Social Security NEWS

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Letter From the Chair

Hon. Larry Auerbach

I want to again thank all of you for being members of the Social Security Law Section. Our section continues to be active in representing your interest and in trying to be of service to you.

As most of you know, we conducted a survey of the membership to ask your opinion on issues which have arisen or which seemed likely to arise. Many thanks to those of you who took the time to complete the survey. The section's actions and advocacy will be guided by your responses.

We have also solicited the membership for interest in providing articles to the newsletter and in serving on the sections governing board. One of the results of this solicitation is an excellent article by Jerrold Sulcove which you will find in this issue of our newsletter. This well-researched and well thought-out article addresses the interaction between seeking unemployment compensation and qualifying for disability under the Social Security Act. This article is well worth reading—even if you think you have a clear understanding of this issue.

We have heard from a number of excellent individuals who are interested in being considered for positions on the board. When the selection process is complete, we will have a larger board with members from across the country. This will enable us to better serve you.

In this issue, we have an article addressing some of our recent advocacy. The section has recently sent letters to Social Security addressing the new policy of not divulging the name of the administrative law judge who is to hear a case until the actual hearing. We have also addressed a safety and health issue which, while not as prominent on our members' minds, is still important to clients, attorneys, judges, and others involved in Social Security hearings.

Finally, I want to remind you that this section can only be successful with your help. I urge each of you to: (1) Tell an attorney or a

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

Also in this Issue

Recent Modification of the Re-Contact Rule

Hon. Jim Frasier

Hon. Jim Fraiser

For those of you who may have missed it, the Social Security Agency has recently modified 20 CFR Parts 404) and 416 with regard to the Administrative Law Judge's (ALJ's) responsibility to re-contact the treating medical source in certain instances. As of March 26, 2012, ALJs are being given more flexibility as to whether they must first re-contact the claimant's treating physician when attempting to resolve inconsistencies or insufficiencies in evidence the treating physician initially provided. These insufficiencies and inconsistencies have been defined as when the medical source contains a conflict or ambiguity that must be resolved, the report does not contain essential information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques. 20 CFR 416.912(e)(1). Where the previous language provided that the ALJ "will" seek additional evidence or clarification from the medical source in these circumstances, it now provides "may." *See* 20 CFR 404.1512(e) and 416.912(e).

The modification notes in part that, "there may be other, more appropriate sources from whom we could obtain the information we need." By giving adjudicators more flexibility, the modification will allow adjudicators to make determinations or decisions "more quickly and efficiently in certain situations." While this modification may "significantly" reduce the need to re-contact the medical source(s) in many situations, the rules pertaining to when a consultative examination may be purchased, as provided in 20 CFR 404.1519a, have not changed. It provides in part that "if we cannot get the information we need from your medical sources, we may decide to purchase a consultative examination (CE)." After initial evidence from all medical sources such as treating and examining sources has been received, re-contact "may," rather than "will," become necessary where ambiguities or conflicts have arisen in treating reports. The regulations continue to require the claimant (pursuant to the claimant's burden of proof in Steps 1-4) and the ALJs (pursuant to the ALJ's responsibility to develop the record and burden of proof in Step 5) to make an initial contact with treating sources.

But when a treating physician, psychologist or other medical source either cannot or will not provide the necessary evidence (*see* 20 CFR404.1520b [c](1)), the adjudicator may now first look elsewhere for the essential evidence. Furthermore, although the initially supplied or obtained treating source evidence may contain conflicts and inconsistencies, which formerly mandated re-contact with the treating source, pursuant to the modification, re-contact with the treating source is no longer mandatory when other evidence in the file (e.g., a more recent treating source's notes) or other evidence obtainable elsewhere (e.g., a CE more specialized in a relevant area than the treating general practitioner) suffices to clear up any conflicts or inconsistencies so as to allow the ALJ to make a decision based upon substantial evidence. The adjudicator will now have more flexibility as to whom to contact for additional evidence or when to rely upon other substantial evidence already in the record.

What does this mean for the disability attorney or representative? They continue to bear the burden of proof in disability cases through Step 4, and must produce evidence from treating sources sufficient to make a good enough case to invoke the various protections of the regulations, such as the duty of the ALJ to develop the record or to re-contact the treating source in certain circumstances. This will mean gathering all the claimant's previous medical records and filing them contemporaneously with or as soon after the filing of the claimant's Title II and/or Title XVI petition as circumstances allow. For claimants who cannot afford additional medical care, and who possess spotty medical records to begin with, you should make a prompt written request that a consultative exam be performed by a specialist in the field in which your client's primary impairments exist.

If there are inconsistencies or insufficiencies in the evidence your client's treating physician[1] initially provided, you should re-contact the treating source because the adjudicator no longer has a mandatory duty to do so as first resort. For example, sometimes treating sources who wish to help their patients will respond to questionnaires in ways that are unrealistic (e.g. can stand and sit zero, can lift zero) or at odds with the objective medical evidence. The ALJ may eventually need to contract the source in

order to make a determination of how much weight to give to that source's opinion, but this modification allows the ALJ other options, such as resort to other (perhaps less favorable) treating sources or consultative examinations by specialists in a relevant field of expertise. Simply relying upon the adjudicator to develop your client's record for you may result in your petition being denied for failure to meet your burden of proof. When you receive such evidence, you should not wait to see if the ALJ will contact the source. You should be proactive in trying to develop a credible case for your client. As this modification makes clear, its purpose is merely to give the adjudicator more flexibility in accomplishing a major goal of the regulations—the best possible development of every claimant's medical record so every claimant may receive a due process hearing and a decision supported by a reliance upon substantial evidence.

New Case Update

Hon. Jim Fraiser

Eleventh Circuit affirms ALJ decision to discount the opinions of a treating physician and two examining physicians. *Geralyn Anderson v. Commissioner of Social Security*, No. 10-15435 (11th Cir. Sept. 26, 2011). In an unpublished opinion, the Eleventh Circuit found the ALJ articulated adequate reasons, supported by substantial evidence, for giving the opinion of the claimant's treating physician less than controlling weight. Specifically, the ALJ gave the treating psychiatrist's opinion little weight because it was inconsistent with the psychiatrist's own treatment notes. The court also found substantial evidence supported the ALJ's decision to reject the opinions of two examining physicians. The ALJ gave little weight to the one consultative opinion because the physician was not a treating source and his opinion was a recitation of the plaintiff's subjective allegations. The ALJ gave little weight to the other consultative opinion because the physician uncritically accepted the claimant's subjective claims and because the opinion lacked support in the record. *See also, Winschel v. Comm. Of Soc. Sec.*, 631 F.3d 1176 (11th Cir. 2011) (affirming basis for declining to give controlling weight to treating physician where other examining physicians offered different opinions).

Sixth Circuit finds the ALJ properly weighed the medical and psychological opinion evidence of record. *Cleo Cress v. Commissioner of Social Security*, No. 10-5951 (6th Cir. Nov. 14, 2011). Claimant argued that the commissioner improperly rejected the treating physician's and consultative psychologist's opinions. The Sixth Circuit held the ALJ provided good reasons for according minimal weight to the opinion of the claimant's treating physician. The ALJ noted that the opinion was not supported by the physician's own treatment notes and conflicted with the objective medical evidence. The court also determined that the ALJ properly rejected the opinion of a consultative psychologist who continued to treat the claimant after performing the consultative psychological evaluation on behalf of the agency. The court noted that the ALJ weighed and evaluated the evidence in the psychologist's reports and accepted his findings to the degree warranted by the evidence.

Fifth Circuit finds ALJ properly rejecting opinion of treating physician. *Luckey v. Astrue,* 2011 U.S. App. LEXIS 25378 (5th Cir, Dec. 19, 2011). Claimant argued that the ALJ employed improper legal standards by not giving controlling weight to the opinion of his longtime treating physician. The court found that the ALJ properly articulated his reasoning for doing so in noting that the physician's medical source statement was inconsistent with his own notes, with his decision to treat the claimant conservatively, with his non-referral of the claimant to a specialist and with the fact of medical improvement during subsequent chiropractic treatment. The court declared that these facts constituted "good cause" to give little or no weight to the treating physician pursuant to regulation 20 CFR 404.1527 and the controlling circuit precedent of *Newton v. Apfel*, 209 F.3d 448 (5th Cir. 2000). The court also decided that the ALJ was not required to seek the opinion of a medical expert as to onset date as the onset date in question was not ambiguous and thus no medical expert was required to consider that issue.

Damned If You Do and Damned If You Don't: Unemployment Compensation and the Disabled Client

by Jerrold A. Sulcove

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Any representative who has done more than a few disability hearings knows the difficulties posed by a client who has received unemployment compensation benefits prior to, and concurrent with, her application for disability benefits. The dilemma faced by the client is based upon the client's assertion that, when she had applied for unemployment compensation benefits, she certified to the Department of Labor and Industry that she was "able and available" to return to work. On the other hand, when she applied for disability, she alleged that she could not do her past relevant work or any other job in the national economy. The implication, of course, is that the client is either lying about being able to work or lying about not being able to work.

While most circuit courts have held that receipt of unemployment compensation benefits does not preclude an individual from receiving Social Security benefits, it is clear that many courts permit the Commissioner to use this fact to support a finding that a claimant's statements are not credible. It is therefore vitally important for a representative to know whether a claimant has received unemployment compensation benefits and to understand how to address this fact at all levels of appeal.

As a preliminary matter, a representative should have a basic understanding of the applicable unemployment compensation scheme that authorized the payment of unemployment benefits. While federal unemployment compensation is available to some workers, most claimants who are eligible for unemployment compensation receive state unemployment benefits. As an example, the Pennsylvania unemployment compensation statute provides that an individual is not eligible for unemployment benefits for "voluntary termination" of employment.

However, if a potential disability claimant voluntarily quits her job due to a disability, the individual will still be eligible for unemployment benefits under certain circumstances.1 The disabled claimant is confronted with the obvious baffling conundrum. She cannot work due to her disability and feels she must quit her job; however, if she quits her job, she and her family will be more destitute than they already are. She is eligible for unemployment benefits which would provide temporary money to live on; however, she must certify that she is "able and available" to work. She is likely getting the advice from her welfare caseworker that she must apply for unemployment compensation benefits and is not yet represented. She almost certainly does not understand that, in what may be over a years' time, she will need to explain to a hostile judge why she certified she could work to the state's department of labor.

Most claimants elect to apply for unemployment compensation because, practically, they cannot live without the income and do not understand the consequences of their application for unemployment on their disability claim. Additionally, a claimant may feel that she can do very limited work with accommodations for her disability. Many claimants may feel that they can work from home or work for a friend for several hours per week, perhaps.

Two basic questions arise from the receipt of unemployment compensation benefits. First, can the Commissioner preclude a disabled claimant from receiving disability benefits on the basis of her receipt of unemployment compensation? Second, can an ALJ use the fact that a disabled claimant has received unemployment compensation as evidence to support the assertion that the claimant is not credible?

While the Supreme Court has yet to address the issue conclusively in the context of Social Security benefits, it is clear that, as a matter of policy, the Social Security Administration will not prevent an individual from receiving disability benefits solely based upon prior payment of unemployment compensation benefits. Chief Judge Frank A. Cristaudo set forth this policy in a memorandum to all Regional Chief Judges dated November 15, 2006 in which he conclusively stated that "the receipt of unemployment insurance benefits does not preclude the receipt of Social Security disability benefits."

Chief Judge Cristaudo relied primarily on

the Supreme Court case, Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999) in which the Court addressed the issue of whether an individual who has filed suit against her employer under the Americans with Disabilities Act (ADA) can also be eligible for Social Security disability benefits. To succeed in a wrongful termination claim pursuant to the ADA, a plaintiff must allege that she is able to perform the essential functions of her job. In Cleveland, the Court remanded the case, finding that:

> The pursuit, and receipt of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work ... she must explain why that SSDI contention is consistent with her ADA claim that she could 'perform the essential functions' of her previous job' ... " 526 U.S. at 798 (emphasis added).

While not directly commenting on the issue of credibility, the Cleveland Court recognized the inconsistency of an individual claiming that she is able to work for the purposes of an ADA claim and unable to work for the purposes of a Social Security disability claim. Most federal circuit courts have held that, while a claim for unemployment benefits does not preclude an individual from receiving Social Security benefits, the inconsistency may be used to impeach a claimant's credibility.

In a case where a disability claimant received unemployment compensation benefits after applying for disability benefits, the Third Circuit Court of Appeals has commented:

> ... the ALJ found that Plaintiff's historical employment record contains a number of unexplained gaps and that Plaintiff's receipt of unemployment benefits tends to undermine his desire to return to work ... . The ALJ found that Plaintiff committed to the disability process one-month after being laid off, indicating his inability to work, and then six-months later drew unemployment compensation, which requires a willingness to work ... . The ALJ is entitled to point out the inconsistency between the receipt of unemployment benefits and an application for disability as it adversely affects his credibility ... . Further, the gaps in Plaintiff's employment history ... in combination with the receipt of unemployment benefits led the ALJ to conclude that Plaintiff was committed to not returning to work ... . The ALJ's citation of specific evidence in support of his finding bolsters his credibility determination and meets the requirement of substantial evidence. Kerik v. Astrue 2008 WL 2914793, 8 (W.D. Pa.,2008) (citations omitted).

Other Circuit Courts have reached a similar conclusion. In its unpublished opinion in Nieves v. Heckler, 802 F.2d 459 (6th Cir. 1986), the Sixth Circuit found "that Nieves' prior statement concerning his ability to work is inconsistent with his disability claim" and the Eighth Circuit, in Jernigan v. Sullivan, 948 F.2d 1070 (8th Cir. 1991), commented that "Jernigan's application for unemployment compensation benefits adversely affects his credibility ... because his application [for unemployment compensation benefits] necessarily indicates that Jernigan was able to work, this may be some evidence, though not conclusive, to negate his claim that he was disabled ... "

There is hope for a claimant who brings her claim in the jurisdiction of the Ninth Circuit Court of Appeals which has taken the position that, under Oregon law, an application for unemployment benefits is "not necessarily inconsistent" with a claim of disability under the Social Security Act due, in part, to the fact that an individual can work part-time and still be eligible for unemployment benefits under Oregon unemployment compensation scheme. Owens v. Barnhart, 48 Fed. Appx. 624, 2002 WL 31217251 (9th Cir. 2002). Furthermore, the Sixth Circuit has held that "the mere receipt of unemployment insurance benefits does not prove ability to work." Kinella v. Schweiker, 708 F.2d 1058, 1066 (6th Cir. 1983).

So, how should a representative deal with the fact that a claimant has received unemployment compensation? As an initial matter, the representative should determine whether the information contained in the disability file regarding unemployment compensation payments is correct and confirm when the payments were received by the claimant.2 If the payments were made prior to the alleged onset date, at least one court has held that receipt of disability benefits prior to the onset date is not inconsistent with an assertion of disability. Bevelle v. Commissioner of Social Security, 2008 WL 5351020 (E.D. Mich. 2008). Also, prior to the hearing, the representative should submit a copy of Chief Judge Cristaudo's memorandum which will form the basis for the future argument that the claimant is not precluded from receiving disability benefits solely on the basis of unemployment compensation payments.

A careful review of the disability file for statements by the claimant is also required. Typically, an ALJ will assert that the claimant who received unemployment compensation benefits made certain representations to the governmental entity issuing the payments. However, the disability record typically does not contain any statements from the claimant regarding unemployment compensation. The representative could certainly argue that there is no evidence to support the conclusion by the ALJ. See Lackey v. Celebrezze, 349 F.2d 76, 79 (4th Cir. 1965) ("In this record, however, no showing is made that Lackey actually represented to the state authorities that he was able to work or that he was aware of the legal requirements for unemployment compensation").

The representative may also make a compelling argument based upon the requirement that an applicant for SSI must also apply for other state and federal benefits including Title II benefits, veterans pension and compensation payments,

retirement benefits, workers' compensation payments, private pensions, and unemployment insurance. See 20 C.F.R. 416.210; POMS SI 510.005(A)(1). An individual will not be eligible for SSI if she "does not take all appropriate steps to file for and, if eligible, obtain any such payments within 30 days of receipt of such notice." POMS SI 510.001(B)(1). Therefore, an individual who voluntarily quits her job due to a disability and is eligible for unemployment compensation insurance must apply for these benefits in order to receive SSI benefits. A representative can certainly argue that a claimant's application for unemployment compensation benefits was designed to preserve her eligibility for SSI.

The representative may further argue that the receipt of unemployment compensation benefits is not at all inconsistent with a claim for disability benefits. After all, unemployment compensation and Social Security disability are two entirely separate state and federal programs with separate governing rules, regulations, and eligibility requirements.

An individual can qualify for disability benefits pursuant to the 5-step sequential evaluation process, even if she is capable of performing some work. For example, at the fifth step of the sequential evaluation process, the ALJ must determine whether a claimant can make an adjustment to other work given the claimant's age, education, work experience, and residual functional capacity. 20 C.F.R. 404.1520(v). An individual of advanced age with a past relevant work of light, unskilled work may therefore qualify for disability benefits while still capable of performing some work. In addition, the representative could argue that an individual may be "able and available" to do certain work; however, the work may not exist in significant numbers making her eligible for disability benefits at step 5.

Furthermore, a claimant whose disability meets or functionally equals an impairment described in the listings is automatically declared disabled at step 3 of the sequential evaluation process. The claimant, however, may still believe that she is able to do some work. Claimants who cannot work on a consistent basis, must take frequent breaks, require the use of a walker to ambulate, require regular absences from work due to their disability, or require accommodations to work, may be disabled pursuant to the Social Security rules and regulations but still feel that they can "work" and legitimately believe and can certify that they are "able and available" for work.

Moreover, a claimant who works may still be eligible for disability benefits as long as the work does not rise to the level of substantial gainful employment. A claimant who is "able and available" to do a part-time job and is paid less than the SGA level could be eligible for both unemployment and disability benefits. It is entirely consistent for an individual who is able to work part-time at a job that pays less than SGA levels to certify that she is "able and available" and still assert that she is disabled pursuant to the Social Security rules and regulations. Finally, as in every disability case, the representative should be sure to elicit evidence at the hearing to bolster the claimant's credibility. What were the circumstances behind the claimant's filing for unemployment compensation? Did a welfare caseworker or Social Security claims representative recommend that the claimant file for unemployment benefits? Did the claimant have any other source of income at the time she quit her job due to her disability? Was the claimant represented during the application process for welfare, unemployment benefits, or her initial disability application? Did the claimant "misapprehend his own condition" or was the claimant in "desperate financial straits"? Schmidt v. Barnhart, 395 F.3d 737, 746 (7th Cir. 2005). Did the claimant realize the "legal requirements for unemployment compensation"? Lackey, 349 F.2d at 79.

The Sixth Circuit highlights the need to provide evidence supporting the claimant's credibility quite succinctly (and poetically) in Kinsella:

> Moreover, in the context of all the evidence, it was unreasonable to infer that the application for such [unemployment compensation] benefits diminished the credibility of Kinsella's complaints of pain. It is true the credibility determinations rest exclusively with the Secretary ... But, viewing the record as a whole ... when such a credibility determination is based upon so slender a reed, and is contradicted by the overwhelming medical and testimonial evidence indicated disabling pain, the Secretary's decision is not supported by substantial evidence. 708 F.2d at 1066 (citations omitted).

In many of the circuit court opinions cited above, the ALJ cited the receipt of unemployment compensation benefits as one of several factors that diminished the claimant's credibility. If the representative produces a record which strongly supports the credibility of the claimant and makes the arguments contained in this article, it is more likely that the ALJ will find the claimant to be credible.

Endnotes

[1]For instance, Section 402(b) of the Pennsylvania unemployment compensation law states that a claimant is ineligible for benefits for any week in which her unemployment is due to voluntarily leaving work without a cause of a "necessitous and compelling nature." Pennsylvania courts have found that a disability can be a "necessitous and compelling" cause for quitting one's job. Individuals who voluntarily leave their jobs because of a disability are therefore eligible for benefits if the individual has notified the employer of the disabling condition and the employer could not provide suitable work.

2 In certain circumstances, it may be necessary to request a subpoena to obtain the claimant's unemployment compensation file from the applicable governmental entity.

Advocacy Update

One of the prime missions of the Social Security law Section is to advocate on behalf of our members and others involved in the Social Security disability adjudication process. As part of our ongoing efforts in this regard, we recently sent two letters to the Social Security Administration.

As most of you are aware, Social Security has recently adopted a policy of not disclosing the name of the administrative law judge assigned to adjudicate a case until the time of the hearing. On January 23, 2012, the Social Security Law Section sent a letter to Commissioner Michael Astrue and Deputy Commissioner Glenn Sklar objecting to this procedure and proposing an alternative to meet the agency's needs. The letter was in response to complaints from members—both ALJs and private attorneys—that this new policy of the Commissioner is unnecessary and creates inefficiencies for the process and deprives attorneys of information which can help them better prepare their clients for the hearing and more effectively represent their clients. The Section understands the agency's desire to avoid "judge shopping" and proposed a means to accomplish this without causing the real harm caused by the new system. A copy of the letter is on our Section's website.

On February 22, 2012, the Social Security Law Section sent another letter to Deputy Commissioner Sklar and Chief Judge Debra Bice. This letter addresses the need for Automatic External Defibrillators (AEDs) in each hearing office. AEDs are well-recognized as lifesaving devices and are commonly found in hotels, airports, schools, and similar places. Some, but not all, hearing offices have AEDs available. The costs to the Social Security Administration of purchasing and maintaining this equipment is relatively small, and there is a reasonably foreseeable likelihood that someone will need this equipment. The individual in need could be a claimant, attorney, ALJ, hearing reporter, expert witness, visitor, or support staff member. The availability of an AED could literally be the difference between a full recover, or death or disability. A copy of this letter is also on our Section's website.

Gary Flack, the Immediate Past President of the Social Security Law Section, signed these two letters which were drafted and approved by the Section's Board.

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judge working in this area of practice about our section and urge then to join. If each of us could simply recruit one or two new members, the force of our voice would be amplified dramatically; and (2) Consider writing an article for the newsletter. Articles can be brief or long and can address any topic of interest to the Social Security bar. Articles may have been previously published. Send your ideas or articles to jim.fraiser@ssa.gov.

If you have ideas about issues which you think the section should address, let me know: larryauerbach@earthlink.net.