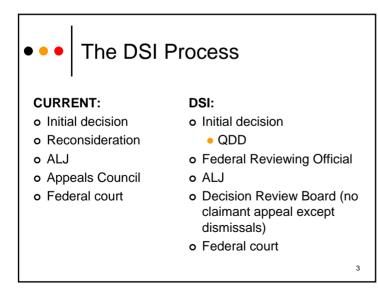
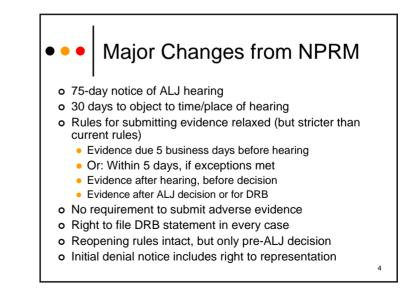
The Final Regulations to Change the Disability Claims Process: Do They Help or Hurt Claimants?

Region I Representatives Meeting: How to Deal with DSI July 10, 2006







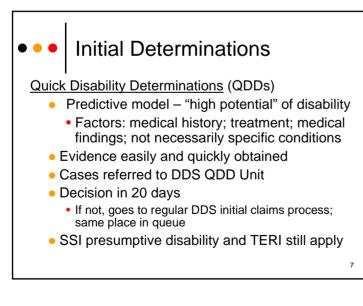
••• DSI Implementation

- o Effective August 1, 2006
- o Applies only to cases processed through DSI
- Current process applies to cases that are not initial disability claims (including in Region I)
- o Gradual, region-by-region rollout
- o First DSI region: REGION I (Boston):
 - CT, ME, MA, NH, RI, VT
 - For at least one year
- <u>Note</u>: If claimant moves, original process at time of application will apply

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Impact of eDIB

- o Disability folders are electronic
- o Adjudicator can be located anywhere
 - Federal Reviewing Officials
 - With video hearings, ALJs
 - Decision Review Board
- o Medical/vocational experts can be anywhere
- Representatives get CD with all evidence early access to record to determine what additional evidence needed



Medical and Vocational Experts System (MVES) Medical and Vocational Experts of all adjudicators Muscal adjudicators Includes VEs earlier in process Medical and Vocational Expert Unit (MVEU) Metoral network of medical and psychological experts Muscal insues Muscal insues

••• MVES (cont'd)

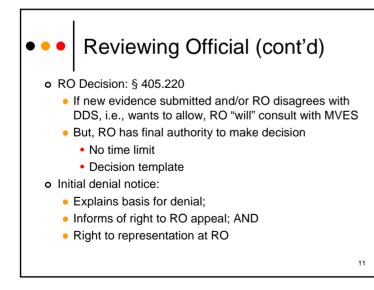
- ROs^I and ALJs <u>must</u> request MEs and VEs through MVEU
- o SSA sets qualifications & standards for all experts
 - Including DDS doctors and psychologists
 - Eventually for VEs
- o Fees/rates set by SSA
- o ALJ must consider treating MD op., even if not in MVEU

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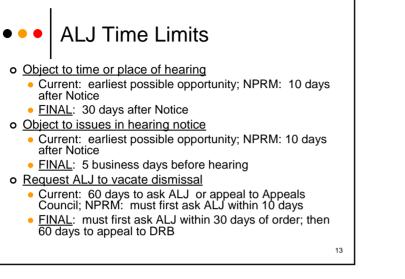
- o Consultative examinations
 - Can be done by treating MD
 - SSA to develop training and certification requirements
- Note: MVEU was the "Federal Expert Unit" in the NPRM

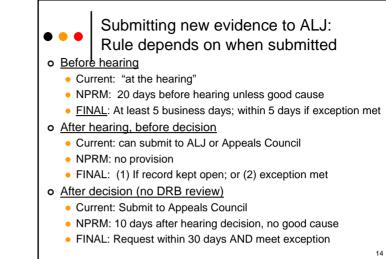
Federal Reviewing Official (RO) Reconsideration eliminated <u>Federal</u> RO review "Centrally managed" – Per SSA: "linchpin" of DSI May be located anywhere because of eDIB and no face-to-face meeting ROs will be attorneys RO job announcement: "Many vacancies" and all in Falls Church, VA (ODAR HQ)

- o Procedures before RO: § 405.215
 - RO will develop evidence:
 - Can be submitted at any time before decision
 - RO may obtain from other sources or obtain CE
 - RO has subpoena authority. § 405.217









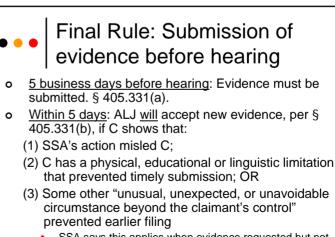
Submitting evidence before ALJ hearing

CURRENT:

- 42 USC § 405(b): Right to hearing with decision based on "evidence adduced at the hearing"
- Case law re ALJ "duty to develop" in every circuit
- Regulations allow submission at hearing

NPRM:

- C must submit all new evidence (both favorable and unfavorable) 20 days before hearing UNLESS:
- (1) Good cause; or (2) material change in condition before hearing



Submission of evidence before hearing (cont'd)

- Exceptions are the same as "good cause" to extend time limits: § 405.20(a)
- Examples that "if documented, may establish good cause include":
 - "You were trying very hard to find necessary information to support your claim but did not find the information within the stated time period." § 405.20(b)(4)
- Within 5 day period, no requirement to show "possibility" or "probability" of changed outcome

Submission of evidence after hearing

CURRENT:

- o Can submit after hearing if record open
- o Can submit to Appeals Council within limits

Under NPRM:

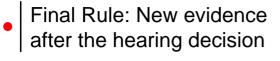
- Not considered at all unless: "Request permission" within 10 days of ALJ decision (no good cause); AND
- C required to show:
 - "Unforeseen and material change" in condition between hearing and decision; or
 - At hearing, asked ALJ to keep record open, ALJ agreed, and show good cause for missing deadline

 Final Rule: New evidence between hearing and decision
 20 CFR § 405.331(c): ALJ will accept and consider if: (1) One of these exceptions is met:
 SSA's action misled C;

- C has a physical, educational or linguistic limitation that prevented timely submission; or
- Some other "unusual, unexpected, or unavoidable circumstance beyond the claimant's control" prevented earlier filing; AND
- (2) There is a <u>reasonable possibility</u> that new evidence, alone or with other evidence, would <u>affect</u> the outcome of the claim.

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- Final Rule: New evidence
 between hearing and decision: ALJ keeps record open
- In addition, ALJ has discretion to hold record open for additional evidence
- o According to preamble:
 - If C requests additional time, ALJ <u>may</u> keep record open
 - C should inform ALJ at hearing if: (1) aware of other evidence unable to obtain before hearing or (2) scheduled to undergo additional medical evaluation

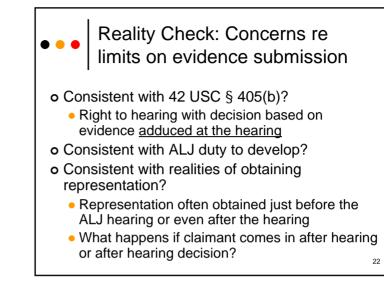


20 CFR § 405.373: ALJ will consider if:

(1) One of these exceptions is met:

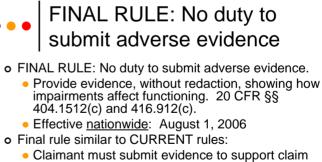
- SSA's action misled C;
- C has a physical, educational or linguistic limitation that prevented timely submission; or
- "Unusual, unexpected, or unavoidable circumstance beyond the claimant's control" prevented earlier filing; AND
- (2) There is a <u>reasonable probability</u> that new evidence, alone or with other evidence, would <u>change</u> the outcome of the claim; **AND**
- (3) Request filed within **30 days** of receiving the ALJ decision

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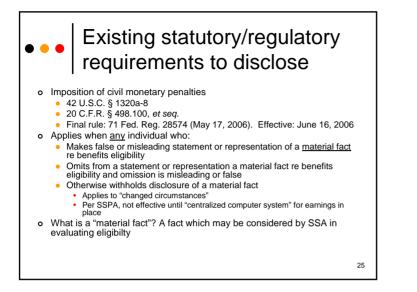


- Reality Check: Concerns re limits on evidence submission (cont'd)
- Consistent with realities of obtaining medical records (before or after hearing)?
- Consistent with DSI goal: Ensure that adjudicators have complete record?
- Consistent with realities of claimants' changing medical conditions?
- Will ALJs have too much discretion to refuse evidence?
 - Will DRB detect problems or will Cs be forced into federal court?

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- Statutory and regulatory requirements and penalties re disclosure of "material" facts
- o Under NPRM:
 - Claimant must submit all "available" evidence, including unfavorable evidence



• The ALJ decision

- Explain in detail why agrees or disagrees with RO findings and rationale. § 405.370(a)
 - RO decision not considered "evidence"
 - ALJ decision templates
- o Does this requirement:
 - Undermine de novo nature of hearing?
 - Compromise ALJ's decisional independence?
 - Add unnecessary burden to ALJ's decisionmaking process?

Other ALJ level issues

- C "should" (but not required) to list issues with request for hearing. § 405.310(a).
- 30 days to object to issues in hearing notice (NPRM: 10 days). § 405.317.
- Pre-hearing statements: You "may" submit or ALJ "may" request. § 405.334.
- o Video hearings. § 405.315(c)
 - Reaffirms right to object and appear in person
 - Query: Does C have 30 days after notice to object to VTC?

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• Other ALJ level issues (cont'd)

- R/H "may" be dismissed for failure to appear at pre-hearing conference. § 405.330.
 - Only if neither C nor representative appears and no good cause
- R/H cannot be dismissed for failure to appear at post-hearing conference. § 405.336(b).
- Documents other than evidence 12 pt font.
 § 405.333
- Subpoenas request 10 days before hearing. § 405.332

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••• ALJ dismissals

- o Must first ask ALJ to vacate. §§ 405.381, 405.382, 405.427
 - Must request 30 days after dismissal notice
- If ALJ denies, 60 days to file request to vacate with DRB. § 405.427(a)
- May submit dismissal-relevant evidence to DRB. § 405.427(b)
- May submit written statement (2000 words) but only at time request to vacate is filed. § 405.427(c)

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Decision Review Board

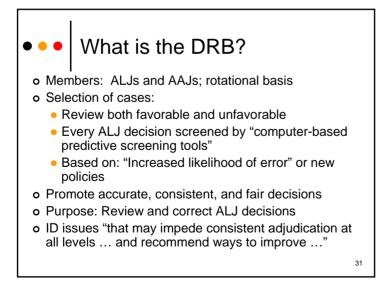
o CURRENT:

- C can file appeal to Appeals Council
- C can submit new evidence within limits
- Over 25% of claimants receive relief

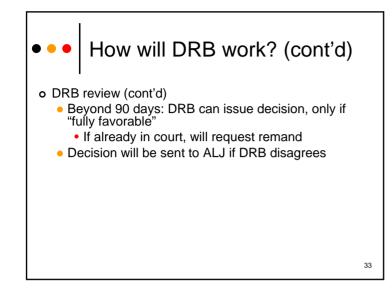
o FINAL RULE:

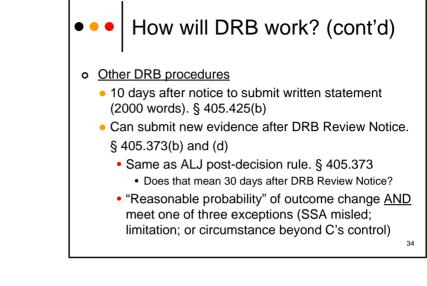
- Eliminates Appeals Council
- Eliminates C's right to administrative appeal
 - Only claimant appeal: ALJ dismissals (but must first ask ALJ to vacate)
- Replace with review by DRB

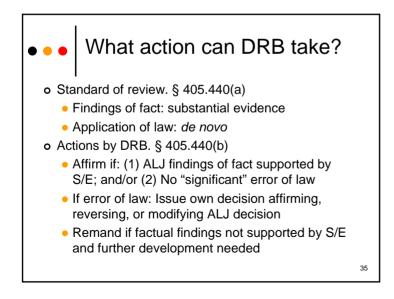
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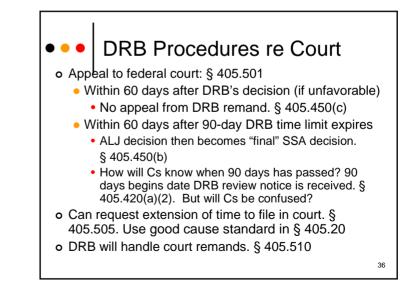


How will the DRB work? ALJ decisions reviewed before effectuation Cs will not receive ALJ decision until DRB screening Goal: 10 days to screen 6 days to screen ALJ decision sent ALJ decision is SSA's "final decision" 60 days to appeal to court 16 DRB review: ALJ decision sent with DRB Notice of Review DRB has 90 days to complete action. § 405.415 90 days starts with date DRB Notice is received If not completed in 90 days, ALJ decision is "final" and C has 60 days (after 90th day) to file in court









How will the DRB be implemented?

- o Very gradually in one "small" region: Boston
- AC review eliminated only where application filed under DSI process (Region I as of 8/1/06)
- AC review retained in all other cases, including non-DSI cases in Region I

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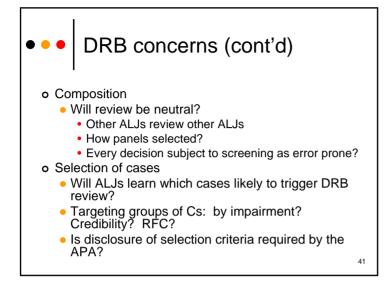
o Review all or "almost all" ALJ decisions

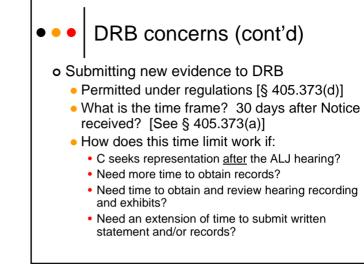
Concerns about the DRB Eliminates effective claimant-initiated appeal FY 04: 27% received reversal or remand JCUS: Urges keeping claimant's right to appeal Simple procedure vs. filing in court Why else important to claimants? Can submit new evidence Can request review of ALJ dismissals and reopening denials Can raise denial of right to full and fair hearing Can also review nondisability issues

DRB Concerns (cont'd) Impact on federal courts Avalanche of cases? Are we headed to a Social Security Court? Final rule says gradual implementation in one small region with few court filings. But if filings increase, will SSA change final regulation? Will there be more sentence 6 remand court filings if ALJs reject new and material evidence?

DRB Concerns: Impact on courts

- In FY 2004, there were 92,540 appeals from the ALJ stage to the Appeals Council. Meanwhile, there were only 14,944 actions filed in federal court.
- "This amount ... is a relatively modest percentage of the 92,540 requests for review presented to the Appeals Council....the existence of a right to seek administrative appellate review appears to result in a large majority of claimants not seeking judicial review following receipt of the Appeals Council final decision." Congressional testimony, Judge Howard D. McKibben, 9/27/05





DRB concerns:
Can DRB provide effective review of unfavorable ALJ decisions?
What is considered an "error"?
Will DRB screening find:
The broad range of issues used to deny claims?

- All errors in an ALJ decision?
- More subtle errors, e.g., bias/unfair hearing?
- o What if case has both legal and factual errors?

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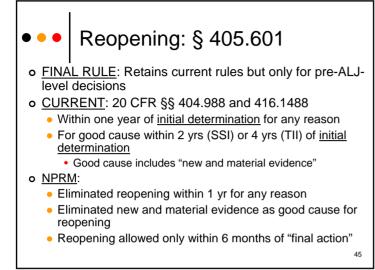
• Remand is only remedy for factual error

DRB concerns (cont'd)
 Limited DRB authority to remedy errors
 Error of law:

 Affirm, reverse, or modify, but NO remand
 Findings of fact:

 If not supported by substantial evidence: remand
 What if case has both legal and factual errors?

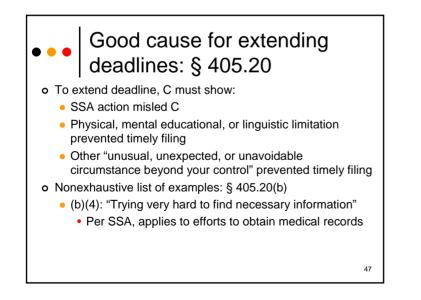
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Reopening (cont'd)

- o Current procedures apply prior to "final decision"
 - Ex: ALJ can reopen RO decision for new and material evidence within 2/4 year time periods
- The "final decision" of the Commissioner (ALJ or DRB decision) can be reopened ONLY within <u>six</u> <u>months</u> AND
 - "New and material evidence" is not basis for good cause per §§ 404.989 or 416.1489
 - In only two situations:
 - Clerical error in computation of benefits; OR
 - Clear error on face of the evidence

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Discrimination complaints:

- First time process established for: "race, color, national origin, sex, religion, or impairment"
- o 180 days to file after became aware (60 days in NPRM)
- o List of grounds does not include "general bias"
 - "We have procedures in place to deal with allegations of [ALJ] bias and complaints of discrimination.... [W]e did not believe it was necessary to include those procedures...." (p. 16440)
- o But how adequate are these procedures?
 - See Pronti v. Barnhart, 339 F.Supp.2d 480 (W.D.N.Y. 2004)



• What's next?

- August 1, 2006: Implementation starts in Region I
 - Remember: Changes apply only to those cases that start out in the new process from the beginning, even if C moves
 - Region I states: CT, ME, MA, NH, RI, VT
- Monitor Region I implementation provide feedback to SSA
- Check the NOSSCR and DLC websites for updates and further information