



The Federal Jurist

Hon. Robert S. Habermann, Editor

Summer 2004

Message from the Editor

By Hon. Robert S. Habermann

Over the next year, the Department of Health and Human Services (DHHS) will begin to create what will eventually come to be the second largest group of administrative law judges in the federal government. These judges will be called upon to adjudicate Medicare cases that are now beginning resolved by judges assigned to the Office of Hearings and Appeals (OHA) of the Social Security Administration (SSA).

On March 21, 2004, SSA and DHHS submitted a document entitled *Plan For The Transfer of the Responsibility For Medicare Appeals* (hereafter, the plan) to Congress and the Comptroller General of the United States (the Government Accounting Office) delineating the manner in which the transfer will take place. The plan anticipates that the adjudication of over 80,000 Medicare appeals to be initially will be resolved by its administrative law judges beginning on July 1, 2005. In addition, the plan calls for the judges to be located at DHHS regional offices, and specifies that they will be functionally and organizational separate from the Centers for Medicare and Medicaid Services (CMS). DHHS will solicit applications for administrative law judge positions this winter and will begin hiring judges and support staff next year. Judges will be hired from three sources: 1) the existing OPM Register; 2) Re-employed annuitants from the Senior ALJ Program; and 3) sitting administrative law judges. Upon receipt of the plan, the Government Accounting Office (GAO) will have six months to evaluate the plan and submit a report to Congress. In a notice dated June 24, 2004, DHHS entered an item in the Federal Register soliciting public comments to the plan. Permit me to set forth some of my concerns.

Under the current adjudicatory scheme, the administrative law judges assigned to OHA are charged with the privilege of hearing and deciding Medicare cases arising under

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Message from the Chair

By Hon. Gail Randall

Greetings from Washington, D.C. We have had a very active spring, and despite "vacation fever," it looks like the summer will be just as busy. I hope you are checking our Web page often for division updates. Again, if you have other suggestions for material you would like to see on our Web page, please contact me, Gail Randall, at gailarandall@mindspring.com. Rodger Drew has promised he will remain our webmaster, but he is in the process of moving from the Washington, D.C., area to a new military assignment. As soon as he has a new email account, I will gladly relinquish Web page posting responsibility to him.

Once again we have been asked to comment upon an issue vital to the judiciary. I hope you saw the article in the June 2004, *The Federal Lawyer*, entitled "In Opposition to Proposed Federal Rule of Appellate Procedure 32.1," by Hon. Alex Kozinski. If you are not familiar with the issue of the proposed rule that would lift prohibitions against citation of unpublished opinions in federal court, this article provides an excellent background of the proposal, as well as an argument against the proposed rule. However, the Federal Bar Association is seeking information from its members concerning what, if any, position the association should take on this issue. Please, if you want to be heard, now is your chance. Send me your comments, and I will see that the FBA's Government Relations Committee receives them. I would hate to think that members of the Judiciary Division lack a position on this controversial issue.

Next, we activated the Judiciary Division's Long-Range Planning Committee, and Judge Andy Effron of the U.S.

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Court of Appeals for the Armed Forces has graciously agreed to chair the committee. If you would like to serve on this committee, please contact me. The committee plans to hold its first meeting in September. Don't let distance deter you, for the FBA has an excellent teleconference capability.

I have also appointed Judge Dick O'Hair to chair an ad hoc committee to plan programs for visiting international judges. We are very pleased to continue these programs in conjunction with the International Judicial Academy. Again, if you would like to serve on this committee, please contact me. There is always room for more volunteers in our division!

Lastly, the pay bill for federal administrative law judges is still in the works. Last month I was asked to represent all of the federal administrative law judges in making a presentation to both House and Senate staff members working on the House and Senate versions of the Bill (H.R. 3737, and S. 2064). OPM also sent delegates to the meeting, and a lively discussion ensued. We still have hope that this pay compression relief bill may actually get passed this session of Congress.

In conclusion, as always, I note that judging can be a lonely job, and keeping in touch with colleagues through our professional organizations helps. Please, remain an active member in our division, for your own sake and for ours!



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The Three Faces of Mental Health: Social Security Disability, Diagnostic Treatment, and Forensics

by Alan John Leidecker, Esq.*

Just as the notorious Eve with the split personality was one individual with many faces, so too, mental health itself has many faces. There are many faces of mental health, such as disability for veteran's disability benefits, workers compensation, railroad retirement benefits, or civil lawsuits for damages. However, only the three most commonly used types, Social Security disability, diagnostic treatment, and forensics, are addressed here. In each type, there are completely different emphases, such as establishing disability, finding the correct medications and treatment, or establishing the need for criminal rehabilitation.

In establishing Social Security disability, the primary objective is to find the functional limitations that prevent an individual from working. Thus, when somebody suffers from a mental health problem, the question often arises as to whether that person can take care of his or her daily needs, social interaction, and the ability to concentrate on a sustained basis. The exact title or diagnostic description of the problem is less significant to Social Security disability than the functional limitations and the ability to perform mental-work related activities. Some of the descriptions used by mental health professionals differ from the descriptions used in Social Security disability claims. For example, "mild" mental retardation is not a "mild" impairment in establishing Social Security disability but can actually meet the Listing of Impairments.

When an individual is seeking Social Security disability, the individual should try to stress the functional limitations preventing work activity. Many mental health professionals fail to recognize the full impact of functional limitations in Social Security disability claims, and this failure can actually delay the disability process.

In diagnostic treatment, a mental health professional seeks to label with a diagnostic code that type of condition described by the consumer and supported by clinical testing. This is very important for the purpose of selecting medication and other types of treatment the professional will use. For example, an individual with depression often responds differently to medications from an individual suffering from chronic anxiety or panic attacks. In standard medical textbooks, mental health professionals can find differential diagnoses in an attempt to obtain better treatment.

Some mental health problems are very closely intertwined with physical impairments. Beginning in August 2003, many doctors began (for the first time) treating chronic depression as *always* present in people suffering

from adult onset diabetic problems because treating both problems produces better results than treating either problem alone. For many years, professionals have also recognized that treating anxiety and panic disorder can assist in the treatment of serious respiratory problems, such as asthma or chronic obstructive pulmonary disease.

In forensics, law-enforcement officers generally seek courtroom evidence. This evidence can establish the need for alternative treatments such as inpatient hospitalization or the use of clubhouses or group therapy for treatment. If an individual is convicted of a serious crime but has shown that that he or she has suffered from mental health problems, alternative treatments may play an important role in rehabilitation. As in diagnostic treatment, the diagnostic code or label can be very important for a decision maker or judge to decide on the appropriate treatment the convicted individual may receive. Unfortunately, public resources for such treatment are often inadequate or lacking entirely. Few politicians get elected to office by raising taxes to improve jails or mental health facilities as alternative treatments.

Although all three faces of mental health (Social Security disability, diagnostic treatment, and forensics) employ clinical testing to establish their desired goals, there are additional differences in the three approaches. For example, an initial consultative mental status evaluation obtained to establish (or disprove) Social Security disability would elaborate on the functional limitations but would not generally include any treatment medications since treatment is not a significant factor until disability is established. Such a consultative evaluation would (or should) contain a list of all known medications already used to treat any mental health problems (since this can help establish the exact nature of the mental status); however, the initial evaluation would not generally add any medications to the treatment list. Similarly, a diagnostic report would include recommended medications, if any, even on an initial diagnosis. Sometimes, of course, an initial consultative mental status evaluation leads a potential consumer of mental health services to seek treatment from the same source. In this situation, an initial consultative report can lead to a diagnostic treatment report at a later time with follow-up medications. Likewise, a treating mental health specialist may be asked to perform consultative testing and to render an opinion for Social Security disability. In this situation, treatment medications might already be known and the consumer's response or lack of response may already be available to

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the examiner. Thus, this type of consultative evaluation will differ from an initial consultative evaluation in which little discussion of medications will be available.

Someone might ask if it makes any difference whether one mental health problem is viewed as disabling, diagnostic, or forensic. The whole point of this article is that mental health reports should be written differently for each type. For example, a diagnostic report would emphasize clinical testing and the suggested or tested method of treatment. The diagnostic reports would also state whether further clinical testing was necessary to confirm or disprove a potential diagnosis. By contrast, mental health reports written for Social Security disability claims would stress the functional limitations resulting from the mental conditions involved. Whether a mental condition was more appropriately classified as depression or anxiety

would be less important for Social Security disability than the limitations resulting in interpersonal interaction. And forensics reports would stress the potential for rehabilitation and whether rehabilitation is considered possible.

**Alan John Leidecker received a J.D. from the Columbus School of Law, an LL.M. from The Georgetown University Law Center, and a M.R.E. from Loyola University of New Orleans. Since 1982, he has been a staff attorney with the Office of Hearings and Appeals of the Social Security Administration in Roanoke, Virginia. Previously, he published an article entitled Trends in Psychosocial Rehabilitation & the Social Security Disability Program in the Spring 2002 edition of The Federal Jurist.*

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Title XVIII of the Social Security Act. OHA currently has 139 field hearing offices and approximately 250 additional remote sites at which it currently adjudicates approximately 75,000 Medicare appeals per year. While I have many concerns with the feasibility of the plan to provide the necessary adjudication services to the beneficiaries and providers, my main concern involves access to administrative law judges so that these hearings can be held in a timely fashion without unnecessary inconvenience and expense to the litigants and their representatives.

In Part IX of the plan, entitled "Geographic Distribution," the plan is silent on the manner in which judges will be distributed throughout the country. The plan seems to hint at locating the majority of the judges in a "central hearing support office in the Baltimore/Washington area" and a "presence" in the regional offices. I believe that such a procedure is inconsistent with the intent of the language and spirit of Section 931 of the act that mandates a geographical distribution of judges "... throughout the United States to ensure timely access to such judges." While it is unlikely that DHHS will be able to offer hearing location opportunities in the same number of sites as currently being offered by OHA (*i.e.*, nearly 400 hearing locations), I feel that the intent of Congress is to require a physical presence located throughout the United States so that beneficiaries and providers alike can have ready access to judges so as to adjudicate their disputes. I believe that multiple hearing offices should be created to adjudicate these matters so as to provide timely access to the judges charged in resolving these disputes.

I am also concerned with the language of Part VII of the plan entitled, "Access to Administrative Law Judges." In that part, DHHS is once again advocating the use of telephone hearings to resolve a large number of these cases. Such a plan was conceived and later harshly rejected by the Congress in the early 1990's when it was then referred to as the "dial-a-judge" program. I believe that telephone hearings are inconsistent with the intent of the Administrative Procedure Act and the intent of Congress when it mandates "access to judges" in any adjudicatory scheme developed by DHHS. The plan should call for face-to-face hearings using a traditional trial court model.

Finally, I have grave doubts that such an ambitious plan can be effectuated by July 1, 2005. When fully implemented, DHHS will house the second largest group of administrative law judges and support staff in the United States, and will adjudicate approximately 100,000 cases per year. I fear that thousands of beneficiaries and providers will be forced to wait for an unreasonable period of time until DHHS' adjudication process is fully operational. Contingency plans should be identified for a continuing relationship with OHA should the plan fail to meet the timelines identified in the plan. The bench, the bar, and public need to be protected from needless delays in case adjudication that may arise from DHHS' inability to achieve the announced ambitious goals. I will continue to advise you of further developments in future columns.

As you know, we are always looking for good articles to publish. If you have an article that you believe is newsworthy, please consider us at *The Federal Jurist*.

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