2018 FOREWORD

The Social Security Administration is continuing to change the terrain this year for disability benefits claimants and their advocates.

Some of the changes seem small, but confusing. For example, in October 2017, the Administration reissued SSR 16-3p, the policy guidance that removed the concept of “credibility” from SSA’s decision-making process, replacing it with the issue of whether “symptoms and related limitations [are] consistent with the evidence.” The republication updated regulatory references to those that went into effect shortly after it was published, but also revised the effective date. Initially effective on date of publication, March 16, 2016, it was summarily revised to an effective date of March 24, 2016. Then last October the republication made it applicable to administrative determinations and decisions made on and after March 28, 2016. In June this year, SSA finally got around to rescinding SSR 96-3p and SSR 96-4p as “unnecessarily duplicative” of SSR 16-3p.

Another small change with a cautionary tale attached to it came in March 2018, with a small adjustment to Listing 13.02 and 13.03 for Cancer. Ostensibly corrections to printer’s errata, the change to Listing 13.03 removed two paragraphs that were supposed to have been deleted when the Listing was brought up to date in 2015. Depending on where an adjudicator was looking to read the Listing, those two paragraphs may have led to incorrect denials.

Also, last October SSA issued SSR 17-4p, policy guidance that significantly reduces the role the Office of Hearings and Appeals will play in developing evidence in disability claims, laying the obligation of obtaining and submitting medical and other evidence in the lap of the claimant or representative. We have revised Chapter 16 Administrative Law Judge Hearings, and incorporated this SSR and the regulatory revisions that preceded it. Also in that chapter we were able to incorporate the new (published in July, effective August 1) strictures applicable to representative conduct. These revisions impose restrictions on withdrawal from representation, and require disclosure if the representative has participated in the preparation of a medical report (including the provision of a questionnaire) or has referred the claimant to a medical provider.

In May, SSA proposed revisions to the Listings for Musculoskeletal impairments, Listings 1.00 and 101.00. The comment pe-
period has closed and the comments are being considered as of this writing. One major change if the revisions are adopted as initially published, is that references to inability to ambulate effectively will be gone; on the other hand, there will be clarification that “a complete absence of function” is not necessary to meet these Listings.

Also in May, SSA, in light of the regulatory changes in October, 2016, that removed the increased restrictions for finding an Unsuccessful Work Attempt (UWA) lasting between 3 and 6 months, rescinded SSR 05-02, which had reiterated and distinguished the conditions applicable to a 3-month UWA -vs- a >3-month UWA. Back in the small but confusing change category, this leaves SSR 84-25 still in place, with its detailed description of the parameters for determining a UWA but also with its distinction between a UWA of 3 months or less versus 3 to 6 months. Of course, the regulations still control.

SSR 18-3p on Failure to Follow Prescribed Treatment came out in October this year, too late to be incorporated in this year’s revisions. It rescinds and replaces SSR 82-59, and will be worth familiarizing with for advocates.

Also in October this year, after we went to press, SSA issued SSR 18-01p and SSR 18-02p, replacing SSR 83-20 on determining onset of disability. This new policy guidance adds several degrees of nuance to decision-making which advocates will want to be careful to grasp.

Finally, just on the eve of writing this foreword, SSA came out with a Notice of Proposed Rule Making that would revise the regulations on scheduling hearings to take away a claimant’s right to opt out of having a hearing by video teleconference, and also would expressly authorize appearance of expert witnesses by telephone or VTC.

We’ll be keeping an eye on these and other developments and doing what we can to keep you aware of them.

As always, our annual supplement offers coverage of current case law, regulatory and legislative updates, and practical tips on advocacy strategy. We hope, again, as always, that its content provides support to your practice.

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