ERIC BUCHANAN AND ASSOCIATES

ERIC BUCHANAN & ASSOCIATES, PLLC
Attorneys at Law

ERISA & DISABILITY BENEFITS NEWSLETTER

VOLUME 6, ISSUE 2, APRIL 2014

ABOUT OUR FIRM

Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits. Eric Buchanan and R. Scott Wilson are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization. For more information, visit our website at www.buchanandisability.com.

Jeremy Bordelon, R. Scott Wilson, Rachael Pas, Eric Buchanan & Hudson Ellis.

SOCIAL SECURITY'S PROPOSED RULES REGARDING SUBMISSION OF EVIDENCE

BY JEREMY L. BORDELON

As many of you may know, Social Security issued a Notice of Proposed Rulemaking (NPRM) on February 20th regarding the submission of evidence in disability claims.[1] The proposed changes, they say, are meant to "clarify" their rules regarding what evidence must be submitted to the Agency. Unfortunately, the things that have been clarified are heading in a direction unfavorable to claimants and representatives, and many things are still left unclear. In fact, this proposed regulation may cause more uncertainty than it solves. The deadline to submit comments opposing these proposed regulations is April 21, 2014, and they can be submitted online.[2]

The general idea behind these regulations is to require claimants "to inform us [Social Security] about or submit all evidence known to you that relates to whether or not you are blind or disabled." This is a change from the previous language of the affected regulations, under which claimants only have to "furnish medical and other evidence that we can use to reach conclusions about your medical impairment(s)." In other words, the change is designed to require all evidence – good, bad, or irrelevant – to be submitted, rather than just what the claimant believes would support his case.

This might seem reasonable at first blush. After all, Social Security's system is supposed to be "non-adversarial," and most state bars agree that attorneys have a special duty of honesty when dealing with a tribunal *ex parte*. However, while it may be technically true that Social Security is a non-adversarial system, in the sense that there is no attorney arguing for a denial on behalf of the Agency[3], this ignores the reality that many Social Security Administrative Law Judges have taken it upon themselves to be champions of the Social Security trust fund. In reality, in many hearing rooms across the country, Social Security *is* an adversarial system, and the claimant's adversary is the Judge deciding the claim.

Setting that issue aside, there is also the question of duty and power to obtain information. As for duty, the Social Security statute itself (which, of course, trumps the Agency's regulations) states that the Agency has a duty to "develop a complete medical history" and "shall make every reasonable effort to obtain…all medical evidence…." 42 U.S.C. § 423(d)(5)(B). The United States Supreme Court has also stated that Social Security's Administrative Law Judges have a duty "to investigate the facts and develop the arguments both for and against granting benefits." *Sims v. Apfel*, 530 U.S. 103, 111 (2000). While the Agency acknowledges both of these points in its NPRM, and states that "we are not shifting our responsibility to develop the record to claimants' representatives," the remainder of the proposed rules do

not read this way. For example, the commentary to the proposed rules states that they would "require you to inform us about or submit all evidence known to you that relates to whether or not you are blind or disabled." Once this burden is put on the claimant, it is not hard to imagine a downward slide where the Agency shirks its own duty to develop the evidence.[4]

In addition to duty, there is an issue of power – power to obtain evidence. Social Security ALJs have subpoena power, and although it is rarely exercised, they have the power to obtain any evidence they see fit in a disability claim. Claimants, on the other hand, and their representatives, do not have subpoena powers in a Social Security claim as they would in a court proceeding. We must request evidence and opinions, pay for such evidence and opinions, and sometimes hope that we receive that evidence in time for it to be used in the claim. Hopefully, if these rules are adopted, Social Security will not forget that the minimum requirement is that a claimant and his representative *inform* Social Security about evidence, and need not always *provide* that evidence if it is beyond their grasp, either practically or financially.

At its core, the most disturbing part of this proposed rule is the submission of unfavorable evidence. In the proposed rule, the requirement is that all evidence must be submitted, and evidence is defined quite broadly to include not just medical facts, but opinions. And not just treating physician opinions, but any opinions, from both medical and non-medical sources. If the surgeon who operated on your client, whom your client is suing for medical malpractice, believes no harm was done in the surgery, that must be provided to Social Security. If the worker's compensation IME doctor believes your client is capable of working, that must be provided to Social Security. If a private disability insurer has denied your client's claim for LTD benefits, that must be provided to Social Security. If your client's neighbor thinks he's faking his condition, that must be provided to Social Security.

These proposed rules purport to put this burden on claimants themselves, but they also "require that representatives help obtain the information or evidence that claimants must submit under our proposed regulations." This puts attorney representatives[5] in an awkward position, *vis a vis* our ethical obligations under state bar rules. The American Bar Association's Model Rules of Professional Conduct, which have been largely adopted by most state bars, have several potentially relevant rules. First, we have Rule 1.6: Confidentiality of Information, which states generally that an attorney shall not reveal information relating to the representation of a client unless the client gives informed consent. That rule does have an exception allowing disclosure "to comply with other law or a court order," and Social Security's regulations would likely qualify as an "other law," but this still puts us, as attorneys, in a position of providing evidence against our client's position, perhaps without their permission or against their instructions.[6] The only way out of this ethical morass, in some cases, may be for the attorney to withdraw from the case.

The better way, in my eyes, would be for the Social Security Administration to acknowledge an attorney's existing obligations under Model Rule 3.3, "Candor toward the Tribunal," and similar state rules. Attorneys already have an obligation not to make false statements, not to offer false evidence, and not to allow fraudulent behavior on the part of our clients or others. In *ex parte* proceedings, lawyers are expected to inform the tribunal of all material facts, using his professional judgment to determine what is, and what is not material. Instead of removing all professional discretion from duly licensed attorneys already subject to discipline if they break these rules, Social Security should instead consider making the same rules apply to non-attorney representatives.[7]

Similar rules were proposed in 2005, and ultimately not adopted. Hopefully, with a reasoned response from the claimant's bar and other interested parties, the same will happen again. Otherwise, claimants and representatives may find themselves in the awkward position of having to supply biased opinions against their own claims. Social Security ALJs and their staff will find themselves dealing with a mountain of largely irrelevant material, and the job of adjudicating these claims will be made slower and more difficult. I encourage everyone to comment before the April 21, 2014 deadline, and let Social Security know what you think about these proposed rules before they're enacted.

Endnotes

[1] https://www.federalregister.gov/articles/2014/02/20/2014-03426/submission-of-evidence-in-disability-claims

[2] Comment at http://www.regulations.gov/#!submitComment;D=SSA-2012-0068-0001

[3] Unless a claim is denied, and proceeds to federal court. At that point, there is an attorney defending the denial.

[4] For example, there is a requirement in the Social Security statute that the Agency "make every reasonable effort to obtain from the individual's treating physician…all medical evidence…prior to evaluating medical evidence obtained from any other source on a consultative basis." 42 U.S.C. § 423(d)(5)(B). However, in reality this almost never happens. Social Security rarely makes any effort to obtain an opinion from a treating source, and even if one is provided, it still will often order a consultative exam, which usually results in a contrary, non-disabling opinion. This plays out, therefore, as more of an adversarial system than the text of the law might suggest.

[5] The rules would apply equally to attorney representatives and non-attorney representatives, although the latter have no state bar rules they must follow.

[6] The Tennessee ethical rules do not adopt the Model Rule exactly, and in a situation as described, where a Tennessee attorney is ordered by a tribunal to provide adverse evidence, he or she must "assert[] on behalf of the client all non-frivolous claims that the information sought…is protected against disclosure by the attorney-client privilege or other applicable law[.]" Tn. R.P.C. 1.6(c)(2). If that is unsuccessful, and the client still insists the evidence not be disclosed, the attorney may have to withdraw, subject to Tn. R.P.C. 1.16.

[7] The background statement preceding the proposed rules specifically states that the Agency was encouraged to write the rules to "minimize the extent to which a claimant and his or her representative must make subjective judgments as to the legal relevance of particular evidence."

NEED A SPEAKER?

The attorneys at Eric Buchanan & Associates are available to speak to your organization regarding social security disability, ERISA long-term disability, group long-term disability, private disability insurance, ERISA benefits, denied health insurance claims and life insurance claims.

ERIC BUCHANAN & ASSOCIATES, PLLC UPCOMING CLE SPEAKING ENGAGEMENTS

Eric Buchanan will be on a panel at the American Association for Justice Annual Convention to discuss how to train new staff and attorneys. The conference is scheduled for July 26th - July 30th in Baltimore, MD.

Eric Buchanan & Associates, PLLC
414 McCallie Avenue • Chattanooga, Tennessee 37402
telephone (423) 634-2506 • fax (423) 634-2505 • toll free (877) 634-2506
www.buchanandisability.com