State Bar of Michigan
Social Security
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In this Issue

From the Chair

My name is Kerry Spencer and it is an honor to be the current chair of the Social Security Section. It is an exciting time for the area of Social Security law. Indeed, in the past few years alone there have been several Social Security cases that have been heard before the Supreme Court. This would have been unheard of a decade or two ago. Social Security is one of the most talked about and debated federal government programs. It impacts practically every working American, retired or disabled person, and their dependents.

My goal is to offer ongoing, high quality, education on Social Security law to our section members. We have implemented virtual seminars and our June 2022 seminar will be comparable to a national NOSSCR seminar, but for a much lower price. There will be leading national experts to speak about virtually all aspects of how to best represent Social Security clients. Additionally, our board is trying to engage people in active discussions concerning pertinent Social Security issues on the section listserv.

Congress is looking for more answers from the Social Security Administration, and senators are growing frustrated with the workarounds the agency implemented during the pandemic in an effort to keep employees and the public safe. As we know, SSA field and local offices have been closed since the start of the pandemic, though members of the public can make an appointment with the agency for "dire-need" requests. It has been a very difficult time for those from vulnerable populations who lacked a sound internet connection or don't have a reliable phone number or mailing address- struggling to access SSA while field offices were largely closed. With the new reopening plans laid out, hopefully we can get back to some form of "normalcy." However, since the pandemic is not over, it is hard to imagine what this will look like. With this in mind, attorney advocacy seem critical.

Lastly, I want to thank our board members for serving on this committee. Our collective efforts hopefully will yield a great outcome to the continuing efforts to the advancement of this area of law.

—Kerry Spencer

Remand When a Decision is Lacking an Exhibit List

Pay close attention to details when reviewing less than Favorable Decisions. It may be possible to obtain a remand on very technical issues, including a Decision in which an exhibit list has inadvertently not been attached. The following language was recently noted on a remanded Decision by section member:

> Pursuant to the regulations, when an unfavorable decision is being issued, hearing office staff must prepare the exhibit list in final form and place it in the claim(s) file, and that an exhibit list is in final form is required when a less than fully favorable decision is being issued to protect the claimant's due process rights (HALLEX I-2-1-20). This provision also notes that the claimant is entitled to know the information relied on when making the decision. Additionally, when a less than fully favorable decision is being issued, preparing the exhibit list in final form is mandatory and is not a discretionary practice (HALLEX I-2-1-20).

Vocational Expert Language

By Jim Rinck

There has been a great deal of traffic lately on the list serv which I am a member. What seems to me to be good advice, especially in light of the ongoing issues with vocational expert examination, is to add a paragraph to each brief (or five-day letter) that you file with the court as follows. You can use this language or modify it as you like, but it seems to me we have to protect ourselves by doing this. The language I have been using is as follows:

> "Depending upon the vocational experts' testimony at the hearing, counsel may chose to submit a post-hearing memorandum potentially including rebuttal evidence. While a review of 20 CFR § 404.935(a) and 416.1435(a) does not reveal whether those regulations contemplate rebuttal of vocational evidence or memorandum, Plaintiff provides this notice to this court out of an abundance of caution and as an attempt to comply with what may be interpretations of those regulations. ★

Representing Veterans in their Claim for Social Security Disability Benefits

By Erika Riggs, partner at Disability Law Group, Troy, MI

Veterans oftentimes need legal assistance at some point following discharge from military service for a wide-range of practice areas, up to and including disability benefits. Whether you specialize only in disability benefits before the Social Security Administration ('SSA'), including Social Security Disability ('SSD') and Supplemental Security Income ('SSI'), or you represent clients in a broader range of legal arenas, it is critical that we understand and advise our clients regarding other potential benefits that may be available to them. As an attorney representing your veteran client for their SSD case, there are a number of important considerations to keep in mind. You will want to explore whether there could be additional benefits available to your veteran clients, including VA disability benefits.

To start, you will want to ask your veteran clients about any decisions from other entities, including the VA, and consider other evidence you may not otherwise know about in connection with those claims. This information could be helpful for the disability case you are handling. Interestingly, I have found that many of my veteran clients filing for SSD benefits were unaware that they could qualify for both SSD and service-connected disability benefits through the Department of Veteran's Affairs ('VA'). Some veterans are discouraged from applying for VA benefits due to the complexity of the law and ever-changing procedures involved paired with the timeframe for decisions, taking years or even decades to resolve. However, this is where attorneys specializing in these benefits can help. Remind your client that there is no offset between SSD and service-connected VA disability benefits, and that they could potentially qualify for both benefits, assuming no technical issue precluding eligibility, with tax funds dedicated for these programs.

First and Foremost: Listen to the Story.

Regardless of whether you are assisting your veteran client in his or her claim for disability benefits before the SSA and/or VA, or for a completely unrelated claim, our first job as their attorney and counselor is to listen to their story. Even non-combat veterans, or those who have not experienced serving during wartime, have likely been through the trenches. They have a unique story to tell. I certainly look forward to the day I can listen to the story of my very first client from the U.S. Space Force! At any rate, asking the right questions can help you understand their story, identify whether they are in fact a veteran, and if there are other potential benefits available or outstanding decisions and evidence to know about. In turn, this practice builds trust with your client, something critically important to veterans who may be facing some of the most difficult and vulnerable times in their lives.

Evidence Considerations – the Good, the Bad, and the Required!

First, always keep in mind the legal framework you must operate within, including regulations that require attorneys and claimants to inform SSA about, or submit, any evidence no later than 5 business days before the date of the scheduled hearing pursuant to 20 CFR § 404.1523. If you know your veteran client has filed for VA disability benefits, there is a good chance that there are records associated with that claim that you will want to know about and, most importantly, have a duty to inform, or submit to, SSA. Much like a Consultative Examination ('CE') or Residual Functional Capacity ('RFC') evaluation are commonly performed or completed in SSD cases, other forms of examinations and testing may have been performed in connection with other types of benefit claims. The VA oftentimes provides their own government-contracted examinations akin to CE's, called Compensation and Pension ('C&P') examinations. These examinations are associated with a claim for service-connected disability benefits or non-service connected pension and typically require the examiner to complete a Disability Benefits Questionnaire ('DBQ'). If you have a veteran client who has claimed service-connection or non-service-connected disability pension, chances are high that the veteran was requested to attend a C&P at some point in the claim and/or appeal process.

Generally, the DBQ will involve an examination of the veteran and include findings similar to a CE. If the veteran has an attorney or representative assisting with

their VA disability case, you can contact them directly for this information quicker upon prior authorization by your client. Many times, private nexus letters, or letters that help substantiate claims for service-connection, and DBQ's, are in the veteran's electronic folder (similar to ERE for SSD claims) that could be helpful evidence, even in the face of a non-supportive C&P examination. At a minimum, SSD practitioners will want to know about these types of examinations, questionnaires, and other documentation so that any outstanding evidence can be obtained and reviewed, as well as to be able to fulfill the duty to disclose (or submit) requirement under CFR § 404.1523. Moreover, decisions from other sources, including the VA, while not dispositive, must at least be considered in your client's SSD case.

An initial determination from the VA is called a Rating Decision ('RD'), but there are also other decisions following appeals, including from the Board of Veteran's Appeals. If your client has a rating of 100% Permanent & Total ('P&T'), SSA will provide expedited processing of their disability claims as a 'Wounded Warrior.' However, never assume that SSA will automatically know that your veteran client is a 'Wounded Warrior,' and process their claim expeditiously. As a matter of practice, always obtain a copy of your veteran client's RD to help support 'Wounded Warrior' status, and submit a copy to SSA for consideration with a cover letter identifying the proof enclosed with your request for expedited processing under 'Wounded Warrior' status when appropriate. Note that a finding of P&T by the VA is not interchangeable with a finding of Total Disability Individual Unemployability ('TDIU').

By contrast, TDIU does not in itself qualify a veteran for 'Wounded Warrior' status. Briefly, TDIU will allow a veteran to receive a 100% rating due to being unemployable as a result of the combination of their service-connected conditions even if their true combined rating does not add up to 100%. Take the case of a veteran who receives a RD granting service-connection for PTSD rated at 50%, degenerative disc disease of the thoracolumbar spine rated at 40%, and bilateral radiculopathy for each lower extremity rated at 10%. While it would seem that this hypothetical veteran would qualify for a combined rating of 100% or higher, VA math is not so simple. In this case, the RD may indicate that the veteran was also found unemployable due to the combination of his service-connected conditions, and therefore grant TDIU. However, this veteran would not qualify for expedited processing of his SSD claim through 'Wounded Warrior' status. You will need to make sure that the decision explicitly states 100% P&T status. Nevertheless, the RD should be discovered and supplied to SSA for consideration.

Practice tip: discuss other decisions relevant to a finding of disability (including a finding of disabled whether through TDIU or P&T), when arguing that your client should be found "disabled" based on SSA's substantial evidence standard pursuant to 20 CFR 404.901, 416.1401, HALLEX I-3-3-4. When looking at the totality of the record evidence, encompassing a variety of documentation – such as medical records, medical source statements, any pertinent examinations or evaluations, Function Report(s), and more – relevant decisions from other entities like the VA, must at least be considered in that equation.

Other Evidentiary Considerations

Similar to SSD, and other disability claims, when benefits are awarded, veteran claimant's will receive an award letter from the VA detailing the relevant dates, including the date of entitlement or the effective date of the award of benefits. While a number of factors play into the entitlement date for a SSD case, including the date of the SSD application and the alleged onset date, as well as the 5-month waiting period, VA benefits operate differently. A bit more like SSI claims, where benefits are payable the first full month after the claimant applied or became eligible for SSI, VA service-connected disability benefits can be effective only as far back as the date of the application, or potentially the date the intent to file was submitted. However, in some cases, such as where there was a clear and unmistakable error (CUE), the veteran may be eligible for years or even decades more of benefits, depending on various factors, including evidence the VA had, but failed to consider.

Nevertheless, SSD practitioners should be aware that VA effective dates can be found in the VA RD and award letter. Knowing this information ahead of time could be helpful when arguing the validity of an onset date for your client's SSD case. At a minimum, you will want to counsel your veteran client that their SSD decision may affect their VA disability case, and that they will want to provide a copy of the decision to their VA attorney, if they have one, or directly to the VA. However, new evidence (including decisions from other entities), can only be considered in limited VA appeal scenarios, as outlined by the Veteran Appeals Improvement and Modernization Act of 2017, which became law on August 23, 2017 (Pub L. 115-55), taking effect on February 19, 2019. In any case, having at least a basic understanding about your veteran client's VA claim status will be useful.

Regardless of whether your veteran client has a claim pending for VA disability benefits, listening to their story and understanding the basic status of other potential claims helps you represent your client and position them in the best way possible to be eligible for SSD benefits. Not only are you more likely to present a fully complete and up-to-date evidence trail for your client, you will be better equipped to make the best arguments supporting a finding of disability in their SSD case. Establishing a relationship with a veterans disability attorney can help ensure that your veteran clients understand their rights, as well as identify and resolve any potential claim deadline, or effective date issues. In turn, your veteran clients will feel heard and confident in your level of care and representation, more likely to heed your advice and refer others to you. ★

Fee Wars in the Western District of Michigan

By Jim Rinck

As some of you may know, I have been filing briefs in the United States District Court for Western District of Michigan since about 1984. Over the years, there have been a number of developments with regard to Equal Access to Justice Act (EAJA) fees. While the rate was finally raised in about 2014 from the $125.00 originally specified by the EAJA statute, the raise to $175.00 an hour in the Western District had been stuck there until recently. More specifically, we now have a breakdown of fees Western District Magistrates as follows:

> Magistrate Vermaat: approved the inflation adjusted figure of $204.75 in *Belanger v Commissioner of Social Security* (WD MI 2:20-cv-9 (2021). He was the first Magistrate in the Western District of Michigan to rule in favor of the new hourly rate.
>
> Magistrate Berens: approved a fee of $204.75 in *Bickmeyer v Commissioner* (WD MI Case No. 1:20-cv-371 (2021); please note that she adjusts the hourly rate depending on when the work was completed, so a case in which most of the work was completed in 2020 would receive an hourly fee of $197.27 per hour. Of course, her several decisions on this issue essentially concede that EAJA fees now will change with inflation every year.

Continued on next page

Magistrate Kent: in *McIntosh v Commissioner* (WD MI Case No. 1:20-cv-810 (2022), he that maintained a $175.00 hourly fee was reasonable because criminal defense work receives a fee of $155.00 and attorneys in those areas perform comparable work. This does not address, however, the issue of contingent fees that attorneys in Social Security cases receive, and it does not address the recent Sixth Circuit decision (*Doucett*) on this issue (see below). Whether that decision will change his future decisions in this area remains to be seen.

Magistrate Green: in *Shellman v Commissioner* (Case No. 1:21-cv-47), the last of our Magistrates to rule on this issue came down in favor of $204.75 per hour.

I would note that in *Mogdis v Commissioner*, (Case No. 1:18-cv-82), our colleague Fred Bleakley, Jr., was successful in persuading Judge Quist that he was entitled to an hourly rate of $270.00 in an EAJA case. To judge by the case docket, there was no small amount of opposition to that rate by the U.S. Attorney's Office, but he ultimately was successful. Perhaps my vision is not high enough. I have not had any recent cases in the Eastern District of Michigan, so I do not know if the issue of increasing EAJA hourly rates has been raised recently in that Court.

In the Sixth Circuit's decision in *Doucette v Commissioner of Social Security,* (Case Nos. 20-5592/5632, decided September 2, 2021), it remanded some cases where the district courts had awarded hourly rates of $125.00 and $150.00; the Sixth Circuit found the use of those rates to be an abuse of discretion. The remands caused by that decision have yet to produce new decisions. To explore the reasoning of Magistrate Kent more thoroughly, he states that the $155.00 hourly rate paid to attorneys who represent the accused in local federal criminal cases and that the work was roughly comparable. While criminal defense work is work that requires a great deal of skill, it also cannot be contingent fee work according to the applicable Canons of Ethics. Moreover, while work on a criminal case can be limited, especially in some guilty plea cases, writing a brief for this Court in a Social Security case (assuming it is not a Doud-style brief) requires most if not all of the billable hours in a week and is not guaranteed to result in victory and thus the payment of attorney fees. I am sure that others can produce even better arguments, but those are a start.

Moreover, what should be emphasized throughout any EAJA petition is that the EAJA money belongs to the client, as those of us who have lost EAJA fees to pay a client's student loan know all too well. And since roughly 67% of remanded cases ultimately result in victories for plaintiffs, when attorneys then file for 406(b) fees in federal court, the client receives a credit for any EAJA payments. Thus, the higher the EAJA, the higher the credit for the client. And, of course, that also means higher fees for the Social Security bar.

This article is a snapshot; there certainly is more to come on this issue. I hope that is due to the efforts of all of us across these pleasant peninsulas.

In a breaking development in *Shellman v Commissioner*, case number 1:21-CV-47, Magistrate Green has approved a $204.75 per hour EAJA bill. This case is awaiting the final approval of Judge Maloney. Thus, the situation in Western District is that three out of four magistrates approved the increased EAJA hourly rate, with one yet to be persuaded. ★

2022 Social Security Changes: Cost-of-Living Adjustment (COLA)

Social Security National Press Office, Baltimore, MD

Based on the increase in the Consumer Price Index (CPI-W) from the third quarter of 2020 through the third quarter of 2021, Social Security and Supplemental Security Income (SSI) beneficiaries will receive a 5.9 percent COLA for 2022. Other important 2022 Social Security information is as follows:

Tax Rate	2021	2022
Employee	7.65%	7.65%
Self-Employed	15.30%	15.30%

NOTE: The 7.65% tax rate is the combined rate for Social Security and Medicare.The Social Security portion (OASDI) is 6.20% on earnings up to the applicable taxable maximum amount (see below). The Medicare portion (HI) is 1.45% on all earnings. Also, as of January 2013, individuals with earned income of more than $200,000 ($250,000 for married couples filing jointly) pay an additional 0.9 percentin Medicare taxes. The tax rates shown above do not include the 0.9 percent.

	2021	2022
Maximum Taxable Earnings		
Social Security (OASDI only)	$142,800	$147,000
Medicare (HI only)	No Limit	
Quarter of Coverage		
	$1,470	$1,510
Retirement Earnings Test Exempt Amounts		
Under full retirement age	$18,960/yr. ($1,580/mo.)	$19,560/yr. ($1,630/mo.)
NOTE:One dollar in benefits will be withheld for every $2 in earnings abovethe limit.		
The year an individual reaches full retirement age	$50,520/yr. ($4,210/mo.)	$51,960/yr. ($4,330/mo.)
NOTE: Applies only to earnings for months prior to attaining full retirement age. One dollar in benefits will be withheld for every $3 in earnings above the limit.		
Beginning the month an individual attains full retirement age	None	

	2021	2022
Social Security Disability Thresholds		
Substantial Gainful Activity (SGA)		
Non-Blind	$1,310/mo.	$1,350/mo.
Blind	$2,190/mo.	$2,260/mo.
Trial Work Period (TWP)	$ 940/mo.	$ 970/mo.
Maximum Social Security Benefit: Worker Retiring at Full Retirement Age		
	$3,148/mo.	$3,345/mo.
SSI Federal Payment Standard		
Individual	$ 794/mo.	$ 841/mo.
Couple	$1,191/mo.	$1,261/mo.
SSI Resource Limits		
Individual	$2,000	$2,000
Couple	$3,000	$3,000
SSI Student Exclusion		
Monthly limit	$1,930	$2,040
Annual limit	$7,770	$8,230

Estimated Average Monthly Social Security Benefits Payable in January 2022	Before 5.9% COLA	After 5.9% COLA
All Retired Workers	$1,565	$1,657
Aged Couple, Both Receiving Benefits	$2,599	$2,753
Widowed Mother and Two Children	$3,009	$3,187
Aged Widow(er) Alone	$1,467	$1,553
Disabled Worker, Spouse and One orMore Children	$2,250	$2,383
All Disabled Workers	$1,282	$1,358

★

Earnings Credit Tax Returns – SEI Earnings

By Kimberly Lamb

As you know (or should know), credit/quarters of coverage for purposes of insured status cannot be given for unposted self-employment income ("SEI") for any prelag year unless a tax return is filed. Social Security Act Section 205(c)(5) and POMS RS 01804.150. As you also know, for SSA credit/quarters of coverage purposes, the tax return must have been filed within 3 years, 3 months and 15 days after the year in which the SEI was derived. POMS RS 01804.150. However, what is often overlooked when advising clients or potential clients who have prelag SEI earnings that were not reported but a DLI needs to be extended for purposes of insured status for disability benefits is that there are 11 exceptions to this statutory deadline. POMS RS 02201.008. Most are relatively straight forward: there is an error apparent on the face of the record, errors in allocation, crediting no entry or incomplete entry of wages, etc. However, one exception is noteworthy. An exception to the statutory deadline exists if an application for disability benefits (both Title II and Title XVI) is filed *before* the expiration of the time limitation and a final decision on the application has not been made. POMS RS 02201.008A1. The part of the earnings record open to correction at the time of the filing may be corrected up until the time a final determination or decision is made on any earning issue, rather than the time the claimant is notified of the determination made on his/her claim. POMS RS 02201.010. Therefore, if an application is filed *before* the statutory deadline to file a tax return has lapsed, then SEI earnings can be counted as quarters of coverage and potentially extend a date last insured. Credit for prelag SEI may only be given if a return is filed with IRS and a copy submitted to SSA. POMS RS 02201.019(A).

For example, a Claimant files an application for Title II disability benefits on January 5, 2017. She seeks correction of her earnings record to extend her DLI past the date she meets a Listing by filing tax returns for the years 2012, 2013, 2014, 2015 on May 1, 2019 (outside the statutory time limitation). To meet the exception, the Claimant's application for Title II and/or Title XVI benefits would have to have been filed *before* the expiration of SSA's statutory time limitation for filing the tax return.

The expiration of the statutory time limitation for filing her most dated tax return of 2012 was three years, three months and 15 days after the year in which the SEI was derived (2012). Three years, three months and 15 days after the year in which the Claimant derived the SEI (2012) is April 15, 2016. Because the Claimant filed her application for Title II benefits on January 5, 2017, she does *not* meet the exception as the application date is *after* SSA's statutory time limitation of April 15, 2016. Therefore, 2012 SEI earnings cannot be used to extend her insured status. However, the expiration of the statutory time limitation for filing her 2013 was three years, three months and 15 days after the year in which the SEI was derived (2013). Three years, three months and 15 days after the year in which the Claimant derived the SEI (2013) is April 15, 2017. Because the Claimant filed her application for Title II and/or Title XVI benefits on January 5, 2017, she meets the exception as the application date is *before* SSA's statutory time limitation of April 15, 2017 to file the return even though the correction was made after the statutory deadline (May 1, 2019). As no final determination had yet been made, the Claimant meets the second part of the exception. As required, her tax returns for 2013, 2014, and 2015 would have to be filed with IRS and submitted to SSA.

This is why attempting to reopen prior applications can become important. HALLEX I-2-9-20 addresses computing time periods for reopening. § 404.988 permits reopening a Title II determination or decision within 12 months of the notice of the initial determination for any reason and within 4 years of the date of the notice of the initial determination if good cause is found and 2 years for a Title XVI case under § 416.1488. Stacked applications can also be reopened. HALLEX I-2-9-20(B) provides an example:

> The claimant filed an application for disability insurance benefits (DIB) on December 13, 2002, alleging that he became disabled on November 4, 2001. The application was denied initially on February 12, 2003, and again upon reconsideration on April 12, 2003. The claimant did not appeal the determination.

The claimant filed a second application for DIB on February 10, 2006, alleging that he had been disabled since November 4, 2001. This application was denied initially on April 15, 2006, and was denied upon reconsideration on June 13, 2006. The claimant did not appeal the determination.

The claimant filed a third application for DIB on September 23, 2009, alleging disability since November 4, 2001. He submits evidence that establishes he has been disabled since November 4, 2001.

Assuming none of the "reopening at any time" criteria are met, the ALJ must reopen the second application because the notice of the initial determination on the second application (April 15, 2006) was within 4 years of the filing date of the application currently before the ALJ (September 23, 2009). However, the ALJ cannot reopen the final determination on the first application because the filing date of the current application (September 23, 2009) was not within four years of the date of the notice of the initial determination on the first application (February 12, 2003).

If the Claimant has prelag SEI earnings that could potentially extend a date last insured, it is not only important to do the legwork associated with determining whether those earnings could, in fact, extend the DLI if filed, but to also determine whether prior applications could potentially be reopened if those prelag SEI earnings are remote. ★

TECH HELP SECTION

Video Hearings

In lieu of in person hearings, claimants and their representatives now have the options of a telephone hearing, or a video hearing via Microsoft Teams. The determination is made by sending in the COVID-19 Remote Hearing Agreement Form. This article will provide the practitioner with assistance in performing video hearings.

We have been advised that agreeing to participate in an online video hearing does not necessarily mean the SSA will transfer the case to the National Hearing Center or another office. When scheduling the hearing, the SSA will consider who in their network of judges and hearing sites will provide the most expeditious service. Substantive and procedural issues that arise during an online video hearing are handled in the same way they would be handled in any other hearing.

Microsoft Teams is free to use. Although it can be access through the internet, hearings often run more smoothly when the app is downloaded. If you chose to download the app, do so well ahead of the hearing.

Prior to the hearing, make sure you have a stable internet connection. Check to ensure the camera for your device is on and unobstructed, and the microphone is not muted. As with a phone hearing, you will be asked to verify you are not recording the hearing. Place your device directly in front of you, so you are looking directly into the camera and therefore speaking directly to the participants.

Once a video hearing has been scheduled, a link will be emailed to you and your client at the addresses provided on the COVID-19 Remote Hearing Agreement Form. If you have downloaded the app, your upcoming hearings will appear on the calendar. Once you click the link to join a meeting, you will be placed in the virtual lobby. Below the video image, you have the option to select "Background Filters," and you can blur your background or select another image as your background.

The SSA can provide you with support for any technical issues. This link will bring you to the SSA's page with technical resources, including a training video for representatives. https://www.ssa.gov/appeals/appointed_representatives.html. If you experience problems or have questions, reach out to your local hearing office for further technical support. ★

Effective Presentation of Social Security Disability Case

1. Interview client and completely fill out the questionnaire - special attention to age, education, and height and weight. Remember arduous work - §404.1562. (35 years-marginal education)
   a. Have client sign contract.
   b. Have client sign 1696 form to appoint representative.
   c. Have client sign SS medical release forms.
   d. Have client sign U5 form *Request for Reconsideration*.
   e. Have client sign request for school records if a minor's case.
2. Obtain copy of OHA file and review the exhibits and all SS papers, especially vocational reports and computer print out of the relevant dates and amounts. Obtain a computer run of the claimant's wage earnings for the past 15 years. PIA and Dividend.
3. Prepare a vocational exhibit of PRW - analyze the jobs with DOT criteria.
4. Obtain relevant medical records (discharge summary from hospitals) and RFC assessments from treating physicians to determine claimant's degree of impairment (usually only need medical information one year before the alleged date of onset.)
5. Review file to determine if claimant meets or equals a listed disability or if he/she is disabled by reference to a vocational rule or if reference to other examiners is needed to prove disability.
6. Have treating physician refer claimant to other examining specialist, if necessary or desirable.
7. Obtain corroborative affidavits from lay witnesses and, in certain cases, an affidavit from the claimant, all of which should be forwarded to OHO.
8. Obtain reports and RFC assessments from examiners and forward to OHO with a prehearing memorandum stating claimant's theory of disability. Must be done at least 5 business days before the hearing is scheduled pursuant to § 404.935. (Our form)
9. Perhaps prepare a Medical Timeline to show inability to be at work more than 2 days per month. 1 copy for ALJ and 1 copy for VE.

§ 404.1562. Medical-vocational profiles showing an inability to make an adjustment to other work.

If you have done only arduous unskilled physical labor. If you have no more than a marginal education (see §§ 404.1564) and work experience of 35 years or more during which you did only arduous unskilled physical labor, and you are not working and are no longer able to do this kind of work because of a severe impairment(s) (see §§404.1520(c), 404.1521, and 404.1523), we will consider you unable to do lighter work, and therefore, disabled.

Example to paragraph (a): B is a 58-year-old miner's helper with a fourth grade education who has a lifelong history of unskilled arduous physical labor. B says that he is disabled because of arthritis of the spine, hips, and knees, and other impairments. Medical evidence shows a "severe" combination of impairments that prevents B from performing his past relevant work. Under these circumstances, we will find that B is disabled.

If you are at least 55 years old, have no more than a limited education, and have no past relevant work experience. If you have a severe, medically determinable impairment(s) (see §§404.1520(c), 404.1521, and 404.1523), are of advanced age (age 55 or older, see §?404.1563), have a limited education or less (see §?404.1564), and have no past relevant work experience (see §§ 404.1565), we will find you disabled. If the evidence shows that you meet this profile, we will not need to assess your residual functional capacity or consider the rules in appendix 2 to this subpart. ★

6th Circuit Case Law Highlights

Substantial Evidence

Turner v. Comm'r of Soc. Sec.
2021 U.S. App.. LEXIS 29160
(6th Ct. App. 9/24/21)

The Sixth Circuit Court of Appeals upheld the district court's determination that substantial evidence supported denial of the Petitioner's claim. The ALJ had found that the claimant could perform his past relevant work. In doing so, the Court agreed with Petitioner that the ALJ did not address his contention that his symptoms would cause excessive absenteeism as is required by SSR 96-8p. However, the Court concluded that the ALJ *substantially complied* with SSR 96-8p because the ALJ found that Petitioner's testimony about the intensity, persistence and limiting effects of those symptoms were not entirely consistent with the evidence of record, and explained at length why she did not think the limitations were as severe as Petitioner claimed. The Court did, however, comment that it was a "close call."

McCauley v. Comm'r of Soc. Sec.
2021 U.S. Dist. LEXIS 238520
(E.D. Mich. 11/17/21)

In addressing whether an ALJ may render a decision that is not supported by a medical opinion, the court recognized that courts within the 6th Circuit are split. In this case, the magistrate judge found the approach in *Deskin v. Comm'r,* 605 F.Supp.2d 908 (N. D. Ohio 2008) and *Kizys v. Comm'r of Soc. Sec.*, 2011 U.S. Dist. LEXIS 122296, (N.D. Ohio 20211) persuasive, and suggested that where a "crucial body" of "objective medical evidence" is not accounted for by a medical opinion and there is significant evidence of potentially disabling conditions, the ALJ should develop the record by obtaining opinion evidence that accounts for the entire relevant period. The court went on to say that where an ALJ has medical opinion evidence covering the entire relevant period, the ALJ need not make an RFC finding consistent with any of the available medical opinions, citing *Kizys, supra*.

Huffman v Comm'r of Soc. Sec.
2021 U.S. Dist. LEXIS 176136
(W.D. Mich. 9/16/21)

ALJ's decision was not based on a complete review of medical record where the consultative examiner did not have the complete record when she made her diagnosis that did not include ADHD and therefore, the RFC determination was not supported by substantial evidence. There had been a prior diagnosis of ADHD that the CE did not have when she gave her opinion. Therefore, reliance on the CE alone was insufficient. Case was remanded for further evaluation of all the medical opinions.

Snover v Saul
2021 U.S. Dist. LEXIS 162220
(E.D. Mich. 8/26/21)

Where ALJ failed to give any weight to a newer treating physician's opinion that covered over two years of more recent medical evaluation and instead only considered a non-treating report from 2 years prior, it is unclear whether the disability determination was supported by substantial evidence. This did not mean one opinion should be valued over another, but instead it calls into question whether substantial evidence supports the ALJ's decision. Remand was appropriate.

Appointments Clause

Acker v. Comm'r of Soc. Sec., 2021 U.S. App. LEXIS 27337 (6th Ct. App. 9/9/21)

In an appeal brought by the claimant seeing review of an order granting Commissioner's motion to dismiss the claimant's complaint for judicial review of denial of SSDI benefits, the *Commissioner*, on its motion (to which the claimant consented) requested vacatur and remand based on the premise that the ALJ who denied benefits was not properly appointed under the Appointments Clause. Citing *Lucia v. SEC,* 138 S. Ct 2044, 201 L.Ed.2d 464 (2018), the Court granted the motion for vacatur and remand, despite the fact that the complaint had been dismissed prior to *Lucia* being decided. The court noted, failure to raise the Appointments Clause challenge before the agency does not foreclose the ability to seek judicial review

of that claim and concluded that the ALJ who dismissed claimant's hearing request was not properly appointed.

Fees

Doucette v. Comm'r of Soc. Sec
13 F.4th 484
(6th Ct. App. 9/2/21)

Here the Court vacated two EAJA fee awards and remanded for further review: one was with direction to properly determine under the EAJA statute whether attorneys fees for hours spent preparing the reply brief in support of the EAJA fee noting that the outright denial was legal error; and as to both matters the courts had to determine the appropriate hourly rate given the market range established by the claimants. In one case the plaintiff's counsel had requested $203/hour and in the second $207.67 was sought. Both counsel submitted evidence to support hourly market rates between $205 and $500. The court noted this and stated that relying on prior fee awards of lower amounts was in error where evidence was submitted justifying a higher rate. The court vacated the fee awards and remanded one to determine whether fees for the time spent preparing the reply brief was justified and in both to determine the appropriate hourly rate given the market range established by plaintiffs.

Lockwood v. Comm'r of Soc. Sec.
2021 U.S. Dist. LEXIS 223027
(E.D. Mich. 10/27/21)

The magistrate judge allowed the Commissioner to file its opposition to petition for 406(b) fees 3 weeks late mainly because the neglect to file on time did not prejudice the Plaintiff. In this case, the court opined that the hourly rate of $201.83 is *per se* reasonable because it was well below twice the amount of any relevant standard market rate. Even if it was not *per se* reasonable, the amount of time (27.25 hours of time before District Court) was well within the average number of hours expended by most social security attorneys. Even though Petitioner did not ask for more, the court opined that the fee falls below the standard hourly rate for attorneys in his market.

Palmer v. Comm'r Soc. Sec.
2021 U.S. Dist. LEXIS 163103
(E.D. Mich. 8/30/21)

The Court disagreed with the recommendation of the magistrate judge to affirm the finding of the commissioner denying benefits, on the basis that the ALJ should have either included a limitation for use of a cane as part of the RFC assessment or better explain why such a limitation was not required. Despite raising successful arguments in court the magistrate judge recommended the denial of EAJA fees on the basis that the government's position was substantially justified. Relying on *DeLong v. Comm'r of Soc. Sec.* 748 F.3d 723 (6th C 2014), the court agreed with the magistrate judge, stating that a fully justified position might be poorly explained but there was nothing to suggest a lack of substantial justification. In so finding, the court reasoned that on remand it may still be the case that the ALJ was correct to omit a cane limitation in the RFC assessment. The Plaintiff's request for EAJA fees was denied.

Harris v Comm'r of Soc. Sec.
2021 U.S. Dist. LEXIS 213587
(E.D. Mich. 8/17/21)

In denying Petitioner's motion for EAJA fees, the magistrate judge found that the position of the Commissioner, while ultimately incorrect, was substantially justified. Petitioner successfully won her argument that the ALJ was improperly appointed following *Lucia et al. v. SEC*, ___U.S.___, 138 S.Ct. 2044, 201 L.Ed.2d 464 (2018) and *Jones Brothers v. Sec'y of Labor*, 898 F.3d 669 (6th Cir. 2018). However, because there was a narrower issue contested during the litigation, which was whether the Petitioner had forfeited the Appointments Clause argument by failing to raise it at the administrative level (which was ultimately decided against the Commissioner's position in *Carr v. Saul*, 141 S.Ct. 564 (2021)), and that issue had not been decided at the time the Commissioner made the argument, it was substantially justified.

Articulation

Boza v. Comm'r of Soc. Sec.
2021 U.S. Dist. LEXIS 177109
(W.D. Mich. 9/17/21)

The application for benefits in this case was filed before 3/27/17. The court held that while at the time of filing, a physician's assistant was then-deemed not an acceptable medical source and therefore the opinion of said physician assistant was not entitled to any particular weight or deference, the ALJ's decision must still say enough to allow the appellate court to trace the path of his reasoning. Because the ALJ did not say enough to allow the court to trace the path of his reasoning for rejecting all of the PA's opinions, the case was remanded.

Harmless Error

Webb v. Saul
2022 U.S. Dist. LEXIS 22917
(E.D. Mich. 2/8/22)

In this child's case, the District Court found that the ALJ's reasons for discrediting the mother's testimony at the hearing were invalid and that the error was not harmless. The court reasoned that if the mother's testimony were given more weight the difference between a "less than marked" limitation and a "marked" limitation in several domains could have yielded a different outcome. In this case the ALJ had cited the child's ability to ride a bike and the fact that he slipped on ice as reasons to discount the mother's testimony about his breathing issues. The court reasoned that those activities were not inconsistent with the mother's testimony that a pulmonologist recommended the child not go out in extreme weather.

Treating Physician Rule

Smalley v. Comm'r of Soc. Sec.
2021 U.S. App. LEXIS 26754
(6th Ct. App. 9/3/21)

The claim for benefits was filed before 3/27/17, and therefore dealing with the treating physician rule, the Court distinguished a separate, but closely related rule, which is the "good reasons requirement" for the weight given to a treating source opinion. The court determined that the ALJ had failed to give good reasons for rejecting a doctor's opinion regarding sitting limitations where the evidence discussed did not undermine that opinion. That failure was not harmless error, the court concluded, commenting that this was not the "rare" situation in which an ALJ's analysis met the goal of the good reasons rule despite violating its formal requirements. The court remanded. ★

Babcock Summary

Babcock v. Kijakazi
595 U.S. ____ (2022)

This is a Social Security case originating in the Sixth Circuit and argued before the Supreme Court on 10/13/21. Petitioner/Claimant David Babcock was represented by Michigan attorneys Ronald Bahrie and Nicholas Kipa, as well as Washington DC attorney Neil Katyal. The issue presented was whether dual-status military technicians hired prior to 1984 performed their work "wholly… as a member of a uniformed service" 42 U.S.C Sec. 415(a)(7)(A)(III). The case affects approximately 50,000 similarly situated individuals. The case was decided on 1/13/22.

David Babcock retired from employment as a dual status military technician. As a condition of his employment, he was required to maintain membership in the National Guard. Mr. Babcock received both civil service and military pay. Upon retirement, he received both a pension from the Civil Service Retirement System, as well as a military pension. Mr. Babcock was provided Social Security Retirement Benefits upon retirement, but benefits were reduced by a "windfall elimination provision," due to his civil service pension. Mr. Babcock argued that he should fall under a statutory exemption for payments "based wholly on service as a member of a uniformed service."

Justice Barrett, writing for the Court, determined the statutory exception does not apply, as Mr. Babcock was not only a member of the national guard, but was also a civilian employee. As such, the windfall elimination provision applied and Mr. Babcock's Social Security retirement benefits had been properly reduced.

Justice Gorush was the only dissenting Justice. He noted Mr. Babcock was required to maintain his National Guard membership at all times. Justice Gorush further noted that "dual-status technicians" show up for work each day in Guard uniform and are subject to Guard discipline. As such, he opined these individuals consider themselves members of the Guard, and he therefore would not deny these service members benefits based on what he described as "bookkeeping" statutes. ★