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

Winter 2014
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In this Issue

2014 Winter Section Meeting Held at Kellogg Center

Our new section Chair Kim Lamb continued the tradition of lining up outstanding speakers for our Winter Seminar. The line-up included the Honorable R. Stephen Whalen, Magistrate Judge for the Eastern District of Michigan; Kendra S. Kleber, Mt. Pleasant ALJ; Meredith Marcus, representative from the distinguished Fred J. Daley, Jr. Law Office in Chicago; Madiha Tariq, giving a timely discussion on the Affordable Healthcare Act. We also had a panel of distinguished speakers consisting of James A. Carlin, Sr.; Larry R. Maitland II; Margaret A. O'Donnell; and B. Thomas Golden, who spoke on everything from discharging student loans to maximizing SSI benefits. ☆

—Lewis M. Seward, Editor

(Left to Right) - Aaron Sumrall, Chuck Robison and Kimberly A. Lamb at the October annual meeting.

Affordable Healthcare Act

Access to healthcare has always been a challenge for our clients. Madiha Tariq gave a presentation on this new law. She works at a call-in center to sign up for health insurance under the Affordable Healthcare Act. She indicated there are 13 health insurers who offer insurance on "The Exchange". The premiums depend on family size and household income, which must be at or below 250% of the National poverty level. She indicated on the website you can enter your information to see whether your client is at or below 250% of the National poverty level.

The penalty for adults not applying for healthcare is $96 per person or 1% of their adjustment gross income, whichever is higher. This penalty increases yearly. People who do not need to file an income tax return are exempt. People who are non-exempt and do not sign up will have their tax refund garnished to pay the penalty.

Michigan also has a Medicaid expansion called the "Healthy Michigan Plan" for people who are 138% below the National poverty level. In order to see whether your client qualifies refer them to *www.mibridges.com*. It is expected that the State of Michigan will be granting medicaid for these new individuals starting April 1.

If your client has Medicare insurance as a result of their Title II Disability claim, they do not need to apply for the Affordable Health Care Act. This Act is designed to get as many Americans as possible insured for healthcare.

To find out more information about the health insurance program in Michigan or to find a free clinic in your client's area visit *www.EnrollMichigan.com*

Please be advised that **March 31, 2014,** is the date that the enrollment ends for the Affordable Care Act and it will not re-open until October, 2014. There are exceptions to this rule, however, such as a person turning 18 and becoming an adult, or loss of health insurance through their job, etc. ☆

—Lewis M. Seward, Editor

Our Mission

The Social Security Section of the State Bar of Michigan provides education, information and analysis about issues of concern through meetings, seminars, the website, public service programs, and publication of this 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.

Addressing Vocational Testimony

Meredith Marcus from Fred Daley Law Firm in Chicago opened the Section Meeting with a presentation on vocational issues at the hearing. There was a lot of time spent on addressing SSR 004-p which requires the ALJ to inquire if there are any conflicts between the job listed by the vocational expert and the description in the DOT.

As a starting point at the hearing you should always remember to get the DOT numbers in the unusual circumstance where the numbers are not given. It's helpful to have the DOT information at the hearing so you can verify that the DOT numbers given by the VE accurately match the RFC given by the ALJ in the hypothetical question.

Ms. Marcus indicated that it certainly would be advantageous to have this information on a laptop when you come into the hearing room. If that is not practical then you can either ask to keep the record open to research the issue and file a post-hearing memorandum.

Case law on this issue puts the burden on the representative's shoulders to object to and discuss what characteristics in the job description listed in the DOT differ from the ALJ's RFC.

Basically, if you do not raise an objection it is waived and the courts will back up the Commissioner on this issue. See *Barrett v Barnhardt, 355 F.3d 1065, 1067 (7th Cir. 2004),* i.e.: because *Barrett's* lawyer did not question the basis for the vocational expert's testimony, purely conclusional though that testimony was, any objection to it is forfeited. In *Barrett* apparently the vocational expert reduced the number of jobs available given the RFC, but there was no inquiry to the VE as to how those numbers were adjusted.

In a Seventh Circuit case, when asking how the VE arrived at the number of jobs, the answer was based on knowledge of the vocational expert and labor market surveys. However, the VE could not provide any data or citation for the references she relied upon in forming her opinion, and the ALJ did not inquire into the reliability of her conclusions as she was required and the case was Remanded. *McKinnie v Barnhardt, 368 F. 3d. 907, 911 (7th Cir. 2004).*

When cross-examining the vocational expert and in questioning the answers given by the VE make sure you request the documentation or data that backs up what the vocational expert is relying upon. If the numbers were based on a "market survey" ask for a copy of the materials. If the answer for the number of jobs listed is an extrapolation based on the total number of jobs in the region, ask for the formula as to how those numbers were reduced. If extrapolation is based upon "personal experience" this normally would not be substantial evidence.

Obviously the VE normally would not have the materials with him. Therefore you have to leave the record open until you receive those materials and follow-up with a post-hearing memorandum or letter. In the alternative, at the very least, object on the record and ask the ALJ to keep the record open for you to submit information as to why the numbers or jobs listed by the VE are not accurate.

On another issue, a "composite" job is a job which consists of two or more jobs, such as a cashier at a grocery store and shift supervisor. The claimant must be able to perform all the duties in *both* jobs or otherwise they may be deemed not able to perform past relevant work. (SSR 82-51.POMS 25005.020B)

When arguing if jobs are significant in numbers there is no bright line rule on this. The Circuits are all over the map on this issue. In *Beltran v Astrue* 700 F. 3d 386 (9th Cir 2012) 135 locally and 1680 nationally surveillance system monitor jobs was not a significant number of jobs.

A different approach would be to take a look at the number of jobs listed by the vocational expert. Let us say Security Monitor, which is typically listed as unskilled and sedentary. Ask the vocational expert the number of unskilled sedentary jobs in the region. Then compute the percent of Security Monitor positions versus unskilled, sedentary jobs in the region and/or national economy. If that percent is very low, it is easier to make an argument that the jobs of Security Monitor are not a significant number. ☆

—Lewis M. Seward, Editor

Published Sixth Circuit Case Expands Treating Source Rule *Gayheart v. Commissioner*, 710 F. 3d 365 (2013)

The Sixth Circuit has a new published case which expands the Treating Source Rule and discusses the confluence between the Treating Source Rule and substance abuse.

Until the case of *Wilson v. Commissioner*, 378 F. 3d 541 (6th Cir. 2004) it was difficult to prevail if that was your only issue at the Sixth Circuit. Since *Wilson*, (which the Editor argued in 2004) the Sixth Circuit has been more receptive and willing to remand when the ALJ does not clearly articulate a rationale for rejecting the treating doctor's opinion.

The most recent case of *Gayheart v. Commissioner* discusses the common problem of encountering opinions from medical CEs sent out by SSA with a contrasting opinion from the treating source. This is a must-read case. There are a lot of very good, commonsense analyses written by Circuit Judge Ronald Gilman.

It certainly helped that Mr. Gayheart had a 20 year work history as an assistant manager in an auto parts store. He started having increasing difficulty with panic attacks to the point that his supervisor had to drive him home on several occasions due to symptoms of dizziness, sweating, shaking, etc.

In 2005 Mr. Gayheart stopped working and filed a claim. He had three hearings, two of which apparently were supplemental hearings with the same ALJ before being ultimately denied and affirmed by the Appeals Council and Federal District Court.

The fly in the ointment was that claimant continued drinking during the period in question. He testified he would drink two to three beers per day to calm his nerves, which he has been doing since he was 21 years old.

In addition to two psychological CEs a psychologist was present to testify at the second and third hearings. When the ALJ asked the medical examiner about the DA & A question, she testified that according to Mr. Gayheart's treatment record there was insufficient evidence that without the alcohol the Anxiety improved. She clarified that when alcohol is continuous throughout the record it is impossible to say whether or not it had an affect on the claimant's emotional problems.

The two psychological examiners the claimant was sent to gave different opinions regarding restrictions in the mental RFC. One of the psychologists suggested that Mr. Gayheart was "moderate malingering". (The Editor has never seen these two words used together in the same sentence.)

The other psychologist who later examined the claimant indicated that he did not appear to be malingering. The psychologist noted that Mr. Gayheart had a tremor of his hands and found him at least "moderately" impaired in the ability to maintain concentration and attention, as well as persist with tasks or to tolerate stress. He also gave him a "marked" impairment in relating with co- workers, the public and changes in a routine work setting which would be work preclusive.

During the pendency of this case the claimant's treating psychiatrist wrote a letter indicating that the claimant still suffers from frequent Panic Attacks, irritability and extreme Social Anxiety even with medications and he would not be capable of being dependable and reliable in a normal work setting.

The treating doctor also clarified that Mr. Gayheart's alcohol consumption, although not helping his Depression, was not the root of his problem. The doctor indicated that the frequency of his emotional problems would still persist even if he were no longer drinking alcohol.

The ALJ denied the claim after the *third* hearing and did not give controlling weight to the treating psychiatrist deferring to the opinion of the medical examiner at the hearing and the psychologist who found moderate malingering.

The opinion states the overall general rules that: (1) an opinion from a medical source who examines the claimant is given more weight than from a source who has not performed an examination; and

(2) an opinion from a medical source who regularly treats the claimant (treating source) is afforded more weight than that from a source who has examined the claimant but does not have an ongoing treatment relationship without any support in the record.

The court noted that the ALJ's conclusion that the treating psychiatrist minimized the impact of the claimant's alcohol abuse was not explained. The court cited *Wilson* for the ALJ's failure to provide good reasons for not giving the treating psychiatrist's opinion controlling weight which hinders a meaningful review of whether the ALJ properly applied the treating physician rule.

The Sixth Circuit noted the ALJ's observation was not well-supported by any objective findings. The court found that this boilerplate statement was ambiguous. If there is objective evidence the court noted that the ALJ did not cite to what evidence he was referring.

The Sixth Circuit also noted that the ALJ "provided a modicum of reasoning" how the psychiatrist's opinion should be weighed *after* determining that he was not going to give controlling weight in the first place. The court noted that even this reasoning fails to justify giving the opinion little weight.

The decision notes that the claimant was able to buy a new lawnmower blade and was looking forward to being outside more. The decision indicated the claimant's alleged Anxiety did not prevent him from leaving his home, driving, keeping medical appointments and attending three hearings. The Sixth Circuit noted that nothing in the record suggests that Mr. Gayheart left the house independently on a sustained basis and that the ALJ's reasoning was insufficient for giving the doctor's opinion little weight.

Regarding the alcohol abuse issue, the Sixth Circuit indicated that the ALJ made it clear that Mr. Gayheart was not disabled without first attempting to separate limitations attributed solely to alcohol abuse. Even the medical examiner at the hearing could not really say whether alcohol abuse would be material to any finding of disability. There are other "pearls" in the opinion, and we invite the members to read this very important opinion. ☆

—Lewis M. Seward, Editor

View from the Federal Court Bench

The Honorable R. Steven Whalen, Eastern District of Michigan Magistrate Judge, spoke at the seminar on his thoughts about Social Security Disability cases in Federal Court. He indicated that the facts are critical and it is important to address the facts to tell your client's story and why the ALJ got it wrong. Make sure you address the negative issues head-on. If your client alleges a disability the day after they are laid-off, explain how they were having problems at work performing the job in the first place. Sometimes employers will lay-off a person who can no longer perform the job rather than fire them, which may prevent the person from receiving unemployment benefits.

On consenting to the Magistrate Judge Whalen indicated he understands the "two bites of the apple principle". However, in his experience the majority of his reversals by the District Court Judge are those that he's recommended a Remand or Reversal. Definitely food for thought.

When reviewing the record, Judge Whalen indicated he would like to see representatives spend more time bringing up the testimony of the claimant to bring out or clear up inconsistencies in the record. Then have the claimant explain the nature and extent of all of their impairments that effect their ability to work. He would also like to see more cross-examination of the vocational expert.

Do not draft a "stream of consciousness" brief where you quote the law without really applying the facts in your particular case to the law. Break the issues into distinct subheadings so that it is easy to follow. The brief must be in 14 point type with footnotes no smaller than 10 - 1/2 characters per inch with a 25 page maximum. On Sentence Six requests for Remand based on new and material evidence, you need to explain why it is material and why it was not presented earlier as part of your good cause element.

Although the statutory amount is $125, the Judge would like to see an argument about why your higher rate is justified. The case of *Bryant v. Commissioner*, 578 F. 3d 443 (6th Cir 2009) has good language on describing what is necessary to include to justify a higher rate. He said a good source to refer to is the State Bar Survey on Economics of the Law Practice for attorney fee rates in the area. ☆

—Lewis M. Seward, Editor