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**SOCIAL SECURITY**

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## Questioning the Vocational Expert

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We were honored to have the chief ALJ for the United States, Frank Cristaudo, and the Hon. Peter Dowd, acting chief ALJ for the Flint hearing office, speak at the Eastern District Federal Bar Association in Detroit. Cristaudo supervises more 1,100 ALJs and 140 ODAR offices; Dowd has worked with SSA for more than 30 years in many different capacities. Through their experiences, both judges brought a wealth of information to the seminar. You may be surprised to know that for 12 years, Judge Cristaudo represented Social Security claimants prior to working for SSA. He is also one of the earliest NOSSCR members, going back to the 1970s.

In his preliminary remarks, Judge Cristaudo indicated that SSA is still planning on opening hearing offices in Mt. Pleasant and Livonia. He acknowledged that the agency has been underfunded and understaffed for many years and indicated that 2.9 million cases were adjudicated at the DDS level. There is an average of 670 cases per ALJ in the nation, and each ALJ needs five full-time equivalent staff members. The agency's ultimate goal is to reduce cases per ALJ to approximately 260.

The topic of the meeting was vocational issues and vocational expert testimony at administrative hearings.

### Vocational Issues

Judge Cristaudo first talked about past relevant work having three elements: (1) whether the work was done at the SGA level; (2) whether the work was performed long enough to meet the durational requirement (usually 90 days); and (3) whether the work was performed in the past 15 years. If work in the last 15 years was not done at the SGA level, such as a telemarketer, then it would not qualify for past relevant work. This could be important if the client's onset date began at age 50 and all other past relevant work was light or heavy. Judge Cristaudo also indicated that the durational requirement for past relevant work was dependent upon the position. In other words, a dishwasher may be only 30 days while an attorney could be nine months to a year.

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## Questioning . . .

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Framing the RFC is also of critical importance. The RFC must be converted into functional terms. A simple way to look at it is that impairments cause symptoms, and symptoms cause limitations. These limitations must be converted into functional terms. There are seven exertional limitations – sitting, standing, walking, lifting, carrying, pushing, and pulling. There are also many non-exertional limitations such as visual, auditory, manipulative, and feeling; environmental limitations such as heat, humidity, dust, and fumes; and mental limitations.

Judge Cristaudo also talked about problems in terms related to RFCs. The proper terms to be used are never, occasional, frequent, constant, and concentrated. Terms such as moderate, fair, reasonable, low, mild, often, and low stress are subject to misinterpretations. An RFC using these types of terms is a recipe for reversible error if the case is denied. “Occasional” is defined as occurring up to one-third of the work day, “frequent” up to two-thirds of the work day, and “constant” up to 100 percent of the work day.

An improper question would be to ask the VE, “Assuming full credibility of the claimant’s testimony, can the claimant perform his/her past relevant work or any work?” Another improper question would be to ask the VE a psychological or medical question. The bottom line in phrasing a question to the vocational expert is the more specific, the better. It is also critical that the question be based upon the evidence of record.

## Work Skills

Judge Cristaudo explained the difference between skills and aptitude. A skill is an aspect of work that takes 30 days or more to learn to perform in an average level of performance, and is based on past relevant work. A skill attaches to an occupation. By contrast, an aptitude attaches to a person (i.e., eye/hand coordination). Work skill must be obtained from work. Therefore, a person who builds furniture as a hobby would not be found to have past relevant work as a furniture maker or cabinet builder.

In determining whether a worker has transferable work skills, there are many factors to review. First, make a determination as to whether the work is semi-skilled or skilled. Obviously, unskilled work would not have transferable work skills. Look at the SVP. If the VE or DOT rates it as a one or two, then it is unskilled and there are no transferable work skills.

The work must be past relevant work with all of the attributes associated with past relevant work. When determining whether there is transferable work, the occupations must be identified, and the RFC must allow the performance of those occupations. The alternate occupation must be able to be performed within those narrowly defined transferrable work skills. The alternate occupation cannot require other skills that are not based upon transferable work skills. The alternate work must also require very little work adjustment.

It is also important to make sure that jobs listed by the vocational expert are consistent with the information in the DOT. This is found in Ruling SSR 00-4p. The practitioner is reminded to look at the prior rulings, especially those dealing with framing an RFC (i.e., SSR 83-12; 83-14; 85-50 and 96-9p).

ALJ Dowd discussed vocational issues from a hearing standpoint. He reminded practitioners to be sure to explain the role of the VE and the sequential evaluation process to clients. Practitioners need to look at the RFC established by DDS, especially if the finding at the initial level was that the claimant could perform past relevant work. Hopefully, further evidence following the DDS denial demonstrates that the client does not have that RFC. If not, there would be no reason to change the RFC.

Judge Dowd also indicated that practitioners need to look at work after the onset date, and suggested that a detailed earnings query called a DEQY be obtained. There is also another query called a NDNH, which is a summary of currently reported earnings. Judge Dowd also reiterated Judge Cristaudo's feelings that the hypothetical to the vocational expert must be based upon evidence of record. In other words, do not ask if the hypothetical worker could perform work if he needs to lie down two or three times a day if your client did not testify to that in the first place.

Judge Dowd indicated that the practitioner must be prepared in advance for potential questions to ask the vocational expert. The hypothetical(s) should be developed before the hearing.

We would like to thank the Eastern District Chapter of the Federal Bar Association for organizing and arranging a very informative seminar. ☆

## Fee Cap Increased to \$6,000

Effective June 22, 2009, the cap in fee agreement cases will increase to \$6,000. In order to be eligible for the fee increase, the fee agreement must contain an "escalator" clause. An escalator clause allows a higher fee to be authorized even though a lower fee cap was in effect at the time the agreement was signed.

There is a new POMS which gives important guidance in evaluating samples of acceptable escalator clauses. As an example, "If SSA favorably decides the claim, I will pay my representative a fee equal to the lesser of 25 percent of my past-due benefits or [insert the specified dollar amount] established pursuant to section 206(a)(2)(a) of the Social Security Act or such higher amount as the Commissioner of Social Security may prescribe pursuant to section 206(a)(2)(a) of the Social Security Act."

This and other examples can be found under POMS GN 03940.003, which was revised on February 24, 2009. The POMS are found under the drop-down box on the SSA website, [www.ssa.gov](http://www.ssa.gov). Go to "Other Useful Links" and look up "Our Program Rules." You will then find the POMS under "Program Operations Manual System."

The user fee remains 6.3 percent for 2009. Additionally, a bill introduced this February contained a provision for an increase in the current fee cap to \$6,264.50, with an annual cost of living adjustment for future years. The details of the bill are available online at <http://thomas.loc.gov/>. The bill was introduced by John Lewis (D-Ga.) under H.R. 1093. ☆

Section meeting June 12, 2009 at the Vista Tech Center at Schoolcraft College in Livonia.

The topic is going to be mental impairments. We are featuring Dr. Lozer, a well known psychologist and vocational expert and another guest speaker to be determined. Please watch your mail or e-mail for the specific time and registration form.

# New Rulings Clarify Children's Disability Cases

The Administration has published new Social Security rulings which clarify and explain the six domains of broad areas of functioning. There was a need to consolidate the plethora of regulations into a more concise format which was more than four years in the making.

According to SSA's definition, domains are intended to capture all of what a child can or cannot do and are divided into six functional areas: (1) acquiring and using information; (2) attending and completing tasks; (3) interacting and relating with others; (4) moving about and manipulating objects; (5) caring for self; and (6) health and physical well-being. The rulings are laid out in an orderly fashion and are quite detailed.

The following are some of the rulings:

- SSR 09-3p evaluates the domain of acquiring and using information. The ruling explains that this domain considers more than just an assessment of cognitive ability, i.e., IQ test or grades in school. It also evaluates how well children learn, understand concepts and symbols, and learn how to read, write, and do arithmetic. The ruling indicates that acquiring and using information involves evaluation of learning at school, at home, and in the community. There are special sections within this ruling under preschool and school evidence, special education services, and other accommodations such as front-row seating in the classroom, allowing more time for tests, and after-school tutoring.

There are a large number of examples of typical functioning within the domain of acquiring and using information which are further categorized by age.

- The ruling of "interacting and relating with others" looks at the child's ability to initiate and respond to exchanges with other people and to form and sustain relationships with others. In evaluating this domain, all aspects of social interaction with individuals or groups at school, in the home, and in the community should be evaluated. The ruling

indicates that some of the more important aspects of interacting and relating to others are the child's response to persons in authority, compliance with rules, and regard for the possessions of others.

There are very good examples of what the regulations mean by "interacting with others" and "relating with others."

- The ruling, "moving about and manipulating objects," considers the physical ability to move one's body from one place to another as well as manipulating things via gross and fine motor skills. This ruling under SSR 09-6p gives many examples of moving one's body and manipulating objects. It also discusses the difference between this domain and the health and physical well-being domain. There are several good examples of limitations in this domain which were drawn from the regulations as well as training manuals.
- SSR 09-7p discusses caring for one's self. This domain does not address the child's physical abilities. Those are addressed in "moving about and manipulating objects" under "health and physical well-being." The domain of caring for self focuses on how well a child relates to "self" by maintaining a healthy emotional and physical state in ways that are appropriate when compared to children of the same age without impairments. This domain looks at the child's emotional wants and needs and evaluates the child's ability to appropriately cope with negative feelings and express positive feelings. It also covers physical wants and needs such as following safety rules, asking for help when necessary, and making decisions that do not endanger one's self.

Examples of limitations in this domain are such things as engaging in self-injurious behavior, disturbances in eating or sleeping patterns, and lack of appropriate feeding, dressing, bathing, or toileting for age.

- There is also a ruling under the functional equivalence of the “whole child” approach. SSR 091p considers how the child functions every day in all settings as compared with other children of the same age who do not have impairments.

“Functioning” refers to activities that the child does throughout the day at home, school, and in the community. It looks at things such as getting dressed for school, cooperating with care givers, playing with friends, and doing class assignments. It looks at the activities the child is able and unable to perform as well as activities that are limited or restricted.

This ruling is a good starting point in determining how to use the six domains. It discusses how examples of activities may require multiple abilities, and therefore may affect more than one domain. It also gives the practitioner and adjudicator guidance on common problems and which domains could be impacted by those problems.

There is also an excellent chart that provides a picture of the child functioning with information about several factors that are relevant in determining the severity of the limitation (FR 7532).

The new rulings follow the same general pattern of giving an overall definition of the domain followed by a detailed explanation. The rulings also discuss the difference between the domain and other domains and give typical examples of appropriate functioning as well as examples of limitation in each domain.

Any practitioner who represents children should take the time to review these rulings. They can be found online on both the Federal Registry website ([www.gpoaccess.gov/fr/index.html](http://www.gpoaccess.gov/fr/index.html)) and also on the SSA’s website ([www.ssa.gov](http://www.ssa.gov)) under “Other Useful Links”—click on “Our Program Rules” and you will find the rulings there. The best way to find the ruling is to go to the “Finding Lists” and proceeding to “Yearly Listings.” ☆

## Sixth Circuit Case of *White v Commissioner*

One of our members, Jim Rink, recently received a remand in the Sixth Circuit in the case of *White v Commissioner*, 2009 WL 454916(C.A. 6 Mich). Although this is an unpublished opinion, there are some real gems in the decision written by the Honorable Karen Moore. The U.S. magistrate judge, Ellen Carmody, recommended that the case be remanded for further proceedings, but unfortunately this was reversed by the presiding district court judge. Mr. Rink argued that the ALJ erred by failing to consider Mr. White’s significant mental impairments and not crediting his testimony particularly on the effects of his pain and pain medication. There is some good language regarding determining how much weight to give a treating physician. The decision draws from prior, well-established case law citing the cases of *Wilson*, *Rodgers*, and *Walker*.

Judge Moore discussed how there was a lack of articulation in discounting the new evidence of Mr. White’s mental impairment. (See b, “Significant Mental Impairment.”). There is also a good discussion on the credibility analysis and how the ALJ mischaracterized the claimant’s testimony.

The Sixth Circuit concluded that as with the *Rodgers* case, the ALJ’s decision fails to contain specific reasons for the findings on credibility supported by the evidence in case record and is not sufficiently specific to make clear to the individual or to any subsequent reviewers the weight the adjudicators gave to Mr. White’s statements and the reasons for that weight.

Lastly, there is a good discussion on the hypothetical question to the vocational expert and the difference between an RFC and a hypothetical. Reversible error was found, as the hypothetical did not accurately portray Mr. White’s mental impairments and did not take into account the side effects of pain medication. Upon cross-examination by Mr. Rink, the vocational expert testified that the listed jobs would be eliminated if the hypothetical claimant doses off during the day as a result of the side effects of pain medications. The court noted that Mr. White had been on several potent pain medications, including Valium, Vicodin, and a Duragesic patch, which are known to have powerful side effects such as drowsiness, fatigue, light-headedness, and weakness. ☆

# Month-Long Michigan Pro Bono Celebration Planned for October

The American Bar Association has designated the week of Oct. 25-31 as National Pro Bono Week, and all across the country lawyers will be taking part in events to educate the public and the legal profession about pro bono and to honor those in the legal profession who routinely provide free legal help to improve the lives of the needy.

In Michigan, the State Bar's Pro Bono Initiative is going further by designating the full month of October as Pro Bono Month and urging members of the legal community, legal service providers, and bar associations to coordinate their pro bono events with the State Bar and national celebrations.

"Pro Bono Month will be an opportunity to shine the light on the good works of attorneys who help in many different ways to deliver civil legal aid to those who need it most," said Ed Pappas, president of the State Bar of Michigan. "Pro bono help does not just mean representing indigent clients free in court. Pro bono can also include an attorney making a financial contribution of \$300 annually to promote civil legal aid or providing 30 hours of legal services to low-income individuals or not-for-profit organizations providing direct services to the poor."

The Pro Bono Initiative encourages organizations to plan free events such as training sessions, legal aid clinics, or recognition of pro bono attorneys and to inform the State Bar of these activities so they can be listed and publicized on the Bar's online calendar and website. More details about these listings are forthcoming.

To ensure that your local pro bono efforts are recognized and publicized by the State Bar, contact Dionnie Wynter at [dwynter@mail.michbar.org](mailto:dwynter@mail.michbar.org) or (517) 346-6412. For more information on the national pro bono effort, visit [www.celebrateprobono.org](http://www.celebrateprobono.org). To find out how to obtain a referral for a pro bono case, contact the State Bar or your local legal aid program. To make a financial donation through the Access to Justice Fund to support legal aid, visit [www.atjfund.org](http://www.atjfund.org).

# e-Journal Now Available for Mobile Devices

The State Bar of Michigan e-Journal publication is now available in a format easily viewed by smart phones, PDAs, and other mobile devices. Current subscribers can simply select the mobile version link in their daily e-mail or click the "mobile version" link at the top of the e-Journal page.

The e-Journal, a daily electronic newsletter sent free of charge to more than 16,000 subscribers, updates the legal profession daily on changes in the law and summarizes opinions to help attorneys stay up-to-date with the law as it emerges from the courts. Apart from case summaries, the publication also contains legal news, public policy updates, classified advertisements, a calendar of events, and fields of practice listings.

Since it came into existence ten years ago, more than 37,000 appellate and district court opinions and orders have been summarized in the e-Journal. It has become one of the most popular services provided by the Bar. To sign up for the e-Journal, visit [www.michbar.org/publications/signup.cfm](http://www.michbar.org/publications/signup.cfm).

## The Following Resources can be Found on Our Website at

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

### ALJ Wm. King's Forms:

- Mental RFC
- Physical RFC
- Request for On-The-Record Decision
- Social Security Law Federal District Court Practitioners

### Policy Interpretation Ruling Titles II & XVI: Evaluation of Obesity

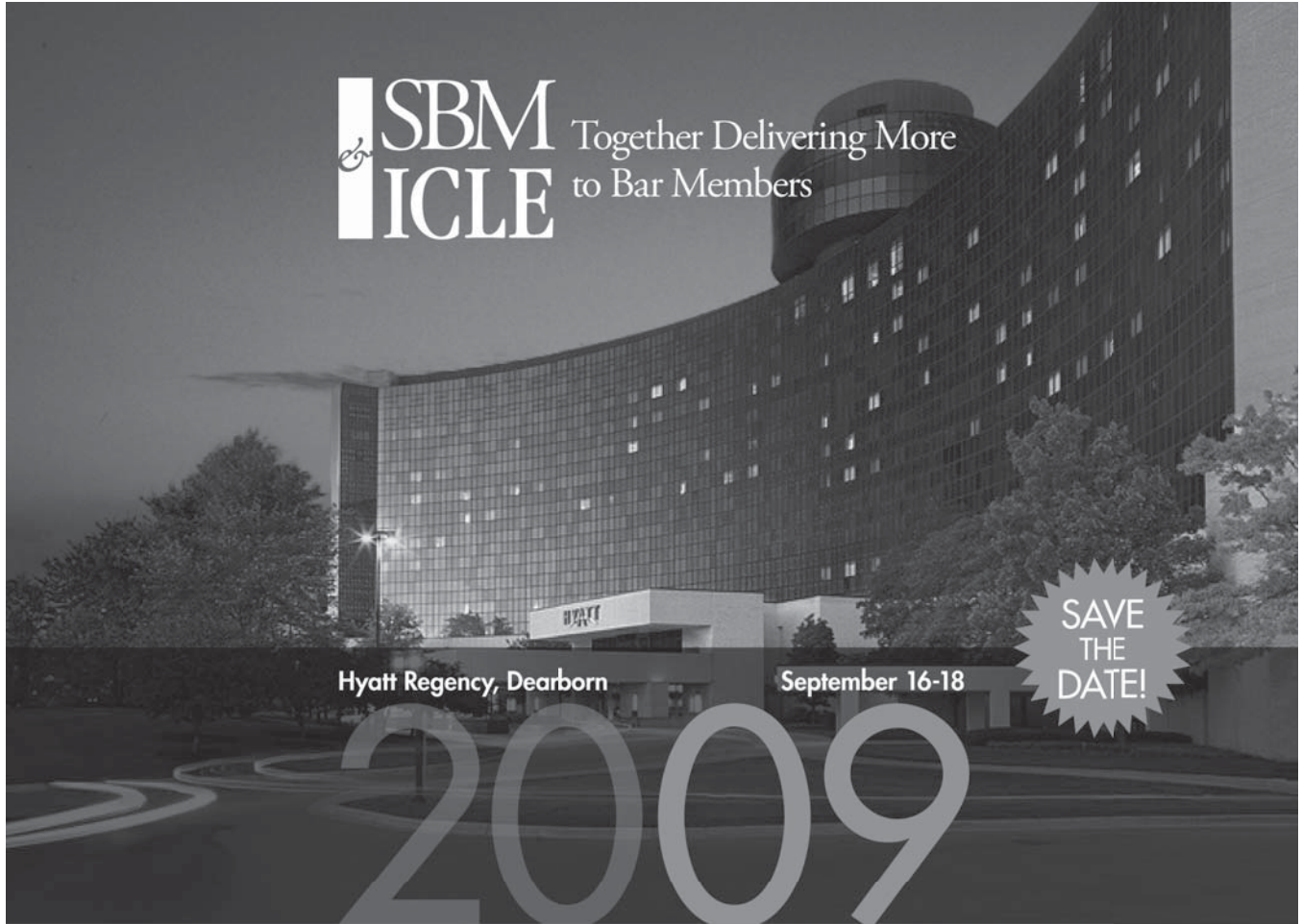
-Provides guidance on SSA policy concerning the evaluation of obesity in disability claims files under titles II&XVI of the Social Security Act(the Act)

### -Processing SSI Fee Petition/ Agreement Cases

A description of the policies and procedures that pertain to authorization of fees for representatives of SSI claimants under the fee petition/agreement process.



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