Social Security NEWS

Published by the Social Security Law Section of the Federal Bar Association

Spring 2011

Letter From the Chair

Hon. Larry Auerbach

Upon becoming chair of this section, I sent a letter to all section members thanking the outgoing chair, Gary Flack, for his years of highly successful service. I want to reiterate those thanks here. In that letter (found online at www.fedbar.org/Sections/Social-Security-Law-Section.aspx), I also asked for input regarding the path this section should take. I continue to welcome your input.

Hon. Larry Auerbach

It has been pointed out to me that, in my letter to all members, I neglected to provide any information about myself. I will briefly cure my oversight. Since May 2006, I have been an administrative law judge with the Social Security Administration in Atlanta. Prior to that, the vast majority of my career was with the U.S. Department of Labor, where I was a trial attorney, manager, and finally deputy regional solicitor. My primary areas of focus included class and individual employment discrimination, occupational safety and health, and the Fair Labor Standards Act. I also worked on government ethics, migrant worker protection, mine safety, veterans' re-employment rights, and many other areas.

As chair, I have two primary goals. The first is to maintain the section's position as a respected organization whose input is sought by both Congress and the Social Security Administration. The second is to enhance the benefits that the section provides to its members. This newsletter is a tangible (or at least electronic) step toward accomplishing this goal. I am most grateful that Judge Jim Fraiser has agreed to take on the challenge of providing this section with an interesting, helpful newsletter. Judge Fraiser is both an excellent judge and a published author. I know that he would appreciate your input in terms of both suggestions and articles offered for publication.

I look forward to working with you in the coming year.

Call for Submissions:
Please contact jim.fraiser@ssa.gov to discuss any potential articles or submissions.

Also in this Issue

Message From the Editor

Hon. Jim Frasier

Hon. Jim Frasier

Welcome to the launch of the newsletter for the Social Security Section of the Federal Bar Association. Our section president, Larry Auerbach, and I are looking forward to providing you with useful—and perhaps, at times, entertaining—information relative to the best practices associated with advocacy before Social Security administrative law judges, as well as best practices for Social Security administrative law judges. In support of that goal, we ask for articles from all lawyers, representatives, experts, and judges involved in the process and request that you forward any such articles, decided case summaries, or any other relevant material to Larry or me for use in this publication. Alternately, please provide us with names and contact information for any individuals who may be interested in making submissions. We hope that you will actively participate in this, your newsletter, and share your knowledge of best practices and other useful information with the section on a regular and frequent basis.

As a point of introduction, I have served as the chief administrative law judge in the Tupelo, Miss., ODAR office for the past year and received my ALJ appointment in 2006. Prior to that, I graduated from the University of Mississippi undergraduate and law school and had practiced trial law for 25 years as a state prosecutor, Mississippi assistant attorney general, and lawyer in solo practice and subsequently with a Jackson law firm, specializing in tort claims act and civil rights litigation, felony criminal cases and death penalty appeals in federal court, general tort and contract litigation, and social security law. During that tenure I wrote 16 Mississippi Law Journal, ALR 5th and ALR Fed articles, penned articles for the Mississippi Lawyer magazine, taught legal and appellate advocacy at the Mississippi College School of Law in Jackson, served as contributing editor for the Jackson Business Journal and the Metro Business Review, and authored four novels and nine nonfiction books. Hopefully, that experience has adequately prepared me for this editorial experience, and I look forward to working with you on your writing projects for the newsletter.

Please do not hesitate to contact me (jim.fraiser@ssa.gov; 662-842-0011) to discuss any potential articles or submissions or to let Larry and me know which subjects you would find most helpful and useful in your practice or on the bench, and we will make every effort to obtain articles on those subjects from appropriate sources.

Let's enjoy a productive 2011, working together to launch a newsletter that will be useful and helpful to members of our FBA section.

ADVOCACY

As you may be aware, the Social Security Law Section stands in a unique position. We are an organization of claimant's attorneys, government attorneys, and judges. There are other organizations that serve important roles on behalf of specific constituencies involved in Social Security law and the adjudication of Social Security issues. Our section differs from these organizations in that, with our diverse membership, we take a wider range of perspectives into consideration. We are recognized as being well informed, responsible, insightful, and impartial advocates for a fair, efficient, and effective adjudicatory process. Because of our long history of being reasonable and credible, our opinion has been sought out by both Congress and the Social Security Administration.

This section has frequently been asked to testify before Congress on issues vital to all of us who are involved in adjudication. Recent testimony by the section can be found at www.fedbar.org/SSAdvocacy. The common thread in our testimony has been advocacy aimed at ensuring efficiency and reducing the disability hearing backlog while scrupulously preserving due process. We have urged enhanced funding at all levels of the disability decision-making process as essential to maintaining full due process, enhancing fair determinations and decisions, and reducing unconscionable wait times.

The section monitors and proposes changes in the Social Security Administration rules, regulations, and processes and addresses any proposals that would not serve the interest of all stakeholders. This includes section members as well as claimants, taxpayers, and others. We also use our relationship with the SSA on other important issues; for example, we are currently addressing issues involving the safety and health of participants in hearings.

Finally, all section members are encouraged to let the chair, Larry Auerbach, know of issues which may be appropriate for comment or action by the section. He can be reached at larryauerbach@earthlink.net.

Examining a Vocational Expert

Hon. Larry Auerbach

Hon. Larry Auerbach

As all Social Security practitioners know, the testimony of a vocational expert can be critical to the outcome of a case. Thomas Edison said that genius is 99% perspiration and 1% inspiration. When it comes to examining a vocational expert, I would revise this to say that good examination of a vocational expert is 33% preparation, 33% analysis, and 33% communication.

I will start with preparation. You must carefully interview the claimant about his past work. Having the claimant complete a work history questionnaire is insufficient on its own. Only by thorough conversation will you learn what you need to know. Just this week, I had a case in which the representative asserted that the claimant should be found to be disabled based on the Medical-Vocational Guidelines since she was above age 50 and limited to sedentary work. The claimant's work history showed significant lifting in her past work. However, the testimony showed that the claimant's past work duties were primarily clerical even though the particular job also involved handing out equipment weighing 20 pounds or more. Better preparation might have prevented this surprise for the representative.

Check the Dictionary of Occupational Titles! You know the expert will rely on it and you should at least know what the DOT says about the claimant's prior jobs both in terms of how they are usually performed and the skills involved. Also, it is worth checking Onet or other more up-to-date reference sources. If the vocational expert testifies as to transferable skills in a job, you have little or no real ability to question him if you do not know what the claimant did and what sources says about skills. As another example, a representative successfully represented a claimant by showing that he did the job with paper and pencil recordkeeping while current practice involves computer skills the claimant lacked.

Analysis is part and parcel of a lawyer's job—do not forget that when it comes to experts. As the testimony develops, new and changed facts will appear. You must analyze how they fit with your theory of the case and adjust your case accordingly. (If you go into a hearing without a theory of your case that is another problem. If you do not know why you should win, you cannot show why you should win.)

Even the most prepared claimant may recall facts you were not told or they forgot to mention that cause critical problems. Vocational experts will construe things differently from your expectations. You must pay careful attention, analyze how these affect your case and then take action. Analysis is what allows you to ask a vocational expert if her opinion would be different if the claimant had not performed certain duties that you know he did not. It permits you to realize that the vocational expert's opinion is based upon assumptions that are subject to challenge. If the vocational expert says that a hypothetical individual could do a certain job, your preparation and your analysis of the hypothetical question will enable you to add to the hypothetical question a limitation established by evidence but not in the question. It will enable you to note a job requirement in the DOT which the expert's response did not account for.

Communication is, of course, critical to all legal work. Your questions to the vocational expert must clearly communicate limitations and define terms. (Detailed discussion of developing a proper hypothetical question is a topic that will be addressed in another issue of this newsletter—stay tuned.) The judge may or, in my case may not, permit vague questions. Even if permitted, such questions do not advance your case. Few questions are less useful than the question that asks whether a person with the (undefined) limitations stated in the claimant's testimony can do competitive work. It is safe to say that between you, the judge, the vocational expert, and the claimant there are at least four different understandings of what these limitations are. Similarly, terms such as "some limitation in..." or "difficulty with..." have no clear meaning.

Too often hypothetical questions include reasonable limitations added to multiple "no job ever" aspects. For example: "If a hypothetical individual of claimant's age, education, and past relevant work, must alternate between sitting and standing every 30 minutes (reasonable limitation), can lift 10 pounds frequently and 5 pounds occasionally, can only bend rarely, will miss 15 or more days of work per month (no job

EXPERT CONTINUED ON PAGE 4

Ten Mistakes to Avoid in SSA Cases

Hon. Jim Frasier

Hon. Jim Frasier

1. Faulty Submission of Evidence

Do not submit duplicative evidence. This is a problematic and time-consuming issue dealt with at the hearing level, and significantly delays preparation of cases for hearing. Hearing office staff often spend several hours on any given case sorting out duplicate evidence. The sooner a case is prepared and exhibited, the sooner the case may be scheduled.

Submit evidence as far in advance of the hearing as possible, using electronic records express. Up to 200 pages at one time can be faxed into the electronic folder using the fax number and bar code supplied with the Acknowledgment of Hearing notice. However, we do recommend smaller submissions when possible (less than 30 pages), as smaller exhibits open more quickly. Early submission (more than 10 working days before hearing) allows hearing office personnel to exhibit the evidence and ensures that the claimant's copy of the file includes a copy of all the evidence that has been received. It also gives the ALJ time to review all of the evidence, and helps to ensure that all relevant evidence is timely provided to experts scheduled to appear at hearing.

2. Inconsiderate and Sloppy Submission of Evidence

Before faxing evidence, check to ensure the evidence you are submitting matches the claimant. This simple precaution would significantly reduce the time hearing offices spend contacting representatives and re-associating evidence with the appropriate file.

Avoid submitting voluminous evidence at the last minute. This does not provide sufficient time for hearing office staff to associate the evidence with the file, or provide the ALJ and experts adequate time to review the evidence. You may suffer a continuance or placing at the end of the day's docket.

Do not submit medical evidence with nonmedical documents such as appointment of representative forms or fee agreements. Medical and nonmedical documents should be submitted separately. Because these documents are included in different sections of the folder, it requires more time to separate documents if they are submitted together.

3. Failure to Do Your Job as a Qualified Claimant's Rep

When possible, obtain a credible medical source statement from a treating source which identifies the limitations imposed by the claimant's impairments. Submit with supporting evidence or direct attention to evidence already in the file. Treating source statements can greatly assist an ALJ in assessing Step 3 of the sequential evaluation and the claimant's residual functional capacity. The key word here is "credible."

Deal with employment (substantial gainful activity, unsuccessful work attempts, sheltered work environments, etc.) or earnings issues in a pre-hearing memorandum or at the hearing. Be sure to distinguish long term disability, vacation, or bonus pay that may appear as earnings after alleged onset. If there is SGA, notify the judge and amend your client's onset of disability to conform to the SGA records.

Deal with worker's compensation issues in a pre-hearing memorandum or at the hearing. If there has been a settlement, provide appropriate proof. Be prepared to state how much the claimant is receiving per month and when that began and/or ended.

Dealing with vocational experts: Do not give up when a VE identifies jobs. If there is a question as to whether claimant can do job(s) listed, ask specific questions about the job. E.g., Does this job require frequent use of both hands? Would this job require the ability to read instructions/work with the public on occasion/work around the fumes that would come from X, etc. On the other hand, do not become abusive to the VE and retain a professional approach even where you disagree with the VE.

4. Failure to Support your Case Adequately

Submit concise pre-hearing briefs whenever possible. This assists an ALJ in preparing for the hearing. Key the brief to the exhibits. Make the brief "brief," succinct, and to the point. One page should suffice. Lengthy multiple page briefs not keyed to the MER are unnecessary and often very time consuming and unhelpful. If the case is unexhibited, key to dates and specific MER in the record.

The brief should be keyed to the exhibits

which demonstrate the impairment, concordant functional limitations, and date these limitations arose, worsened and finally became disabling. Include a motion to amend the onset if applicable, remembering to include a statement of desire to drop the Title II and proceed only on the Title 16 if the amendment effectively dismisses the Title II.

If a listing is relevant, cite the listing and demonstrate how it is met by reference to exhibits and medical opinions and findings.

5. Failure to Properly Support an OTR Request

Clearly label an OTR request "OTR request," and submit as early as possible (but only when a request is appropriate). OTR requests are not appropriate in every case, and should only be requested when a favorable outcome is supported by the evidence in the record. Frequent submission of OTR requests or critical requests with questionable basis in the MER may result in the establishment of your reputation with the ALJs as the "boy who cried 'wolf'".

Identify evidence that supports the OTR. OTR requests should include a concise summary at the beginning of the brief outlining the argument, followed by a more detailed explanation keyed to the MER and record exhibits specifically directing the reviewer's attention to evidence supporting a favorable decision.

Make sure evidence supports onset date. Onset issues are the most frequent reason an OTR request cannot be granted. Send a letter stating your willingness to amend the onset date to the appropriate date as per the MER.

Use FIT templates to submit OTR requests. A CD of these templates is available from hearing office personnel.

6. Failure to Cooperate with Attorney Adjudicator

When contacted, work with attorney adjudicators to expedite decisions in appropriate cases. Attorney adjudicators review and screen cases for an OTR. Currently, attorney adjudicators have the authority to issue a fully favorable decision OTR when it is warranted. If you are contacted by a hearing office attorney regarding substantial gainful activity or onset issues in a particular case, discuss the matter with the attorney to see if the issue can be resolved without the need of a hearing. As always, be polite and professional with attorney advisers and all ODAR staff when discussing any matters with them on the phone.

7. Failure to Take Proper Steps when Dealing with Dire Need, Homeless, Terminal Illness, Deceased, or Incarcerated Claimant.

Notify the hearing office when the claimant has a terminal (TERI) condition, is homeless, or is in dire need, and include appropriate documentation supporting these allegations. Notifying a hearing office of these circumstances can significantly expedite the processing of a case, if the allegation is supported. The criteria and reference links for critical case processing can be found in our provisions in HALLEX I-2-1-40 (Critical Cases).

With the request and documentation supporting the allegation, submit updated evidence supporting the claim for an OTR review. If a dire need case can be awarded without a hearing, this works to the advantage of the claimant and the hearing office.

If claimant is incarcerated, provide the hearing office with the address of the facility and the release date. Many difficulties arise when an individual who has requested a hearing is incarcerated. For example, if an in-person hearing must be conducted, there are varying rules and procedures depending on the facility in which the claimant is incarcerated. Some claimants are transferred after a hearing has been scheduled but before the hearing has been held. For these types of reasons, it is very important that the hearing office is apprised at all times of the status of an incarcerated claimant. Obtaining a waiver from your client that will allow other options than in-person hearings, i.e., telephone or video hearings, may substantially expedite the hearing.

Submit legible death certificate and timely substitution of parties. This allows the staff to notify the ALJ of the claimant's death and to prepare for a hearing under these circumstances.

8. Failing to Properly Manage Your Docket & Caseload Prior to and After Hearings

Do not request postponements unless essential. Be flexible with providing dates and times or hearings, and request postponements in writing in a timely fashion wherever possible. When you have already agreed to the time of a scheduled hearing, avoid requesting a postponement for a conflict that arises later. Continuances may be denied and your case dismissed if there is no good cause for the continuance and you and your claimant fail to appear. NEVER fail to show for a hearing when a continuance has not been

MISTAKES CONTINUED ON PAGE 6

MISTAKES CONTINUED FROM PAGE 5

granted in advance and fail to adequately represent your client's interests. Repeated instances of this can result in your being banned from practice before the court.

DO NOT PLAY FAST AND LOOSE WITH THE COURT ON CESSATION HEARINGS. Failure to provide written documentary support for basis for continuance and last minute failures to appear without good cause explanation will likely not obtain a continuance and could result in a dismissal.

9. Failure to Submit New Evidence in a Timely Manner

SUBMIT NEW EVIDENCE AS SOON AFTER A HEARING AS POSSIBLE AND REQUEST THAT THE COURT ENTERTAIN THE EVIDENCE PRIOR TO DRAFTING AN OPINION IN THE CASE. This will assist the ALJ in reviewing the records and appropriately focus attention on the information supporting your arguments, resulting in the issuance of a timely decision.

10. Failure to Maintain Credibility with the Court, the AC, and Your Claimant.

Avoid the appearance of impropriety by offering last minute "bought" medical evidence that is entirely unsupported by the medical record.

Avoid the appearance of unpreparedness by arguing that a case meets a listing and then failing to explain how the case meets the listing.

Avoid the appearance of offering "cut and paste pleadings" by citing canned bases for why good cause exists for failure to file a timely Request for Notice of Hearing without offering documentary evidence to support your claim.

Avoid the appearance of unpreparedness by being unable to answer the ALJ's questions about the record, e.g., such questions as, "is there support for that limitation or impairment in the MER", or, "is there an MRI in the record, and if so, in which exhibit?"

Avoid the appearance of disinterestedness in your claimant's case by failing to ask any hypotheticals of the vocational expert or medical expert or asking questions that have no basis in the MER, or asking inappropriate questions such as, "if you take everything the claimant testified as true, could she perform any jobs?"

Avoid the appearance of unpreparedness by talking to your client frequently and knowing their limitations well enough so you can ask questions related to what they have actually tried to do or can't do rather than canned questions such as:" how much can you lift, how long can you stand", etc. If the testimony is tied to things that claimant has tried to do or has done with poor results, they are more credible. "I am not able to be around people" is far less persuasive than, "when my wife's brother came to visit my wife, I had to go off to my room by myself and I shook and cried until he left."

EXPERT CONTINUED FROM PAGE 3

limitation), will only be on task one-third of a workday, and can be expected to attack supervisors with deadly weapons once per week...." You will get a meaningless "no jobs" answer. Everyone in the room, including the hearing reporter, knows that any of the last three limitations standing alone will preclude work, so you have neither learned nor conveyed any information about how the other limitations detract from employability.

In communicating with the expert, you are not limited to hypothetical questions. With preparation and analysis, you should be able to inquire about specific jobs identified by the vocational expert. Asking, "Could he really do that job?" will only entrench the expert's opinion. However, asking, "doesn't that job require the ability to work in close proximity to others" or "doesn't that job require use of a computer and frequent movement of the neck" are valid questions. I have seen this kind of examination cause the expert to eliminate every job he had identified.

As a final word on communication, an effective attitude toward a vocational expert would be such that you appear to be examining various options. An attitude of confrontation or animosity will only result in hardened positions when what you want is thoughtful consideration of your concerns and arguments. What's more, this demonstrates a lack of professionalism that does not serve you well with the judge or the expert. This does not mean that you cannot ask difficult questions. It does not mean that you should not follow up to ensure full consideration of the concerns that you raise. It simply means that you should do so clearly, courteously, and professionally.

Recent SSA Decisions in the Federal Courts

Court of Appeals Decisions of Note

Becker v. Comm'r of Soc. Sec. Admin., 2010 U.S. App. Lexis 25481 (3d Cir., Dec. 14, 2010)

The claimant alleged disability due to degenerative disk and joint disease and depression, but the ALJ rejected the treating psychiatrist's opinion that she had marked mental restrictions and an orthopedic surgeon's opinion that she could not physically perform sedentary work. The court rejected the claimant's appeal, holding that the ALJ properly disregarded both the psychiatrist's and surgeon's opinions. Both opinions, the court declared, were contradicted by the doctors' own treatment records indicating only moderate psychological limitations and a positive response to medication which yielded an ability to stand, walkg, and lift to some degree. Furthermore, these doctors' opinions were also contradicted by other doctor's records and the state agency doctor's review of the medical records and the claimant's own testimony which revealed that she could ambulate and perform light activities of daily living without severe pain. The court also pointedly noted that the claimant's objections, replete with vitriolic commentary, did not "advance her position."(Footnote 5, p. 16 of the slip opinion)

Phillips v. Astrue, 2010 U.S. App. LEXIS 26122 (7th Cir., Dec. 23, 2010)

A claimant alleging depression was denied benefits by an ALJ who found she had only mild limitations and could perform sedentary work. The ALJ rejected the claimant's testimony regarding lack of marijuana use as not credible, and gave little or no weight to the opinion of the claimant's treating certified physician's assistant and treating psychologist, giving weight only to the opinion of the state-agency reviewing physician. The court reversed, finding that (1) despite the fact that the physician's assistant did not qualify as a treating source, that opinion could not be rejected (*see* SSR 06-3p, Editor's note) solely on the basis that it was not supported by the medical record and treatment notes, where there were some treatment notes in the MER and that opinion was supported by other physicians; and (2) the treating psychiatrist found that the claimant had marked mental limitations and no basis was given for rejecting that opinion (which was supported by other psychiatrists) except that it was contradicted by the state agency reviewing doctor, who had never seen the claimant and who gave no explanation as to the basis for his opinion. The court pointedly observed that not only did the ALJ simply discard the claimant's medical evidence, the ALJ also "belittled the views of every medical professional who treated or examined [the claimant] and adopted the terse conclusions of the one doctor who had never met her." *See* p. 20 of the slip opinion.

District Court Decisions of Note

Heise v. Astrue, 2010 U.S. Dist LEXIS 78089 (D.N.J., Aug. 2, 2010)

The claimant alleged disability due to orthopedic impairments and the ALJ denied the claim. The claimant appealed alleging that the ALJ failed to assign controlling or significant weight to the treating doctor's opinion, particularly the retrospective aspect of the opinion. The court ruled that the fact of "a treating physician opinion's retrospective nature is not a proper reason for failing to assign it … the weight it is entitled. …" (P. 21 of the slip opinion) (citing *Newell v. Comm'r of Soc. Sec.*, 347 F.3d 541, 547–48 (3d Cir., 2003) & SSR 83-20, especially where that opinion was otherwise entitled to significant weight. The mere fact that certain aspects of the opinion were retrospective was not sufficient basis to accord less weight to it the court concluded, even though the date of onset was unclear. The court reversed for further consideration of the treating doctor's opinion and determination of onset of disability.

McCombs v. Comm'r of Soc. Sec., 2010 U.S. Dist. LEXIS 100620 (S.D. Ohio, Sept. 23, 2010)

Claimant alleged disability due to anxiety, and the ALJ rejected the treating physicians' opinions. The court ruled that a treating facility, such as a mental health clinic, cannot be a treating source under 20 C.F.R. Sections 404.1527(d) and 416.927(d), and an individual does not qualify as a treating source by virtue of employment at a facility providing treatment to the claimant (citing *Smith v. Comm'r of Soc Sec.,* 842 F.2d 873, 875 (6th Cir. 2007) and 20 C.F.R. Section 404.1502. Noting that even if an ALJ declines to give controlling weight to a treating physician's opinion, he/she must determine the weight accorded that opinion by applying the relevant six factors and offering a good reason for according such weight (citing 10 C.F.R. Sections 404.1527(d)2 and 416.927(d)2, the court determined that the ALJ provided good reasons for rejecting parts of the opinion—limited treatment and the conclusive nature of part of the doctor's opinion—while giving some weight to other aspects of the opinion that were supported by the medical evidence of record.

For additional resources on the issue of rejection of a treating physician's opinion by an ALJ, *see also Determination and Application of Correct Legal Standard in Weighing Medical Opinion of Treating Source in Social Security Disability Cases*, 149 A.L.R. Fed. 1; *Effect of Administrative Law Judge's Failure to Explain Rejection of Probative Evidence in Social Security Cases*, 167 A.L.R. Fed. 65; *Sufficiency of Evidence When Evaluating Mental Impairment in Social Security Disability Case Under 20 C.F.R. Section 404.1502a*, 166 A.L.R. Fed 361; *Doctor, is She Disabled? The Eighth Circuit's Struggle With the Treating Physician's Testimony in Social Security Cases:* Morse v. Shalala, 28 Creighton L. Rev. 855 (April, 1985); Comment, A Role for the Courts: Treating Physician Evidence in Social Security Disability Determinations, 3 U. Chi. L. Sch. Roundtable 391 (1996).