



People With Disabilities Foundation

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Social Security Administration
Office of Legislation and Congressional Affairs
Attn: Reports Clearance Director
3100 West High Rise
6401 Security Blvd.
Baltimore, MD 21235

Re: Social Security Administration (SSA) Docket SSA-2016-0030, Agency
Information Collection Activities: Proposed Request and Comment Request

Dear Reports Clearance Director:

Thank you for the opportunity to comment on the SSA information collection activities included in this docket.

People With Disabilities Foundation (PWDF) is a § 501(c)(3) nonprofit agency with expertise in medical (psychiatric and/or developmental)-legal issues and bases these comments on its 16-year history of providing legal representation for Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) issues for people with psychiatric and/or developmental disabilities. In addition to being PWDF's Legal Director, I am also a former Senior Attorney for the SSA.

These comments are provided in response to SSA Docket SSA-2016-0030, Agency Information Collection Activities: Proposed Request and Comment Request. PWDF has comments regarding SSA Form 3385-BK, "Report of Adult Functioning – Employer."

Form SSA 3385-BK, Report of Adult Functioning – Employer, enables past employers familiar with disability program claimants' ability to perform work to provide the SSA with information about claimants' day-to-day functioning in work settings. This form is used for employees who are applying for SSDI and/or SSI benefits or who are being ceased from benefits due to work activities.

PWDF's comments on this form relate to circumstances that prevent the SSA from correctly analyzing the SSA work incentive programs for individuals with psychiatric and/or developmental disabilities. The main problem is that individuals' functional limitations that underlie their disabilities are often not known to either the SSA claims representatives (CRs) who analyze individuals' use of work incentives or to the individuals' employers. Thus, there are important information gaps. This problem manifests in several ways that are particularly harmful to individuals with severe mental illness and/or severe developmental disabilities, as described herein.

As to the first issue, SSA employees concede that the CRs do not do any medical; instead, they rely on medical professionals, e.g., psychiatrists, from the 50 state agencies (Disability Determination Services) for medical. Although the codes for disorders are available in the SSA computer system, the CRs do not routinely look at them, or if they do, there are no explanations of the disorders represented by the codes.¹ This begs the question: if the CRs do not know what impairments a given beneficiary has, how can they correctly analyze the individual's circumstances as they apply to the work incentives? For example, if a beneficiary incurs expenses because of impairments related to the disability but that are required to enable the individual to work, how can a CR correctly analyze the amount and relevance of these expenses if they do not know what impairments the individual has?

The other issue is the simple fact that the form does not enable the SSA to collect information about the circumstances of the claimants' employment that are unknown to the employers. While this sounds obvious, it becomes problematic when SSA CRs rely on this form under the assumption that it can provide the information needed to determine whether the individual is entitled to or eligible for benefits, or the amount of such benefits.

Most importantly, individuals with highly stigmatized disabilities such as severe mental illness or severe developmental disabilities, e.g., psychosis or autism, are not going to tell their employers of their disabilities for fear of discrimination or difficulty obtaining future employment. The employee has no legal obligation to disclose a disability to an employer unless the employee is asking for a reasonable accommodation. As a result, the employer will not have information that is pertinent to the work incentive analysis and the SSA will not be able to obtain it through this form, as discussed herein. We have seen this many times with clients who have psychiatric and/or developmental disabilities, in which the SSA sent this form to the employers. Therefore, the use of this form contributes to a disparate impact on this population.

For example, question 10 of this form asks about the employee's behavior and question 12 asks about employee's interactions with other people, including responding to social cues. For people with psychiatric and/or developmental disabilities, their

¹ For example, an SSA supervisor spent more than 12 months doing a work review of a PWDF client and never knew of the beneficiary's disability (schizophrenia). See *Davis v. Astrue*, Case 3:06-cv-06108 EMC (N.D. Cal. 2012).

behavior and interactions may be partially dependent on their medications. It is unlikely that the employer will know anything about the employees' psychiatric treatment and medications, much less the amount, frequency, how long the employee has taken the medication, or whether the employee's doctor has changed the medications. Since employees do not usually discuss psychiatric treatment and medication with their employers, descriptions of an individual's behavior and interactions with other people usually come from an uninformed employer.

SSA Work Incentives: Unsuccessful Work Attempts² (UWAs)

For a beneficiary's work attempt to be considered "unsuccessful" and therefore not counted against him or her in a work review, the employee must have stopped working because of impairments related to the disability. Question 4 of this form tries to determine this by asking why the employee stopped working. As noted above, however, employees with highly stigmatized disabilities are unlikely to tell the employer about his or her disability or impairments; therefore, if the employee stops working because of the disability, the employer will not know the true reason why the beneficiary stopped working. If the reason for stopping work is related to an undisclosed disability, then the SSA will perform the UWA analysis incorrectly.

SSA Work Incentives: Special Conditions,³ Employer Subsidies,⁴ and Impairment Related Work Expenses (IRWEs)⁵

Among other criteria, the SSA uses evidence about an individual's work activities to determine whether the individual is entitled to or eligible for disability benefits. A common measure of work activities for these purposes is the amount of the individual's earnings. SSA's work incentive rules allow individuals to offset their gross earnings by subtracting certain costs in order to calculate net earnings for the purposes of determining benefits. The SSA's work incentives that implement this concept include Special Conditions, Employer Subsidies, and IRWEs.

Generally, special conditions are circumstances in which third parties provide help and assistance to the employee so that the employee is able to work. IRWEs are disability-related expenses that the employee pays in order to be able to work, such as assistance from a job coach.

An employer subsidy is defined generically as when an employer, whether or not a relative or friend, is paying the individual the same amount of money as other employees, but for doing less work. An employer subsidy is not the same as a reasonable accommodation, which employers are probably more familiar with (although even this

² For employees: 20 CFR §§ 404.1574(c), 416.974(c). For self-employed: 20 CFR §§ 404.1575(d), 416.975(d).

³ 20 CFR §§ 404.1573(c), 416.973(c).

⁴ 20 CFR §§ 404.1574(a)(2), 20 CFR 416.974(a)(2).

⁵ 20 CFR §§ 404.1576, 20 CFR 416.976.

subject is often beyond the knowledge of many employers). A reasonable accommodation can be provided by an entity other than the employer, e.g., a job coach provided by the state Department of Rehabilitation. Employer subsidies must come from an employer.

For people with severe mental disabilities and/or developmental disabilities, the SSA mainly asks employers about employer subsidies and IRWEs. The SSA frequently does not ask employers about special conditions. Special conditions are often the most important work incentives for claimants who have psychiatric and/or developmental disabilities because they are a broader catch-all category than an employer subsidy, which is limited to when an employer is paying the individual the same as other employees, but for doing less work.

Since special conditions are often provided by third parties, the employer may not be aware of them. Accordingly, SSA's process of sending this form to an employer to fill in blanks and check boxes makes it very unlikely that important relevant information will be obtained.

As for IRWEs, the employers are not specifically told that IRWEs are expenses that the employee pays in order to work, over and above what his or her co-workers may pay. Examples of these expenses include assistance from a job coach or an ILS trainer to shop for clothing that may be required for work or even help shopping for a specific color of clothing. Another example includes paying an independent living skills (ILS) trainer for help that enables the employee get to work on time. These types of assistance are an essential type of IRWE for individuals who cannot shop for food, cook their food, and do their laundry, or most other household activities, which is most common in the autism spectrum disorder (ASD) population. IRWEs could also include psychotropic medication.

Question 11 of this form asks the employer to describe the individual's ability to maintain attendance and punctuality. As described above, some individuals may pay an ILS trainer for help with attendance and punctuality. The employer would not know about this, therefore the SSA could not analyze this IRWE. The employer has no way to know, and no need to know, all these IRWEs because they have to be paid by the claimant, as opposed to someone else.

Some claimants may not be able to communicate accurately with the SSA to provide the information required to analyze the special conditions or IRWEs. In these cases, information related to these types of offsets needs to be discussed with the claimants' psychotherapists, psychiatrists, ILS trainers, relatives and other persons who know them well and provide the special conditions or know about the IRWEs.

For example, we have a client who receives Social Security disability benefits and works driving a truck. Among other disorders, this client has cognitive impairments. He is unable to navigate directions, so his spouse/partner ("wife") rides with him to navigate.

This assistance from his wife is a special condition that should be considered when calculating the value of this beneficiary's earnings for disability benefits purposes. The employer did not know that the beneficiary had his wife assist with navigation, so this form did not reveal this important evidence. This lack of information contributed to miscalculations of the value of this beneficiary's earnings.

With respect to employer subsidies, this claimant was not being paid the same or more than other truck drivers, he was being paid less than the others. The Social Security representative's response was that this meant that the beneficiary was just a stupid idiot. Although it might be hard to understand why someone would take a job for less money than others doing the same job, the point is that the SSA needs to ascertain how an individual can do the most work activities, with what help, and understand that it may be very important to the individual to work, rather than not work, regardless of the amount of money.

In cases such as this, i.e., when the employer pays the individual less for the same work, an employer subsidy is best analyzed as a special condition. There is no way an employer filling out the form about employer subsidies is going to know this. Nor will the employer know about the special conditions provided by third parties. The CR doing the initial determination or doing a work review based on a past relevant work report (Form 821), would not know of these either.

Conclusion

The problems with the use of this form cannot be solved simply by revising the form: employers cannot report important evidentiary information they do not have and SSA CRs cannot analyze evidence for its applicability to the work incentives if they do not know the individual's impairments because the SSA does not do medical evaluations as part of the work review process. This evidence can be related to assistance with employment provided by a third party (special conditions), impairment-related expenses borne by the employee (IRWEs), knowledge of the disability itself, or other relevant evidence. The CRs rely on the employers, but neither knows of the impairments or the assistance the employee receives.

This is especially likely for people with severe mental illness and/or severe developmental disabilities, which are highly stigmatized, because the employee is not likely to disclose the disability to the employer. Unfortunately, the result is that claimants with psychiatric and/or developmental disabilities who work or try to work may be unable to fully benefit from Social Security's work incentive programs, thus being at higher risk of losing their benefits or having an overpayment.

As one solution to these problems, PWDF strongly recommends that the SSA provide additional training to its CRs, focusing on understanding the underlying medical disorder so that they can appropriately analyze the work incentives, thereby providing equal, meaningful access to them, as opposed to limiting training to understanding of

physical disabilities, e.g., how wide a door must be in order for a wheelchair to fit through.

It is also recommended that the SSA discuss the circumstances of claimants' employment with persons who are knowledgeable about those circumstances, e.g., the claimants' psychotherapists, ILS trainers, and/or job coaches. When the SSA is doing work reviews, it should use medical information from the state agencies that provide these services to the SSA, to ensure that the impairments are considered in the work incentive analysis.

Regrettably, the confluence of the CRs' lack of medical information and the employers' lack of information relating to the disability and impairments causes the SSA to create undue barriers for people with psychiatric and/or developmental disabilities. The result is a disparate impact on these populations in obtaining equal access to the work incentive programs under both Title II and Title XVI.

Sincerely,

Steven Bruce, Esq.
Legal Director
People With Disabilities Foundation

Cc: Office of Management and Budget, Desk Officer for SSA