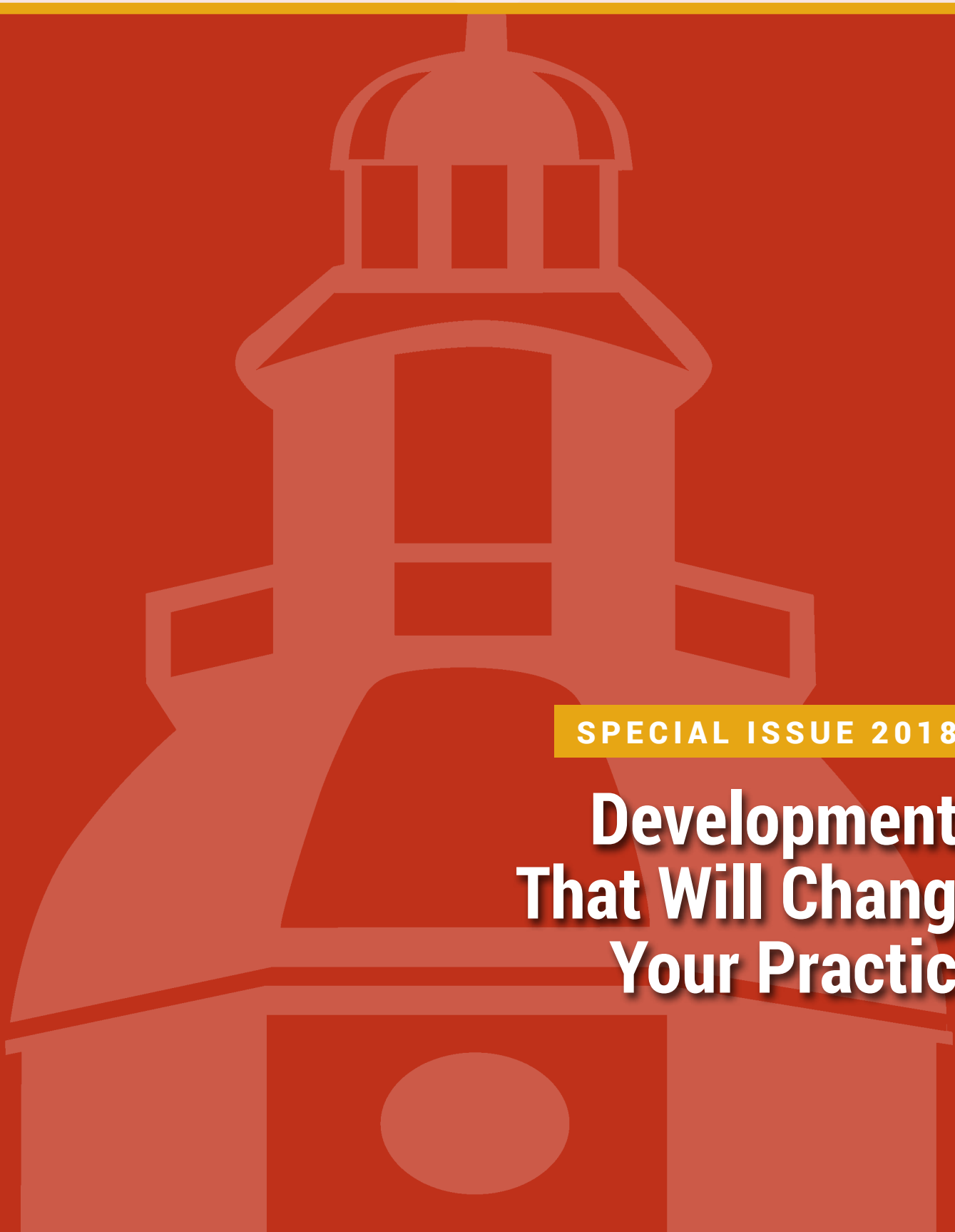
Special Issue 2018

TRIAL REPORTER

Journal of the Maryland Association for Justice, Inc.



SPECIAL ISSUE 2018

Developments That Will Change Your Practice

The New Social Security Five Day Evidence Rule – The Dangers, Pitfalls And Some Precautionary Steps

by Jeffrey Scholnick

On December 16, 2016, the Social Security Administration (SSA) implemented a new rule effective for all hearings as of May 1, 2017. The new rule demands that evidence be received more than five days before an Administrative Law Judge hearing, Title 20, Part 404, Section 404.935. (See Endnote 1.) This was followed up by Social Security Regulation 17-4p, published on October 4, 2017, which was intended to clarify the new Rule, but led to more confusion and appeared to threaten attorneys with sanctions for non-compliance with the five day rule.

This article is intended to explain these changes in the rules and to suggest some precautions to prevent the practitioner from having evidence excluded from the record, resulting in the denial of your case.

I A. – The New Five Day Rule (hereinafter "FDR")

After much fanfare, the SSA decided to impose a Rule that had existed in the North East Social Security Hearing Offices (known as "Region One"), and had been called the "Boston Rule." This Rule requires that medical records in a social security disability case must be submitted more than five business days before the hearing. The Rule states that records submitted within five days of the hearing can be withheld from the evidence that the judge will consider unless two circumstances apply: (1) the attorney, at least five business days prior to the hearing informs the Judge of the additional evidence that has not been submitted or (2) the attorney can show "good cause" for the delay, as defined by the Rule.

In order to make compliance with FDR easier, the SSA adopted a 75-day advance notice requirement for hearings, increasing the time from 60 days. Apparently the additional two weeks would assist attorneys in conforming to this monumental shift in policy.

I B. SSR 17-4p

Most of us who handle Social Security cases have made major adjustments in our preparation for hearings and added personnel in order to comply with FDR. However, SSA decided that the threat of refusing to admit evidence from consideration was not a sufficient warning to claimants' representatives. So, SSR 17-4p was published. (See www.ssa.gov/OP_Home/rulings/PDF/2017-21252.pdf.)

For those of us who practice in this area of law, the sudden publication of this SSR was shocking. The SSR, instead of clarification of FDR, actually had the opposite effect, causing more confusion. Furthermore, the SSR appeared directed specifically at claimants' representatives and seemed to encourage ALJs to refer claimants' representatives to SSA's Office of General Counsel for sanctions if the representatives do not follow the new Rule.

Representatives are "required to act with reasonable promptness to help obtain information or evidence the claimant must submit." In addition, it is only acceptable for a representative to inform us about evidence without submitting it if the representative shows that, despite good faith efforts, he or she could not obtain the evidence.

What is "reasonable promptness?" Does that expand the five days to 30 days or 60 days? And what are "good faith efforts" to obtain the evidence?

II. Steps To Comply With The New Rules

How do we, as practitioners, comply with the new Rules? The following are suggestions, based on procedures we have implemented in my office:

- Send clients forms asking them to give us a list of their doctors months before the hearing. If you have the list of doctors from your client, and you request the medical reports on the list, you have a basis to argue that you cannot request medical records of which you were not advised.
- Use ERE ("Electronic Records Express") to start preparing for the hearing early. As a SSD practitioner, you have to use ERE to see the status of your cases and to electronically download your Exhibit files. In addition, usually at least a month before your office receives a telephone call to schedule a hearing, ERE will change the status of the case to "Ready to Schedule" or will actually list the name of the ALJ, to whom the case has been assigned. In our office, that is when we start updating our medical reports and scheduling clients to come in for meetings to review the case. I have a secretary who checks ERE weekly to see when the status of cases changes in ERE.
- After the initial hearing prep conference, schedule monthly hearing prep phone conferences or meetings to keep the case on your "radar." After the initial hearing prep meeting, I give my staff an "action punch list" of things to be done. This includes sending doctors forms asking for the client's limitations or letters asking if a client meets a specific section of the SSD regulations ("Listings" and "Grids.") By the time of the hearing, I will have had four or five meetings/phone conferences with my client, so they know what to expect at the hearing and hopefully, so

that I can check the status of the medical requests and learn about any new medical treatment.

- If your client does not cooperate with your request for meetings and a list of doctors, because of the new Rules, you have to consider withdrawing from the case. I will send my clients a "10 day" letter advising them that I will have to withdraw within ten days if I do not hear from them. This letter will usually receive a response. However, if you do not receive a response and you do not have the medical evidence to win, you may have no choice but to withdraw. While, in the past, I could take my chances at a hearing by seeing how the case will develop at the hearing, the new Rules really force me to withdraw in certain cases to avoid attending the hearing without evidence.
- Keep good records of your efforts to obtain medical reports and opinions and ask for the ALJ to issue subpoena as soon as you experience difficulty obtaining records. My office has had very good results in obtaining records when the ALJ subpoenas records because the difficult doctors' offices seem to respond to a subpoena. If the ALJ does not issue the subpoena, write another letter to the ALJ requesting the subpoena.
- Use email when asking for assistance of your client in obtaining records, so that you have proof of your efforts. If you request a "Delivery Receipt" and "Read Receipt" when you send the email, you have proof for an ALJ of your efforts to obtain information and help preparing for the hearing.
- Ask your client to obtain their records by physically appearing for the medical records and by waiting for the records until they are received. Your client's hour wait for the records at the doctors' office may save weeks or months of time or a refusal of an ALJ to accept the records. Furthermore, this would prove the "good faith efforts" required by the new Rules.
- Send the ALJ an "inform" letter more than five business days before the hearing. In the letter, advise the ALJ of the records for which you are still waiting as well as your efforts to obtain this information. I recommend including in the letter some information about the procedures you have implemented in your office to comply with the FDR. You may as well receive some respect from the ALJ for how seriously you are following the new Rules.

III. How Have The Courts Interpreted The FDR?

Since the FDR was only in use in "Region 1" of the Social Security Hearing system, there is very limited judicial review of the FDR. (Region 1 covers only Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut). These district courts are in the First and Second Court of Appeals.

After reviewing many sources, I have not found a case in the Court of Appeals of either Circuit evaluating the Rule. However, I have found a number of district court cases evaluating ALJs exclusion of evidence. (see endnotes)

Unfortunately, most of the District Court Judges affirmed the exclusion of the evidence, especially in Maine. However, I have also included a couple of cases in which judges remanded the cases to allow for the evidence where the record and argument shows the attorneys efforts to comply as well as the fact that the evidence was new and material to the ultimate decision of disability.

Conclusion

Efficiency in judicial proceeding is very important. Certainly when we, as attorneys, file suit in court, we are required to have the necessary documentation to proceed with the case. There are discovery deadlines that must be upheld and followed. But, the Social Security system is different.

Firstly, the SSA has a duty to develop the record on its own, 20 CFR §404.1512 and to assist in obtaining records by subpoena, when requested 20 CFR 405.332. Social Security Disability cases are not intended to be adversarial proceedings – they are "inquisitorial rather than adversarial. It is the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits," Sims v. Apfel, 530 US 103, 110-111 (2000). In fact, the Social Security Act is supposed to be construed liberally in order to further its remedial purposes, Cunningham v. Harris, 658 F.2d 239, 243 (4th Cir.1981).

The sad part of these new rules, is that it places new responsibilities on some of the most vulnerable people: our clients. It is precisely because of our clients' medical and psychological conditions that they cannot act in the organized fashion needed to help us prepare their case.

That is the terrible irony of these new rules. Our

clients are often medically, psychologically, emotionally and financially compromised. They are homeless or living with different family members and it can be difficult to contact them. They need to go to the doctor to obtain treatment or records, but they owe the doctor money or they cannot afford the next appointment. They suffer from anxiety or depression and they do not answer your calls or letters for a period of time. They have psychological dysfunctions that prevent them from following deadlines, but now we are placing new demands on them.

I have also found that the new rules, strain the relationship between the claimant and representative. In many cases, it is precisely because of their illnesses, claimants often cannot provide the kind of assistance so crucial to help prepare their case. Yet, if they do not provide assistance, we run the risk of an ALJ excluding evidence. In order to avoid blame after the hearing, the representative has to demand more cooperation from the claimant before the hearing. Despite our explanations, especially for clients with personality disorders such as paranoria, we are perceived more as taskmasters than advocates. For some of our clients, their SSD attorney is their last hope – for saving their homes, their families, their health insurance, their very existence. Yet, the SSD attorney has to be so concerned about the exclusion of evidence that he/she has to be the Enforcer of the Rules. This frays and deteriorates the crucial bond of trust between reps and their clients, the very essence of our work.

There is also a blatant unfairness in allowing form to triumph over substance in a Title II Disability case. Unlike Supplemental Security Income cases, the claimant has contributed money to Social Security benefits every week towards their retirement. Sometimes this claimant has contributed money for thirty or thirty-five years. Under their "contract" with the Social Security system, the claimant is allowed to receive benefits, based on their contribution to the system, when he/she cannot work until full retirement age. This is the reason that the Courts have recognized that SSD cases are not "adversarial" and the law should be "liberally construed" to benefit the claimant. In essence, the contributing worker/ claimant is merely asking to receive benefits earlier due to medical conditions that prevent them from continuing

to contribute to the SSA system. To deny these benefits because an attorney submitted a medical report a day late or a busy doctor delayed completing a form, is not only unjust. It is downright un-American.

ENDNOTES

1. 20 CFR 404.935 – Submitting written evidence to an administrative law judge.

(a) When you submit your request for hearing, you should also submit information or evidence as required by § 404.1512 or any summary of the evidence to the administrative law judge. Each party must make every effort to ensure that the administrative law judge receives all of the evidence and must inform us about or submit any written evidence, as required in § 404.1512, no later than five business days before the date of the scheduled hearing. If you do not comply with this requirement, the administrative law judge may decline to consider or obtain the evidence, unless the circumstances described in paragraph (b) of this section apply.

(b) If you have evidence required under § 404.1512 but you have missed the deadline described in paragraph (a) of this section, the administrative law judge will accept the evidence if he or she has not yet issued a decision and you did not inform us about or submit the evidence before the deadline because:

(1) Our action misled you;

(2) You had a physical, mental, educational, or linguistic limitation(s) that prevented you from informing us about or submitting the evidence earlier; or

(3) Some other unusual, unexpected, or unavoidable circumstance beyond your control prevented you from informing us about or submitting the evidence earlier. Examples include, but are not limited to:
(i) You were seriously ill, and your illness prevented you from contacting us in person, in writing, or through a friend, relative, or other person;
(ii) There was a death or serious illness in your immediate family;
(iii) Important records were destroyed or damaged by fire or other accidental cause; or
(iv) You actively and diligently sought evidence from a source and the evidence was not received or was received less than five business days prior to the hearing.

2. First Circuit Cases on the Five Day Rule

Howe v. Colvin, 147 F. Supp. 3d 5 – Dist. Court, D. Rhode Island 2015 – clerical error by rep's office should not exclude evidence that is crucial (a document was to be sent to ERE, attached to wrong page, attorney discovered a few days before hearing, resubmitted), so ALJ reversed

Birmingham v. Colvin, Dist. Court, D. Rhode Island 2016 – RFC form completed by nurse due to delay of nurse submitted less than five business days – no explanation of delay, so no "good cause," exclusion affirmed.
NOTE – these are 2 different district court judges in Rhode Island and give opposite results.

Brigham v. Colvin, Dist. Court, D. Maine 2016 – medical report filed after the hearing was properly excluded, even if the document is written after the hearing because there was no explanation as to why it was submitted after the hearing and not within five business days of the hearing.

Raymond v. Astrue, Dist. Court, D. Maine 2012 – claimant's lack of remembering treatment is not sufficient good cause, medical reports properly excluded.

Ryder v. Colvin, Dist. Court, D. Maine 2016 – no argument given that late submitted evidence was "new and material" or wants a remand.
Swormstedt v. Colvin, Dist. Court, D. Maine 2014 – Denied, no "good cause" shown

Beaucage v. Astrue, Dist. Court, D. Maine, 2:10-cv-326, http://www.med.uscourts.gov/Opinions/Rich/2011/JHR_06292011_2-10cv326_Beaucage_v_Astrue_AFFIRMED_07192011.pdf – clerical error is not "good cause."

Cardoso v. Colvin, Dist. Court, D. Massachusetts 2014 – no explanation of "good cause" given for chiro records submitted 3 business days before hrg, properly excluded.

Martins v. Colvin, Dist. Court, D. Massachusetts 2014 – good cause shown where the medical provider refused to obtain the records from a storage facility until less than five days before the hearing.

Jones v. Berryhill, Dist. Court, D. Massachusetts 2017 – no "good cause" offered, so exclusion valid.

Savo v. Astrue, District Court, D. Connecticut, 3:10-cv-1612, https://cases.justia.com/federal/district-courts/connecticut/ctdce/3:2010cv01612/90951/15/0.pdf?ts=1428883207 – medical reports excluded were submitted after the hearing, district court remands saying these medical reports were "new and material," not cumulative, submitted as soon as received and the surgery involved was after the hearing and the report was submitted seven days after the surgery.

Simard v. Colvin, Dist. Court, D. New Hampshire 2016 – Claimant's poor memory is not "good cause" for late evidence, does not meet this "rigorous standard," but the ALJ considered anyway, referenced in his decision.

Biography

Jeffrey Scholnick has been practicing law since 1983 and opened his own office in 1996. Jeffrey handles a wide range of cases, including criminal defense, traffic defense, DUI, plaintiff's personal injury, serious auto accidents, workers' compensation, Social Security Disability, bankruptcy and business litigation. He is a member of a number of Bar Associations, and has been approved to practice in front of the United States Supreme Court, the Federal Fourth Circuit Court of Appeals, the United States District Court for Baltimore, the United States Bankruptcy Court of Maryland, as well as the Courts of Maryland and the District of Columbia. Jeffrey is also a member of the National Organization of Social Security Claimants' Representatives.

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

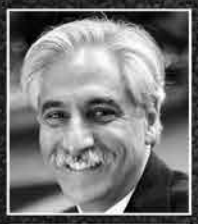
MARYLAND CHAPTER

WWW.MDMEDIATORS.ORG

The following attorneys are recognized for

Excellence in the field of Alternative Dispute Resolution

Hon. Monty Ahalt
Annapolis



Douglas Bregman
Bethesda

Daniel Dozier
Bethesda

Jonathan Marks
Bethesda

Hon. Steven Platt
Annapolis

Sean Rogers
Leonardtown

Hon. Carol Smith
Timonium

Scott Sonntag
Columbia

Richard Sothoron
Upper Marlboro

Snowden Stanley
Baltimore

James Wilson
Rockville

Check your preferred available dates or schedule appointments online, directly with Academy Members - for free.

www.MDMediators.org funded by these members

* The National Academy of Distinguished Neutrals is an invitation-only professional association of over 900 litigator-rated mediators & arbitrators throughout the US and a proud partner of the AAJ and DRI. For more info, please visit www.NADN.org/about