Update and Issues From the Social Security Law Section

by L. David Ferrari

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Health-Based Upgrades to Hearing Offices

For the past five years, the Social Security Law Section (SSLS) has been proposing that automated external defibrillators (AED) should be placed in each of the roughly 160 Social Security Administration (SSA) hearing offices or "ODARs." Given the vulnerable composition of people seeking disability, this seems highly sensible. Letters have been written to the SSA commissioner and congressional leaders.

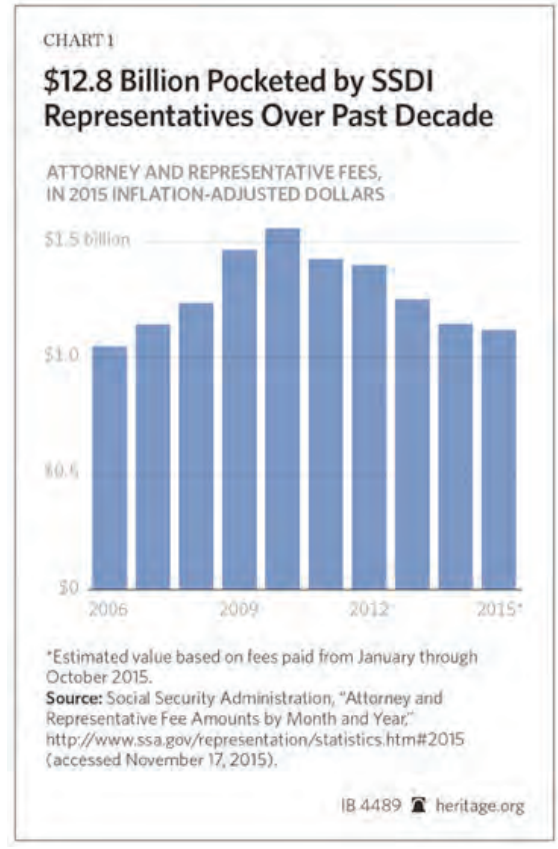
Further, last year, as chair of the SSLS, I met with the counselor to the commissioner and the executive director for the Social Security Advisory Board (SSAB) in Washington, D.C. Resistance to the proposal appears to stem only from funding concerns. The SSLS has always supported increased funding for the SSA, finding it to be highly underfunded for its workload, as evinced by record-setting delays in disability hearings; reduced office hours nationwide; and the multiplication of costly errors in payments from understaffing and the inability to modernize effectively.

Almost everywhere I go, I see AEDs now. They have become ubiquitous for our aging population and indicate the diving cost of these easy-to-use devices. I saw one in the Old Post Office Tower (which shares space with Trump International Hotel) in D.C. The ranger said they learned how to use it during a one-day training, but if they forget, the machine gives instructions. While no statistics appear to be kept on medical emergencies at ODARS, I had one client's husband fall to the ground with a heart attack and, far too long later, leave the hearing site by ambulance. Because AEDs have become part of our modern standard of care, I hope the SSA will see the cost benefit before too many people die. It is possible charitable or industry groups could donate toward this project to be rolled out as pilot programs. If you wish to help in some way to move this proposed forward, please contact me at *ferrarilaw@gmail.com.*

Increasing Claim Representatives' Fee Cap

Since 2016, the SSLS Board has unanimously supported and lobbied for increasing the representative's fee cap from $6,000 to $6,900. An SSA claimant's attorney only gets paid if the claim is approved, usually up to a maximum of $6,000. From that amount, the SSA deducts up to $91 for issuing the check, and costly payment errors and delays can and do arise as well.

Former SSA Acting Commissioner Carolyn Colvin opined that no increase was needed because there were plenty of attorneys and non-lawyers willing to take cases, regardless of the erosion by inflation of a fee that has not been raised since 2009. But SSAB's statistics show that as a percentage of representatives, the number of attorneys has declined to a 17-year low. There is no reason to not expect this trend to continue as more burdens (e.g., Social Security Ruling (SSR) 17-4p, discussed *infra*) are added to a representative's costs and responsibility. While many non-attorney



representatives do a fine job, the SSLS believes claimants, the SSA, and the public at large are better served by having more attorney representatives that are bound by rules of professional conduct.

As shown in the accompanying graph, claimant representatives' compensation has fallen every year from their peak in 2010. Some larger law firms have benefitted to the detriment of some smaller firms; the former can file a larger volume of cases and still profit if many fail. Failing to pay a fair fee also has efficiency consequences, as costs increase when the SSA interacts with claimants who cannot find a willing representative. The SSLS will continue to work on this issue with the new SSA Acting Commissioner, the SSAB, and Congress. Your help or advice is always welcome.

Social Security Ruling 17-4p

SSR 17-4p, published at 82 Fed. Reg. 46,339 (Oct. 4, 2017), has caused some concern about how to follow it and how it may conflict with other regulations such as the five-day evidence rule implemented last year. The SSLS Board has yet not addressed SSR 17-4p, so what follows is my personal opinion as essentially a solo practitioner with one paralegal.

Prior to SSR 17-4p, we would submit medical evidence of records (MERs) as soon as possible at the stage of Initial Consideration and Reconsideration to the state disability decision maker. Often, the MERs were not received in time to do so, so they would sit in the file during the usual yearlong Request for Hearing stage. This was for two reasons: first, many other MERs would show up during the year with duplicate records that we would weed out to assist the administrative law judges; and second, there is a labor cost to sending MERs the moment we got them, even if we did not check them for duplicates. Sending MERs all at once saves time and money. Once we receive a Notice of Hearing, we send the accumulated MERs in accordance with the best practices put out by the SSA. Any received after would be sent before the five-business-day-rule deadline.

Now, following SSR-17-4p, we have a practice of informing the administrative law judge when assigned that we have MERs we are holding for the best practice deadline or five-day deadline, and if they would like us to submit them sooner without duplication review, we will. In some cases it is and will be just simpler to submit the MERs as we get them.

The demands of SSR 17-4p conflict with both the best practices and five-day rule. In my view, SSR 17-4p lacks cogency. ☉