case while his older case sat pending in district court. While he was in pay status on the new claim, his federal case was remanded by the district court. We eventually won the case on the record.

After we had won the case, the claimant called, complaining that his monthly decreased by almost \$100 a month. I told him it had to be a mistake. I found out later that I was wrong.

When the case was processed for payment, the older claim that we had just won went back an additional four years. The PIA, of course, was lower four years earlier due to the cost of living. The claimant's case went back an additional four years from 2002. His PIA had to be re-computed using the 1998 entitlement date. That effectively reduced his PIA by \$100 in 2006. Of course, he was still much further ahead because of his large retro award, but his monthly benefit decreased by almost 10 percent.



Drug/Alcohol and Materiality

If the adjudicator cannot determine what limitations would remain if alcohol or drugs were stopped, then DA&A is not material to the finding of the disability determination. This is found in emergency message EM-96200, entitled "Questions and Answers Concerning DA&A" from the 7/2/96 teleconference (Question #28).

EM-96200 has been extended to January 30, 2007. SSA has continuously extended the expiration date, which has been important since regulations still do not reflect the 1996 changes. EM-96200 can be obtained online at <http://tinyurl.com/gsg4z>.



New Regulations Review of SS File

There are some proposed new rules on privacy disclosure under 71 Fed. Reg. 53994, September 13, 2006. The proposed regulation requires written consent, which must clearly specify to whom the information may be disclosed. This means the individual attorney, not just the law firm. The consent must also include which information is to be disclosed and the timeframe during which that information may be disclosed.

The new proposed rules will not honor a blanket request for all information. SSA will disclose only information specified in the consent.



New SSI Resource Rules

Effective September 8, 2006, SSA has issued new regulations regarding SSI income and resource rules (71 Fed. Reg. 45375 August 9, 2006), that is available at www.ssa.gov. The rules revise the regulations dealing with determining irregular income, how to characterize gifts for educational expenses and interest or dividend income.

Apparently, the claims reps have been complaining that the rules are too complex and too time consuming to apply.

Income up to \$30 per quarter for earned and \$60 for unearned income is excluded now. Social Security defined "infrequent income" as money that is received only once during a calendar quarter from a single source... "we consider income to be received irregularly if you cannot reasonably expect to receive it."

Social Security is now excluding interest income from resources, since resources can only total \$2,000.

Gifts that are used to pay education expenses are excluded for nine months. Grants or scholarships for education expenses have always been excluded unless used for another purpose.



Immune System Disorders Listing is Being Revised

SSA has proposed changes to the Immune System Listing for both adults and children published in the Federal Register August 4, 2006 (71 Fed. Reg. 44431). Social Security intends to reorganize the listing to make it easier to follow. Additions such as HIV and other autoimmune disorders have been streamlined to make it less burdensome. Additionally, Sjogren's syndrome is now given a listing level impairment (Sjogren's is an autoimmune disease with one of the principal symptoms being vision problems).

Kick up your heels!



You can find back issues of the Social Security newsletter at

www.michbar.org/socsecurity/newsletter.cfm

6th Circuit - *Swartz v Barnhart*

The editor argued a 6th Circuit case in October 2005 and finally received the court's decision nine months later in July 2006. This is one of those cases with a DLI of December 31, 1997. The claimant's first application was filed in 1994, and she did not appeal. Agnes Swartz managed to work at a nursing home for many years, although she struggled to keep up with the pace at work. She never attempted to obtain her CNA.

We filed a request to reopen the 1994 application. During the time before the hearing, a statement was taken by the family physician, who indicated that Ms. Swartz had a difficult time comprehending his advice. This was the reason her sister accompanied Ms. Swartz during most of the doctor appointments.

A state agency psychiatrist performed a mental status examination and found Ms. Swartz suffering from depression. The editor sent Ms. Swartz back to the same psychiatrist to do an IQ test, where she scored between 72

and 76. The psychiatrist gave an opinion that it appeared from her history that borderline intellectual functioning had been a lifelong condition.

ALJ Musseman discounted the psychiatrist's opinion, indicating that his evaluation was in 2001, which was four years after her DLI. He rejected Dr. Wagner's treating physician statement for basically the same reason. ALJ Musseman found that Ms. Swartz was only entitled to a current period of disability, which was beyond her date last insured, so she only qualified for SSI.

The two issues on appeal were an inadequate RFC and the motion to reopen under SSR 91-5p. Although the statute of limitations for reopening had long since expired, SSR 91-5p has no statute of limitations. SSR 91-5p looks at the claimant's mental state to determine whether he or she has the emotional ability to understand his or her appeal rights.

Following a district court affirmation, the 6th Circuit ruled that Judge Musseman's decision failed to adequately explain why little weight was given to the psychiatrist's and the treating physician's opinions that

her problems appeared to be lifelong. The court of appeals noted that the ALJ's finding that Ms. Swartz never sought any mental health treatment completely ignores the family physician's findings and his opinion. The court of appeals ruled that the RFC was inadequate, as it failed to include her problems with keeping up with the pace of work.

The 6th Circuit also favorably ruled on the motion to reopen the denial of 1994. The court of appeals found that the ALJ's error in ignoring the work performance evaluation in 1992 "coupled with the failure to account for the medical opinions that many of Ms. Swartz mental problems were lifelong conditions leads us to conclude that the findings are not supported by substantial evidence and that a remand for further consideration is required."

The citation for this case is: *Swartz v Barnhart*, 2006 WL 1972086L 2006; Fed. App. 0489N, C.A.6 (Mich), July 13, 2006.

Editor

Past Relevant Work

We all know that past relevant work for purposes of a Step Four determination is defined as work done within the past 15 years (20 CFR 404.1560(b)). However, the POMS also states that the 15-year past relevant work period is before the date last insured. (POMS DI 25001.001) Social Security ruling 82-62 also explains that past relevant work is work that precedes the date last insured.

The intent is that work that is performed after the date last insured cannot be considered past relevant work for a Step Four finding. This becomes important if you have a claimant who has a work history that may be classified as light or medium prior to the DLI, and then performs a sedentary job after the DLI. With a claimant who's 50 or over, the ALJ cannot consider the current sedentary work as qualifying past relevant work for periods of a Step 4 or Step 5 decision. The judge must proceed to Step 5 of the sequential evaluation process. See *Gossett v Barnhardt*, 374 F Supp 2d 505 (E.D. Tex 2005).

“I believe more in the
scissors than I do in
the pencil.”

TRUMAN CAPOTE

MICHIGAN **Bar Journal**

short-story contest

entry deadline

1 March 2007



rules and entry form

www.michbar.org/publications/bar_journal.cfm

An independent panel of judges will select up to three winning entries:
Winning entries will be published in upcoming issues of the Michigan **Bar Journal**.



SBM Offers Equal Payment Plan for 2007-2008 Dues

As a new service, the State Bar of Michigan is offering a pilot program to interested members who would like to participate in a voluntary equal payment plan for paying their State Bar annual membership dues. A recently conducted survey of the SBM membership confirmed that there is an interest in spreading the dues payments over the year to ease the burden of paying State Bar dues in one lump sum.

If you are interested in making your dues payments in equal installments paid in advance of the Bar year, this pilot program works as follows:

Your annual State Bar of Michigan dues of \$315 (comprised of \$180 for the State Bar portion, \$120 for the Attorney Discipline System, and \$15 for the Client Protection Fund) will be divided into four equal payments of \$78.75 each.

All equal payments will be paid in advance of the 2007-2008 Bar year beginning October 1, 2007, in four quarterly installments: December 31, 2006; March 31,

2007; June 30, 2007; and September 30, 2007. You will be asked to provide credit card information to charge the payments each quarter, and you will be notified by e-mail when we charge your credit card.

After all advance quarterly payments are made for the 2007-2008 Bar year, on October 1, 2007, we will notify you to log onto our e-Commerce website and complete the dues form and all necessary disclosures at that time. You will also be able to make any additional payments for section memberships or other voluntary contributions. The total amount due, less any quarterly payments already made in advance of the dues year, will be charged to your credit card after you complete your dues form online through the e-Commerce website.

This pilot program requires you to notify the State Bar if your credit card information changes. If your

credit card cannot be charged, you will be terminated from the pilot program and provided a refund.

You may opt out of the pilot program at any time, and we will either apply any advance payments made to your 2007-2008 dues or refund your payment by issuing a credit to your credit card.

We will evaluate whether to make this pilot program a permanent service based on the number of members who participate. If you are interested in this program and would like to participate, please follow the link, <http://www.zoomerang.com/recipient/survey.zgi?p=WEB225P2YL7DYM>, before November 15 to sign up to participate in the Equal Payment Plan pilot program. You will receive further instructions after you sign up for the program, including the terms and conditions.

Please contact James Horsch at (517) 346-6324 or jhorsch@mail.michbar.org if you have any questions regarding this program.



"As we express our gratitude, we must never forget that the highest appreciation is not to utter words, but to live by them."

—John Fitzgerald Kennedy

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SOCIAL SECURITY SECTION MEETINGS

Friday, February 2, 2007 State Bar of Michigan Building
Lansing
10 a.m.

Friday, May 18, 2007 State Bar of Michigan Building
Lansing
10 a.m.

DETAILS TO BE ANNOUNCED LATER.

SBM

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