Significant Regulatory Changes for Social Security Disability Insurance and Supplemental Security Income

Social Security benefits, especially Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI), play a big role in both elder law and disability rights planning. Social Security saw substantial changes during the 2016–2017 fiscal year, some of which go to the very core of the disability process. The following is a brief description of those changes.

Treating source rule

Regulations 20 CFR 404.1527 and 20 CFR 416.927 outline how the Social Security Administration considers and articulates medical opinions and prior administrative medical findings for claims filed before March 27, 2017. Claims filed on or after this date are subject to new regulations under 20 CFR 404.1520 and 20 CFR 416.920.[1] The Social Security Administration changed 30-plus years of established caselaw that interpreted the "treating source rule" to require the administrative law judge "to provide good reasons" for cases in which the treating physician's opinion was given minimal or no weight.[2] Past interpretations of the treating source rule were based on the commonsense principle that the physician has an ethical obligation to treat the patient, order the required tests, and refer the patient to specialists as necessary. Opinions from treating physicians were given preference over a one-time consulting physician or a non-examining program physician working for Social Security.[3]

Effective March 27, 2017, the regulations concerning treating source statements were changed because of significant caselaw remanding and sometimes reversing for payment of benefits when the administrative law judge had failed to articulate why the long-term treating physician's opinion was not given controlling weight.[4] Social Security changed the regulations to comport more with administrative law judges who minimally articulate why the treating physician's statement was not given controlling weight.

The new regulations still require the administrative law judge to articulate consideration of a medical opinion from any source, but adds that the adjudicator need only discuss the factors of *supportability* and *consistency* with the medical record rather than the more expanded regulation of the six balancing factors under 20 CFR 404.1527(c)(2) and 20 CFR 416.927(c)(2). Additionally, the new regulation gives the administrative law judge the authority not to provide analysis for a veteran found disabled under a Veterans Administration claim. Without mentioning the Veterans Administration,

By Lewis M. Seward

FAST FACT

Social Security benefits, especially Social Security Disability Insurance and Supplemental Security Income, play a big role in both elder law and disability rights planning. The 2016–2017 fiscal year for Social Security saw substantial changes, some of which go to the very core of the disability process.

the regulation indicated that decisions made by governmental agencies "are inherently neither invaluable nor persuasive to us."[5] The only positive aspect of this new regulation is that physician assistants and nurse practitioners are now considered on par with physicians as acceptable medical sources.[6]

This regulation, under 20 CFR 404.1520c(a)–(b) and 416.920c (a)–(b), is effective for cases filed on or after March 27, 2017. All cases in the pipeline before this date are still subject to the former rules.

Elimination of the term "credibility"

Social Security also added a new ruling relative to the credibility of the claimant. This ruling, under SSR 16-3p, was drafted in response to claimants feeling that they have been accused of not being truthful when the administrative law judge in an unfavorable decision indicates they are "less than credible."[7] The Social Security Administration (SSA) eliminated the term "credibility" because the subjective symptom evaluation that credibility involves is not a character examination. Although the term has been eliminated, the SSA always evaluates the validity of claimants' statements.[8]

SSR 16-3p reaffirms that *allegations* of symptoms are not enough to establish existence of a physical or mental impairment or disability.[9] This is one of the most common misconceptions of unrepresented claimants. The ruling also reaffirms the longstanding requirement that a claimant seeking benefits must try to obtain medical treatment for his or her condition *and* follow the provider's prescribed treatment.[10]

The SSA also reaffirmed its position that conclusive statements such as "the patient is disabled and unable to work" are not sufficient in evaluating an individual's symptoms. This is another common misconception among unrepresented claimants who believe they are entitled to benefits because their doctor has deemed them "disabled."[11]

Revision to mental impairments

Disability impairment listings for mental disorders were revised effective January 17, 2017.[12] The most substantial change is under the "B" criteria,[13] which keeps intact interaction with others and concentration, persistence, or maintaining pace while adding understanding, remembering, or applying information and adapting or managing oneself. The modified criteria for mental impairment disorders clarify how criteria are met while eliminating some of the subjectivity in the mental impairment listings. Guidance is also included for claimants who need structured settings, psychosocial support, and help with living arrangements, which can be indicative of an impaired individual.[14]

New neurological impairment listings

New categories were added, including benign brain tumors, spinal cord disorders, and peripheral neuropathy.[15] The epilepsy criteria were revised, recognizing that a claimant may also have pseudoseizures characterized by blank staring or repetitive simple actions.[16] The listings also introduced five specific areas that require at least one "marked" impairment. The four "B" mental impairment areas include understanding, remembering, or applying information; concentrating, persisting, or maintaining pace; and adapting or managing oneself;[17] physical functioning was added as one of the five areas that must be "marked" to meet an epilepsy listing.[18]

Additionally, the multiple sclerosis impairment listing was drastically changed. The new criteria require an "extreme" limitation in the ability to stand up from a seated position, balance while standing or walking or using the upper extremities, and a marked limitation in physical functioning *plus* a marked finding in the "B" criteria areas similar to the mental impairment listings.[19]

Five-day evidence regulation

With the evolution of electronic records, the SSA has been inundated by a substantial increase in the number of pages of medical evidence submitted. When a hospital stay or emergency room visit is requested, it is easier for the record company to send everything because of the electronic record. It's not unusual for a three-day hospital stay to comprise more than 500 pages of records. Additionally, representatives were submitting large volumes of records just before hearings or requesting to keep the record held open for what could be a substantial amount of subsequent files. The result was a backlog of decisions waiting for records to be submitted and then evaluated by the administrative law judge.

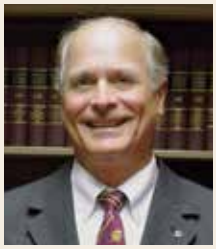
The SSA's response was to institute a five-day evidence regulation.[20] Evidence must be submitted five *business* days before the hearing for the administrative law judge to consider it.

A "good cause" requirement exists if representatives experience unusual, unexpected, or unavoidable circumstances preventing them from submitting evidence in the five business days before the hearing. A representative must inform the administrative law judge in writing before those five days if the records are unavailable. A more common scenario is the claimant's having a significant medical procedure or test (such as an MRI) within a week or two of the hearing, which would be a good-cause factor given the delay in obtaining those records. At a recent Social Security Section Conference in Livonia with local administrative law judges, this regulation, which has only been in effect for four months, has reduced the backlog of cases post-hearing by 50 percent.

Representatives were apparently abusing the good-cause exception, however. As a result, effective October 4, 2017, Social Security debuted a ruling providing "guidance" on the "informed" requirement of the five-day rule. SSR 17-4p specifies that to meet the good-cause requirement and submit evidence after the five-day cutoff, a representative must inform the SSA about the evidence and provide specific information to identify the evidence, source, location, and dates of treatment. It is also advised to indicate efforts made to obtain evidence, such as when requests were sent to the medical provider.[21]

This past summer, a large Michigan hospital sent letters to representatives who requested records from the institution, informing them of a delay in fulfilling those requests. Waiting three or four months before records are sent is not unusual. Other medical providers are at the mercy of their copy service, which may come to the medical office only once a month to scan record requests. If the copy service runs out of time to scan the records, an additional month's delay would result.

Finally, Social Security is required to give 75 days' notice before a hearing.[22] This has helped significantly in giving representatives a head start, as the average time to obtain records from the date of the request has gradually increased. ■



Lewis M. Seward has practiced disability law in Bay City for more than 25 years. He is a former chairperson of the SBM Social Security Lawyers Section and is editor of its newsletter. He is also disability law editor for Advising the Older Client or Client with a Disability, *published by the Institute for Continuing Legal Education.*

ENDNOTES

1. Social Security Administration, *Revisions to Rules Regarding the Evaluation of Medical Evidence*, 82 Fed Reg 5844 (January 18, 2017). See also Social Security Administration, Medical/Professional Relations, *Revision in Rules Regarding the Evaluation of Medical Evidence* <https://www.ssa.gov/disability/professionals/bluebook/revisions-rules.html>. All websites cited in this article were accessed December 3, 2017.
2. *Gayheart v Commissioner*, 710 F3d 365, 375, 379–381 (CA 6, 2013).
3. *Smith v Commissioner*, 482 F3d 873, 875 (CA 6, 2007).
4. Social Security Administration, *Revisions to Rules Regarding the Evaluation of Medical Evidence*.
5. Social Security Administration, Medical/Professional Relations, *Revisions to Rules Regarding the Evaluation of Medical Evidence*, Q14; 20 CFR 404.15b(c)(1) and 20 CFR 416.920b.
6. 20 CFR 404.1520c(a)–(b) and 20 CFR 416.920c(a)–(b).
7. Social Security Administration, *Social Security Ruling SSR 16-3p: Titles II and XVI: Evaluation of Symptoms in Disability Claims* <https://www.ssa.gov/OP_Home/rulings/di/01/SSR2016-03-di-01.html>.
8. Social Security Administration, *Social Security Ruling 16-3p Titles II and XVI: Evaluation of Symptoms in Disability Claims*, 82 Fed Reg 49462 (Revised October 25, 2017).
9. *Id.* at 49467.
10. 20 CFR 404.1530(a)–(c) and 20 CFR 416.930(a)–(c). See also Social Security Administration, Disability Insurance, *SSR 82-59: Titles II and XVI: Failure to Follow Prescribed Treatment* (January 18, 2017) <https://www.ssa.gov/OP_Home/rulings/di/02/SSR82-59-di-02.html>.
11. Social Security Administration, *Revisions to Rules Regarding the Evaluation of Medical Evidence; Correction*, 82 Fed Reg 15132 (March 27, 2017); 20 CFR 404.1527(d) and 20 CFR 416.927(d).
12. 20 CFR 404, Appendix 1 to Subpart P, *Listing of Impairments: Mental Disorders (12:00 and 112.00)*; Social Security Administration, Medical/Professional Relations, *Disability Evaluation Under Social Security: 12.00 Mental Disorders Adult* <https://www.ssa.gov/disability/professionals/bluebook/12.00-MentalDisorders-Adult.htm>.
13. *Id.*
14. *Id.*
15. 20 CFR 404, Appendix 1 to Subpart P, *Listing of Impairments: Neurological Disorders (11.00 and 111.00)*; Social Security Administration, Medical/Professional Relations, *Disability Evaluation Under Social Security: 11.00 Neurological Adult* <https://www.ssa.gov/disability/professionals/bluebook/11.00-Neurological-Adult.htm>.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. 20 CFR 404.935 and 20 CFR 416.1435.
21. Social Security Administration, *Social Security Ruling, SSR-17-4p; Titles II and XVI: Responsibility for Developing Written Evidence*, 82 Fed Reg 46339 (October 4, 2017).
22. 20 CFR 404.938.