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EDITORIAL

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Editorial: Ethical Implications of the Social Security Administration's (SSA's) "All Evidence Rule"

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Introduction

Effective April 20, 2015 and codified at 20 C.F.R. §§ 404.1512 and 416.912, the SSA's "All Evidence" rule requires that claimants or counsel for claimants disclose all "medical and other evidence" that "relates" to their Social Security Disability Insurance (SSDI) and/or Supplemental Security Income (SSI) cases.[1] The previous rule mandated the submission only of evidence deemed "material" to the claims.

The SSA argues that the old rule encouraged the exclusion of evidence necessary for an accurate disability determination. They further assert that removing the "material" language clarifies claimant's obligation by eliminating the implication that claimant must exercise legal judgment. According to them, the new rule only requires claimant to exercise good faith in determining whether information "relates" to his claim, using the ordinary meaning.[2]

Discussion—The SSA's New Regulation May Violate the State Bars' Professional Rules of Conduct

"Client-lawyer confidentiality encompasses the attorney-client privilege, the work-product doctrine, and ethical standards of confidentiality. The principle of client-lawyer confidentiality applies to information relating to the representation, whatever its source, and encompasses matters communicated in confidence by the client, and therefore protected by the attorney-client privilege, matters protected by the work product doctrine, and matters protected under ethical standards of confidentiality, all as established in law, rule and policy." [3]

The SSA states that the regulations preserve the attorney-client privilege and provide a limited version of the work product doctrine. In an attempt to use the legal principle of federal pre-emption, the SSA states that the American Bar

Association's Model Rules of Professional Conduct (adopted by many states) "permit attorneys to disclose otherwise confidential information if 'other law'" requires disclosure and that these new regulations "constitute such 'other law." [4] We disagree with this conclusion because the various state Supreme Courts and/or state bars are the ultimate arbiters of whether their professional rules of conduct are violated, with the attorney disciplined, up to and including disbarment.

Claimants who have severe psychiatric, intellectual, and/or developmental disabilities, with or without cognitive deficits, may have communication deficits that prevent them from effectively communicating with their attorneys. With these types of disabilities, the claimant's ability to communicate objective baseline facts may be compromised. Their ability to concentrate, focus, and remember may also be compromised. In these cases, it may be necessary for the attorney to communicate with another individual, e.g., the client's psychotherapist, family member, doctor, or independent living skills (ILS) trainer, to gain the type of information that a client without such a communication deficit would typically provide on his/her own. This is especially important when the attorney is trying to ascertain whether the case has merit.

In the population with intellectual disabilities, the claimant may be unwilling to be forthcoming about the level of their disability due to stigma and discrimination. Thus, a conversation with the client may not elicit the extent of the claimant's disabilities; again, the attorney may need to communicate with other individuals to ascertain the client's functional limitations.

Under work-product doctrine, the attorney normally could protect these communications from disclosure. The SSA's new regulations do not appear to provide this protection, however. When the new regulations were published, the SSA's accompanying commentary stated that the attorney could protect from disclosure the attorney's notes from a consultation with a medical source, however, the attorney must disclose written medical opinions they receive. The regulations are silent as to whether the contents of other communications, such as those described above for example, must be disclosed.

This commentary indicates that the SSA has taken a one-size-fits-all approach that does not accommodate communication deficits, in spite of data that indicate that over 41% (over 5.3 million) of beneficiaries who receive SSDI and/or SSI have mental disabilities.[5] Like everyone else, this population needs to be able to communicate their innermost confidential information frankly and without fear of disclosure when working with their attorneys.

For these reasons, communications with these additional individuals should be protected regardless of the delivery method (whether verbally, or by letter, fax or email) as part of the claimants' right to effective communication with his/her attorney, under client-lawyer confidentiality principles. We note that the claimant also has a right to effective communication with his/her attorney and the SSA in order to gain equal, meaningful program access to the SSA's disability programs under Section 504 of the Rehabilitation Act of 1973 (Section 504).

One can also argue that there is work-product protection against disclosure of witness statements in every case. Claimants' counsel is required to devote substantial time, energy, and resources developing the administrative record. [6] This process usually involves many hours of reviewing the existing medical evidence and identification of all of claimant's treating sources, many of which may not have previously been included. After requesting charts from all medical sources, counsel must review them to determine which sections of the clinical record are the most important, i.e., pertain to the claimant's impairments. Counsel then requests residual functional capacity (RFC) [7] statements from those sources. Counsel may explore several different themes and theories over the course of developing the case for hearing, but the SSA's limited work product doctrine requires that written documentation pertaining to these theories must be turned over to the SSA.

Claimants may also face bias in their disability determination due to stigma based on information unrelated to the disability claim if such information appears in these communications. For example, heroin use in the past (e.g., 10 years before the current alleged onset date), but not continuing, may not be related to a disability claim. The fact that the claimant had been in a rehab facility for this drug use may be in the medical evidence. The attorney and SSA administrative law judge (ALJ) have a duty to develop the claimant's case, so current or continuing drug use would be related, but the attorney should not disclose it if it is past use that is not related to the disability. Per the new regulations, the attorney should be allowed to withhold such prejudicial information since that evidence does not relate to the disability claim. [8] The SSA may say otherwise. The operative word is "related."

Conclusion

These new regulations do not allow the claimant or the attorney to withhold a doctor's written opinion solicited by the attorney to investigate and understand the client's circumstances. The regulations are silent as to other communications an attorney for a client with a psychiatric, intellectual, and/or developmental disability may commonly have that are usually protected by work product doctrine. Although SSA's regulations do not permit the attorney to withhold a medical source statement that expresses the functional limitations of the client, if a doctor, ILS trainer, or other person is necessary to help the client communicate with his attorney and clear up inaccuracies due to communication impairments, the communication should be protected by attorney-client confidentiality principles. For some claimants, limiting the work product doctrine may also cause these regulations to violate Section 504 by not providing equal, meaningful disability program access.

Whether the communication is needed to assist the attorney in deciding whether to represent a claimant or in determining what strategy is most appropriate in developing a client's case, the SSA's new regulations could be argued to interfere with the work-product doctrine and may not withstand a legal challenge. The U.S. Courts of Appeal may have to decide whether only verbal communications necessary for an attorney to better understand his or her client are protected, in spite of the fact that clear verbal communications are not always possible with some clients.

PWDF PROFILE

Who We Are

People With Disabilities Foundation is an operating 501(c)(3) nonprofit organization based in San Francisco, California, which focuses on the rights of the mentally and developmentally disabled.

Services

Advocacy: PWDF advocates for Social Security claimant's disability benefits in eight Bay Area counties. We also provide services in disability rights, on issues regarding returning to work, and in ADA consultations, including areas of employment, health care, and education, among others. There is representation before all levels of federal court and Administrative Law Judges. No one is declined due to their inability to pay, and we offer a sliding scale for attorney's fees.

Education/Public Awareness: To help eliminate the stigma against people with mental disabilities in society, PWDF's educational program organizes workshops and public seminars, provides guest speakers with backgrounds in mental health, and produces educational materials such as videos.

Continuing Education Provider: State Bar of California MCLE, California Board of Behavioral Sciences Continuing Education, and Commission of Rehabilitation Counselor Certification.

1. 20 CFR §§ 404.1512 and 416.912 (2015). ↩
2. In the commentary to the regulations, the SSA states that the ordinary meaning of the word "relates" is "to show or establish a logical or causal connection between two things." Submission of Evidence in Disability Claims 80 Fed. Reg. 14828, 14829 (Mar. 20, 2015). ↩
3. Rules of the State Bar of California, California Rules of Professional Conduct; Rule 3-100, Confidential Information of a Client, note 2 (Jan. 1, 2015). ↩
4. 80 Fed. Reg. 14828, 14833 (Mar. 20, (2015) ↩
5. US Social Security Administration, "*Annual Statistical Report on the Social Security Disability Insurance Program, 2014*" Table 69, p. 170-171, available at https://www.ssa.gov/policy/docs/statcomps/di_asr/. ↩
6. Notably, the SSA, including the Administrative Law Judge, has a legal obligation to develop the administrative record. 20 CFR §§ 404.1512 and 416.912 (2015). ↩
7. The residual functional capacity, or "RFC," is defined as the maximum an individual can perform given his/her impairments. ↩
8. If, however, the past heroin use came to light during an attorney's investigation of an alleged mood disorder, for example, and the claimant currently uses heroin, then the heroin use is relevant to a drug addiction and alcohol analysis under 20 CFR §§ 404.1535 and 416.935. ↩

Comments on this article (1)

Terry replied

June 2016 Reply

This is should also be not allowed since the HIPPA law prevents.I was denied SSDI/ the Judge claimed since I used beer in my pass she would only allow me SSI. After waiting almost 5 years of been denied.I had no choice to accept,with no place to live,no way to feed my self or keep up with the never ending doctors appts.Although I have a long work history.The system is so unfair.

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