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SOCIAL SECURITY

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Editor: Lewis M. Seward

Commissioner Barnhart Speaks at NOSSCR Seminar in Orlando on the New Disability Process

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Commissioner Barnhart spoke on fine-tuning the proposed changes that will result in a drastically different review process than we have been accustomed to. Although the names and the faces will be the same, the rules will be dramatically different to the detriment of the claimant. The appeals council is still scheduled to be on the chopping block. However, the appeals council will not be closed until all circuits are up and running with the new review process. In other words it will be a slow death for the appeals council. Those employees will most likely transfer to the decision review board (DRB).

Commissioner Barnhart explained that the appeals council has not yielded the benefits it was supposed to. She noted that the appeals council reverses only 2 percent of the cases, making the federal court the safety net rather than the appeals council.

Although the Commissioner's stated goal is to obtain the right decision, as early in the process as possible, this new process will increase the processing time for claims as a result of two additional layers of bureaucracy

created. The Quick Disability Determination Unit is supposed to adjudicate the cases of claimants who are seriously ill in 20 days or less. However, this stated goal is factually impossible to attain since we all know it takes three to four weeks just to obtain the medical records. Additionally, the "quick" disability unit decision is meaningless and bittersweet for the seriously ill who discover they have a five-month waiting period for benefits to begin.

It appears that the only thing that the Quick Disability Determination Unit will accomplish is to statistically place these cases with the other cases that go to hearing in order to skew downward the average processing time per case.

Following public comments submitted, Commissioner Barnhart also indicated that the Reviewing Official will be an attorney rather than a non-attorney. This appears to be the only change from her original proposal. Everything else, including the Decision Review Board and closing the record 20 days before the hearing, will remain intact.

Commissioner Barnhart indicated that 100 ALJs were hired for the fiscal year 2005, and 100 more are scheduled

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Commissioner Barnhart

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to be hired in 2006. However, staffing is already less than adequate. This is the reason cases are not being pulled and put together in a timelier manner. Additionally, the lack of adequate staffing also impacts the time it takes to obtain a written decision.

Other Proposed Changes

Since Commissioner Barnhart announced the proposed changes in the review process, two other proposed changes in the regulations will adversely impact claimants. The first proposal is that the Grid Rules be increased by two years in each category, i.e., 52, 57, and 62. This proposal will allegedly result in a \$1.6 billion savings at least for the first two years that it is implemented. The rationale is that life spans are increasing thanks to medical science and therefore the changes need to reflect the demographics.

At first blush, this rationale makes sense. However, it also makes sense that due to advancements in medical science, healthy claimants do not file disability claims. The age should not be arbitrarily raised for those who are ill mentally or physically and should not have to wait an additional two years due to advancements in medical science. In other words, claimants who do not enjoy the benefits of medical advances should not have to wait two more years to qualify under the grids. This rule ignores the fact that most disability claimants do not have adequate health care, and therefore, do not have access to the advancements in medical science, especially medications to treat these conditions.

The bottom line is the proposed changes merely delay entitlement to benefits under the grids for the claimants who cannot either access medical care or do not improve medically. The only rationale for

the proposal is merely a short-term fix to save the trust fund money.

An additional proposed change is restricting retroactive SSI payments to claimants to only three months rather than 12 months. In other words instead of releasing 12 months at a time, SSA is proposing that only 3 months be released at a time for the first 2 installments with the third installment releasing the balance.

Again, this is a smoke-and-mirrors approach to showing that SSA has saved a significant amount of money in payouts to claimants when in fact it is merely delaying payment. These changes are designed to correlate with the election to show all the dramatic savings under the current administration. By delaying payments, the bureaucrats can take credit for the "savings" generated from both proposals, which is merely delaying payouts into the future. After the election, a successor administration will inherit the significant increase in program costs.

A large number of people were lined up to ask questions of Commissioner Barnhart after her presentation. However, she had only 10 minutes to address questions from two of the 20-plus members who stood in line to ask questions, since it was arranged for her to fly out immediately after her talk.

Her quick exit was quite unfortunate due to the significant problems associated with the Commissioner's new proposed disability process. Equally unfortunate was the fact that Nancy Shor spoke right after Commissioner Barnhart about the shortcomings of the new disability process. Commissioner Barnhart was not present to listen to Ms. Shor or the collective concerns of the membership following Nancy's presentation.

Editor



Inside the Sixth Circuit Court of Appeals

It was a uniquely fortuitous opportunity for the Editor to have oral argument in Cincinnati on the same day that the Sixth Circuit conducted a seminar. The first speaker was Leonard Green, the clerk of the court. Mr. Green spoke on office procedures that occur when moving a case along. There are 16 court of appeals

judges with 2 vacancies. Each judge hears approximately 200 cases per year in oral argument.

Social Security cases make up only 2 percent of the Sixth Circuit's docket. Additionally, the Sixth Circuit is the second busiest circuit in the nation with 31,000,000 people.

As you are aware, the Sixth Circuit is behind the curve on electronic filing. However, they are hoping that sometime by the year 2007 they will be on board with the electronic file.

Despite belief to the contrary, the three-person panel of judges is put together in random order by computer. Additionally, dockets are also intermingled to prevent hearing all criminal cases by the panel on a given day. Each panel hears six cases and then goes immediately into chambers to discuss the outcome of all six cases.

You probably would not be surprised to find out that it usually takes the panel less than a half-hour to decide all six cases with many of them decided within a few minutes. By the time your Social Security case gets to the Court of Appeals, it is at a minimum five-years old depending on whether you had an AC remand. It is certainly disheartening to find out that your five-year-old case will be decided among the panel of three judges within a matter of minutes. This obviously speaks volumes to the simple fact that nearly 98 percent of all Social Security cases filed by the Court of Appeals in the Sixth Circuit are affirmed.

However, do not let the statistics deter you from filing if you have a very good case. The best cases to appeal are the ones in which the ALJ clearly violated one or more regulations. Good cases to appeal are those that can survive the "harmless error" test set forth in *Wilson v Commissioner*, 378 F.3d 541, 544 (6th Cir. 2004), which is the Editor's case.

If you have never argued a case before the Sixth Circuit, you need to know that you have a maximum of 15 minutes to

argue your case. You have to tell the Court ahead of time how long you would like to reserve out of this 15 minutes for rebuttal. At a minimum you should reserve 3 minutes (leaving 12 minutes to argue your case). If you exceed your time limit and you are in the middle of answering a question you are still allowed to complete your answer. Once in a while the panel may pose another question beyond your time limit, and of course, it is perfectly acceptable to complete your answer.

The Chief Deputy, Janice Yates, also spoke on some of the procedural matters. It is very important for you to file an Appearance, which can be faxed to the Court. Without an Appearance, your name will not be added if the case is published (which means in some instances, it may not be a bad idea not to file).

Telephone arguments can be requested rather than enduring the day long journey down to the Court of Appeals. You must file a separate motion. Even if you fly down you almost have to go the day before least your flight be delayed.

The most interesting part of the seminar was listening to the appeals court judges speak about how they prepare for a case. After listening to six judges speak, the vital ingredient for the best and most persuasive brief is "keep it simple."

One interesting aspect of preparation for the case is that most judges have their law clerk prepare a Bench Memo. The bench memo summarizes the case from both parties. Due to the heavy volume of oral argument cases, as a general rule each judges' clerk on the three-judge panel prepares two bench memos. Since there are six cases heard by the panel the bench memos are copied and given to the other two judges. That is used as a template prior to the judge's reading the briefs. In other words, your five-to-seven-year old Social Security case is being summarized by a law clerk that knows

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Inside . . .

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little or nothing about Social Security law other than what is published in the Sixth Circuit. This system explains why the large majority (98 percent) of Social Security cases are affirmed.

Several of the judges candidly admit that they gloss over the briefs when the writing style is repetitive, contain typos, or are exceedingly long. The quickest way to turn off a judge on your panel is to draft a lengthy brief. The attorney needs to understand the MEGO effect (My Eyes Glaze Over). Likewise, it is important to remember to keep the number of issues to a minimum. The higher number of issues, the more likely you will prevent the court from focusing on resolving the case in your favor.

Surprisingly, most judges on the panel agree that oral argument can be outcome determinative. Therefore, the lesson learned here is that if you are serious enough to file a Sixth Circuit brief, you better be prepared to argue your case either in person or via telephone.

It should also be comforting to know that the panel doesn't convene ahead of time to discuss what questions to ask. They state they are just too busy to do that. However, the law clerk does draft

questions, and the judge may also draft his or her own questions. Rarely do judges talk to each other before the case starts. All communication is done by the law clerks via the bench memos.

It is also important to note that the summary of your argument in your brief can be quite important. In fact, some judges take only a copy of your summary of argument along with the bench memo and list of their questions into the hearing.

As of December 1, 2006, the most senior judge will not be the one necessarily drafting the decision. It is going to be done randomly with each judge responsible for writing two of the six decisions heard that day.

It is also important to remember that your brief is not the foremost authority on the subject matter of your issue. Several judges indicated that no matter how persuasive your brief is, the judges' world is not limited to the world you give them. This is a polite way of saying that they can use their gut instincts, common sense, and the arguments raised by Social Security to ignore the Commissioner's Regulations and case law.

Most of the judges indicated that when reviewing the court documents, the first place they begin with is the district court's opinion. Therefore, in writing your Sixth Circuit brief, you need to focus on resolving the points brought up in the lower court's opinion as well as the underlying ALJ decision.

Some judges will meet with the law clerk that briefed the case prior to the oral argument. The only time the law clerk is left out of the decision-making process is after the panel hears the oral arguments and then convenes to decide all six cases. However, their influence from the start of the case certainly carries over to the oral argument (in framing the questions) to the ultimate conclusion reached. The reason they are not allowed in the post-argument conference is to give the appearance that they did not influence the decision.

Knowing the inner-workings of the Court of Appeals goes a long ways in effectively advocating for your client. Remember that when you take a case at this level, make sure it is strong enough to withstand the rigid scrutiny of the Sixth Circuit - lest you create bad law.

Editor

Flint OHA Obtains Video Hearing Equipment

The Flint Hearing Office is in the process of gearing up to conduct video hearings. There still may be cases transferred out of the area, but the word is that at this time, those cases will remain in our region, rather than be transferred to a distant region such as California. Flint hopes to have the video hearing up and running by this spring.

Medicare Prescription Drug Program – Clients Need to Know

By Vanda Vantil, Public Relations, Disability Determination Service

When representing a client, there is one more thing to think about — the new Medicare prescription drug program. If your client is approved for disability benefits at the hearing level and is eligible for Medicare, he or she could benefit greatly from the new Medicare prescription drug program that went into effect January 2006.

This program is available to all people with Medicare. Plus there is additional help for those who need it most. This has helped pay for part of the monthly premiums, annual deductibles, and prescription co-payments under the new prescription drug programs.

The beneficiary can enroll in the new Medicare prescription drug program from November 15, 2005, to May 15, 2006. If they become eligible for Medicare after that date, they have a seven-month initial enrollment. This is similar to Part B. Unlike Medicare Part A and B, where social security beneficiaries are automatically enrolled, beneficiaries must enroll themselves in a prescription drug plan. Plus, beneficiaries can apply for the extra help at any time. This could save an average of \$2,100 per year in prescription drug costs.

To qualify for the extra help, a person or married couple living together must have limited income and resources. For an individual, total annual income must be below \$14,355 and resources limited to \$10,000. For a married couple, total annual income must be below \$19,245 in combined income and \$20,000 in resources. These resources can be slightly higher;

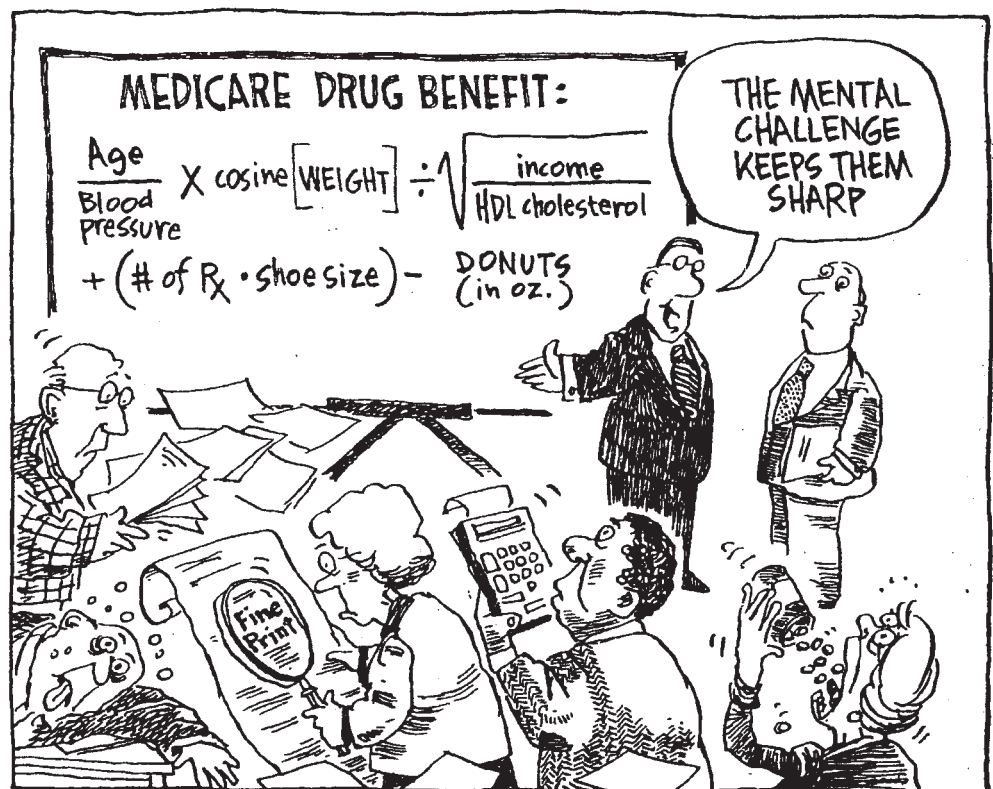
an additional \$1,500 per person if some of the money will be used for burial expenses. (Kudos to the funeral home lobbyist who managed to insert this into the new regulations.)

Some beneficiaries will automatically qualify for the extra financial help. Anyone who has both Medicare and Medicaid or, anyone whose state pays his or her Medicare premiums, will automatically qualify and will not have the complete ineligibility application.

It is also important that all beneficiaries understand that even if they qualify for the extra help, they still need to enroll in a Medicare approved prescription drug

plan to obtain both coverage and the extra help.

Extra help applications can be completed on-line at www.socialsecurity.gov or they can contact Social Security at 1-800-772-1213 and ask for an application in the mail. So if your client becomes a Medicare beneficiary, they will have to make some decisions about the new Medicare prescription program. The information on the various plans can be found at www.medicare.gov or by calling 1 800-MEDICARE. Additionally, if they need extra help with prescription costs, your client should apply for the help that is available.



Dan Wasserman

The Boston Globe "Reprinted with permission of the artist"
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Annual Summit Meeting - 2005

Our annual meeting with the Social Security Administration was held in Grand Rapids on October 7, 2005. Even though it was Grand Rapids' "turn" to host the meeting, it wasn't the most opportune time, since the Hearing Office recently completed their move and was in the middle of switching over to a voice over Internet protocol phone system. Despite the changes, Grand Rapids came through and worked with our Section presenting a very well organized Seminar.

Vonda Vantil, a spokesperson for the Disability Determination Service, gave a presentation on the Medicare Prescription Drug Program. There are currently 17 private companies in Michigan offering the drug program and there are literally hundreds of options depending on the type of Medications that the beneficiary needs. All those rumors you heard about how complicated the prescription drug program are actually true. However, Vonda was able to distill the main provisions of this program so even lawyers could understand it. Please refer to the special article on this important topic on page 5 of this newsletter.

The Hearing Office Manager, Sue Gilbert, spoke about the progress with electronic filing. If you are one of the few attorneys that are able to figure out the 3368 professional version, you are definitely in the minority. Feedback from practitioners using this form report that it takes longer to complete and the local office does not always receive your electronically filed appeal. Basic prudence dictates that you print the form before you electronically send it to the local office.

The new phone system by the Grand Rapids office is voice over Internet protocol and is a test project for other OHAs. Their new phone number is 1-800-248-3401. Use this 1-800 number even if you are calling locally.

During the 2005 fiscal year, which ended October 30, 2005, Grand Rapids grew by almost 4,000 cases (5,861 to 9,238 during the twelve month period ending 09/30/05).

Regarding ranking of hearing offices and the highest number of cases per ALJ, Flint was 140 out of 141 offices, Grand Rapids was ranked at 138, Detroit at 133, Lansing at 132, and Oak Park at 131. In other words, all five Michigan Hearing Offices are within the top five percent of the highest caseload in the nation.

The average time for processing a request for hearing is steadily increasing. For Grand Rapids it is 14 months, Oak Park is 19 months, Lansing is 20 months, Flint is 21 months, and Detroit is 25 months. Statewide, it takes an average of 2.4 months from a hearing to the receipt of a written decision. Grand Rapids is four months and Flint is closer to three months.

The average time from request for review of a hearing decision until receipt of a disposition by the Appeals Council is currently 7.4 months. The bottom line is that the claims keep coming in faster than they are leaving.

Although SSA is planning to hire another 100 new ALJs for the 2005-2006 fiscal year, there is very little money for staff to prepare the case and process the case after hearing.

Tom Ward spoke as the DDS representative. He indicated there were 127,000 new filings in Michigan and 21,000 CDR (Continuing Disability Review) cases during the last fiscal year. The statewide initial approval at the filing level is 31 percent. The CDR approval rate is 89 percent statewide. The average time it takes to process a case once it reaches DDS is 86 days.

Mr. Ward discussed the impact that E-filing has had on record review. At this time, DDS must keep both an electric file

and a paper file. Sometime in the spring of 2006 SSA will check the electronic cases to make sure that they are an exact match to the paper file. If they are, then SSA will no longer need to keep a paper copy of the file. This is termed "Independence Day."

Mr. Ward discussed the same problem that has been noticed nationwide with the electronic file. There is the slow-down in case review that is caused from scrolling through the pages in the file one page at a time. This has added to the length of time it takes to review a file by both the examiner and the physician. Additionally, it is no longer possible to merely hand a file over to a doctor to see what he or she thinks about a certain issue. In order to send a file now on to the doctor it must be tagged electronically and then sent with an electronic message.

DDS is pushing medical care providers to send records electronically. The goal for 2006 is to have 30 percent of all medical records submitted electronically.

ALJ Johnson gave an informative presentation on some of the latest HALLEX rules for Hearing Office protocol. If you have a *res judicata* or re-opening issue, consult the most recent update I-3-3-9 effective 09/08/05. The following are recent HALLEX rules discussed by ALJ Johnson.

Representatives Submitting Written Decisions: HALLEX I-2-8-13 came into effect as of 09/02/05 allowing claimant's representatives to submit proposed decisions. Please note that OHA can supply you with a template for favorable decisions. In the alternative you can also submit a proposed language that you would like to be used in a hearing decision that the ALJ can consider (I-2-8-98).

Changing Venue: I-2-0-70 effective 09/28/05 reiterates the longstanding policy that a claimant may request a change of venue to a different hearing office although it is OHA's policy not to

routinely grant such requests. The claimant must show good cause for making the change. Examples would be difficulty traveling to the hearing, the claimant lives closer to another hearing office, or your client is in jail/prison in a different hearing office jurisdiction.

Video Hearings: Effective 04/26/05, I-5-1-16 spells out for the hearing office what should be provided in the Notice of Hearing and requests that the claimant complete a form consenting to the video hearing.

Reviewing the File: This HALLEX allows that the claimant or its representative has the right to review the claim file, and if you have not already done so, arrangements can be made to review the file. Apparently the hearing office has a "special document camera" to allow the representative to look at the file prior to the hearing. I guess that means that someone on the other end needs to be available to turn the pages.

There is also a related HALLEX that al-

lows the representative to review the file at a field office if the "requestor" indicates that he or she will not be able to examine the file at the hearing office (I-2-1-35). The hearing office is directed to send photocopies of proposed exhibits to the field office.

Transfer of Cases to Different Hearing Offices: A substantial number of cases were transferred in 2005 to California and Arizona with a net result of increased hearings throughout Michigan. One thing to note is that once an assignment is made, the case cannot be returned to the original hearing office without Regional Chief approval (I-2-1-57 effective 09/28/05). The HALLEX indicates that whenever possible, the cases should be transferred to an area that can conduct hearings by video-conference, which obviously prevents the necessity of having an ALJ travel to the hearing office area.

Failing or Refusing to Undergo a Consultative Examination: Under I-2-5-24, the claimant refuses without good reason the ALJ should proceed toward scheduling the hearing and decide the case without the examination. The case can only be dismissed if the claimant fails to appear and the proper post-hearing notification procedures are performed.

Following ALJ Johnson's presentation, our new officers were elected. Charles Robinson is our new Chairman, D. Michael Dudley is Chair-Elect, Matt Taylor is Secretary, and Annette Skinner is our Treasurer.

A special thanks to Kerry Spencer Johnson, our outgoing Chair, who kept us organized and worked with the Grand Rapids area SSA to ensure a successful Annual Summit Meeting.

Editor

Demming Break-Even Points 2006

Number of Ineligible Children	Parent-To-Child							
	All Income Is:							
	Earned Income				Unearned Income			
	1 Parent		2 Parent		1 Parent		2 Parent	
Reduction Begins	Eligibility Ceases	Reduction Begins	Eligibility Ceases	Reduction Begins	Eligibility Ceases	Reduction Begins	Eligibility Ceases	
0	1,331	2,537	1,933	3,139	643	1,246	944	1,547
1	1,632	2,838	2,234	3,440	944	1,547	1,245	1,848
2	1,933	3,139	2,535	3,741	1,245	1,848	1,546	2,149
3	2,234	3,440	2,836	4,042	1,546	2,149	1,847	2,450
4	2,535	3,741	3,137	4,343	1,847	2,450	2,148	2,751
5	2,836	4,042	3,438	4,644	2,148	2,751	2,449	3,052
6	3,137	4,343	3,739	4,945	2,449	3,052	2,750	3,353

Number of Ineligible Children	Spouse-To-Spouse				Spouse-To-Spouse-To-Child			
	All Income Of Ineligible Spouse and Eligible Individual Is:							
	Earned Income		Unearned Income		Earned Income		Unearned Income	
	Reduction Begins	Eligibility Ceases	Reduction Begins	Eligibility Ceases	Reduction Begins	Eligibility Ceases	Reduction Begins	Eligibility Ceases
0	687	1,893	321	924	1,933	3,139	944	1,547
1	988	2,194	622	1,225	2,234	3,440	1,245	1,848
2	1,289	2,495	923	1,526	2,535	3,741	1,546	2,149
3	1,590	2,796	1,224	1,827	2,826	4,042	1,847	2,450
4	1,891	3,097	1,525	2,128	3,137	4,343	2,148	2,751
5	2,192	3,398	1,826	2,429	3,438	4,644	2,449	3,052
6	2,493	3,699	2,127	2,730	3,739	4,945	2,750	3,353

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SOCIAL SECURITY SECTION MEETINGS

Thursday, January 26

Board & Council Meeting
University Club
East Lansing
6 p.m.

Friday, February 10

General Section Meeting
State Bar of Michigan
Lansing
10 a.m.

Topics:

- *How a Case is Prepared for a Hearing, by the Honorable Earl Witten, ALJ at Lansing OHA*
- *Developing the Medical Record - Panel Discussion to discuss techniques and practical tips*

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