

# DLC

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**To: SSI Advocates**

**From: Linda Landry and Barbara Siegel**

**Re: New Disability Determination Process - Region I first to implement!**

**Date: 5/1/06**

Below is an initial analysis of the new disability determination process. More detailed analysis and implementation details will follow.

## **I. Disability Service Improvement (DSI) Process**

SSA has published final regulations, at 71 Fed. Reg. 16424 (3/31/06), to establish a new disability determination process. The final regulations are an improvement over the proposed regulations, published at 70 Fed. Reg. 43590 (7/27/05), especially with regard to the ALJ level of appeal and reopening criteria. However, some of the changes continue to pose a challenge. Whether good bad, the disability determination process changes will mean changes in our practices. There are also a number of new acronyms to learn.

### **A. Timing**

#### **1. Effective Date.**

The effective date of the final regulations is 8/1/06. The “roll out” will be gradual - one SSA region at a time.

#### **2. DSI Implementation in Region I**

Region I will be first: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. Presumably starting 8/1/06.

The Protection and Advocacy System for Massachusetts

## **B. Revised Disability Determination Process Overview**

### **1. Reconsideration and Appeals Council Eliminated**

### **2. New Disability Determination Process**

- a. Initial, including QDD (Quick Disability Determination)
- b. Federal Reviewing Officer (RO)
- c. ALJ
- d. Disability Review Board (DRB)
- e. Federal Court

### **3. Regulations**

New section created at 20 C.F.R. Part 405. Harmonizing changes made to Parts 404 and 416.

### **4. Electronic file**

The electronic file is separate from DSI but has an impact, e.g. the electronic file means that ROs, MEs and VEs can be anywhere and can be linked by e-mail and video conferencing.

SSA states that all 50 states have started to use electronic folders and that 80% of DDS decision makers are adjudicating cases with electronic folders.

The Massachusetts DDS states that this has resulted in a slowdown in case processing, as DDS personnel get used to dealing with electronic formats, but that this slowdown is not expected to be permanent.

## **C. Medical and Vocational Expert System (MVES) 20 C.F.R. § 405.10**

SSA will establish a Medical and Vocational Expert Unit (MVEU) and a national network of medical psychological and vocational experts.

### **1. Standards**

SSA will set the qualifications and standards for all experts, including DDS doctors and psychologists.

SSA will also set the fees and rates for experts.

## 2. MVEU (Medical and Vocational Expert Unit)

The MVEU will advise adjudicators on the nature of the expertise needed to decide a claim. It will also develop and oversee the national network of experts. The MVEU will schedule consultative examinations for Ros and ALJs.

## 3. MVES (Medical and Vocational Expert System)

The national network will provide their expertise to all adjudicators. This will make VE expertise a part of the determination process earlier than under the current process. DDS doctors will have to meet the federal standards within 1 year after the date on which SSA publishes the standards. DDSs will also be able to use the network when a DDS does not have a medical or psychological expert that meets SSA's standards in a particular case.

## D. Cases Affected

### 1. Disability cases only

The new process applies only to initial cases based on disability.

The new process does **not** apply to CDRs or age-18 reviews.

The new process does **not** apply to non-disability cases.

### 2. Timing

The new process applies **only** to cases processed from application under the DSI. If a DSI applicant moves to another state while her case is pending, her case will continue to be processed under DSI, even if the other state has not yet implemented the DSI process.

Applications filed prior to the implementation of the DSI will continue to be processed under the current 4 step administrative appeals process.

## E. Initial - 20 C.F.R. § 405.105 - .120

### 1. Quick Disability Determination (QDD)

The DDSs will have special QDD units. The purpose is to make a quick decision in obvious cases. SSA will use criteria 'highly predictive' of disability to determine which cases are selected for QDD consideration. Criteria may include medical history, treatment, and the availability of medical evidence - not necessarily specific impairments.

The QDD must be made within 20 days. If DDS cannot or does not make a decision within 20

days, the case is transferred to another DDS unit for a regular initial level determination.

**2. Enhanced decision rationales.**

Better rationales/notices will provide more information about the reason for the DDS decision.

**3. Notice of the right representation**

The initial notice will include information on the right to representation

**4. Next appeal step**

If the claimant is dissatisfied with the initial level decision, she has 60 days to appeal to the RO (Reviewing Officer).

**5. Appeal Issue Specificity - 20 C.F.R. § 405.210(a).**

Claimants should state the reasons for filing the appeal.

**F. Federal Reviewing Official - 20 C.F.R. §§405.201 - 405.230**

1. Reconsideration is eliminated.
2. Review of initial determinations will be to a Federal Reviewing Official (RO). Federal RO's will be **attorneys** who are **centrally managed** by SSA. 71 FR 16432.
3. 60-day deadline for requesting RO review. Requests for extension of deadline must be in writing and must state reasons. §405.210. Good cause standards in §405.20 apply.
4. Claimants may submit evidence to the RO up to the date the RO issues a decision. 71 FR 16433. Regs state that additional evidence "should" be included with request for review, §405.210(a)(4), or submitted as soon as possible thereafter, §405.215(b), but RO will consider all evidence submitted up to the date of the decision.
5. RO may issue subpoenas to obtain additional evidence. §405.217(a). Claimant must file written request for subpoena that identifies the needed documents, and states what the documents are expected to show and why they are necessary. §405.217(b).
6. RO may obtain additional evidence from other sources, including DDS or treating

sources. §405.215(c). RO may consult with medical, psychological or vocational expert through the Medical and Vocational Expert System (MVES) if necessary. §405.220(b). RO may order a consultative examination if necessary, 71 FR 16433.

7. RO may ask DDS to clarify or provide additional information about the basis for its determination and DDS must provide this information or clarification in a timely manner. 71 FR 16433. §405.220(b). RO retains authority make disability determination, however. §405.220(b).
8. RO “will” consult with medical or psychological expert through the MVES if:
  - a. RO obtains or claimant submits new and material medical evidence, or
  - b. RO disagrees with initial determination by DDS. §405.220(b).
 RO must not consult with the same medical expert(s) involved in the initial DDS determination. 71 FR 16433.
9. RO’s may affirm, deny, or modify initial determination, but RO’s cannot remand a case back to the DDS. This is a change from the proposed regulations. 71 FR 16433.
10. No hearing before RO. 71 FR 16433.
11. RO decision must include explanation as to why s/he disagrees with the rationale in the initial determination. §405.220(a).
12. SSA is developing performance standards for RO’s but they are not included in the final regulations. 71 FR 16433.

## **G. ALJ - 20 C.F.R. §§ 405.301 - .382**

The “goal” is for ALJs to issue a decision within 90 days.

### **1. De novo review**

ALJ review continues to be de novo - but will ALJ independence be eroded by insertion of the RO in the process?

### **2. Advance notice of hearing** - 20 C.F.R §§ 405.315(a), 405.316.

The advance notice requirement increases from 20 to 75 days.

### **3. Objections as to time and place of hearing** - 20 C.F.R. § 405.317(a).

These objections must be made within 30 days after receipt of the hearing notice.

**4. Objections to issues in the hearing notice - 20 C.F.R. § 405.317(b).**

These objections must be made at least 5 business days in advance of the hearing.

Note that the issues before the ALJ include all issues raised by the claim, regardless of whether the issues have already been decided in the claimant's favor. ALJs may consider new issues at any time after sending out the notice of hearing and before sending out the notice of decision - as long as the ALJ provides the claimant with an opportunity to address it. 20 C.F.R. § 405.325.

**5. Evidence submission - 20 C.F.R. § 405.331.**

**a.** Evidence **must be filed at least 5 business days prior** to the hearing.

**b.** ALJs **may** accept and consider new evidence filed **less than 5 days prior** to the hearing **or at the hearing if:**

- i.** SSA's action mislead the claimant, or
- ii.** The claimant has physical, mental, educational or linguistic limitations, or
- iii.** Some other unusual, unexpected or unavoidable circumstance beyond the claimant's control prevented earlier filing.

**c.** The ALJ **will** accept and consider new evidence **after the hearing but before the hearing decision if:**

- i.** One of the three exceptions in 5.b. above applies, and
- ii.** There is a reasonable probability that the evidence, when considered alone or with the other evidence would affect the outcome.

**d.** The ALJ **will** consider new evidence **after the ALJ decision if:**

- i.** One of the three exceptions in 5.b. above applies, and
- ii.** There is a reasonable probability that the evidence, when considered alone or with the other evidence of record would change the outcome, and
- iii.** If submitted within 30 days of receiving the ALJ decision.

**e.** The claimant may ask the ALJ to hold the record open at the hearing. The ALJ **may hold the record open if**

- i.** the claimant is aware of additional evidence which she has been unable to obtain prior to the hearing, or
- ii.** the claimant is scheduled to undergo medical evaluation.

**6. Adverse Evidence - 20 C.F.R. §§ 405.1512(2), 416.912(c)**

The final regulations did not include the requirement that appeared in the proposed regulations requiring submission of adverse evidence. The final regulations require the claimant to produce evidence, without redaction, showing the affect of their impairments. Note, however, other regulations that provide for penalties for failure to disclose material evidence.

**7. Pre-hearing statements. 20 C.F.R. § 405.334**

Claimants may submit or the ALJ may request pre-hearing statements.

**8. Pre and post Hearing conferences - 20 C.F.R. §§ 405.330, .366.**

ALJs may hold, at the claimant's request or on the ALJ's own initiative, pre or post hearing conferences. Such conferences will usually be held by telephone and a record will be made.

**9. Notice of ALJ decision - finality - 20 C.F.R. §§ 405.371 - .372.**

The notice of decision will state whether it is SSA's final decision or whether the DRB will review the decision. If it is SSA's final decision, the claimant has 60 days in which to file a complaint for judicial review in federal district court.

## **H. Decision Review Board (DRB)**

The DRB is a group of ALJs and AAJs(Administrative Appeals Judges), assigned on a rotational basis, that will review favorable and unfavorable ALJ decisions.

**1. No claimant initiated right to appeal to the DRB**

**a. Exception**

ALJ dismissals can be appealed to the DRB, but the claimant must first petition the ALJ to vacate the dismissal. 20 C.F.R. §§ 405.381, 405.382, 405.427.

**2. Screening cases for DRB review. 20 C.F.R. § 405.410**

**a.** DRB will use **computerized screening criteria** to determine error prone cases for review.

**b.** ALJ decisions will be screened for review before the notice of decision goes out. The "goal" is 10 days to screen.

**c. Special Roll Out Rule.** The DRB will review 100% of ALJ decisions in the first year of the roll out in Region I.

**3. Notices.** 20 C.F.R. §§ 405.415, 405.420

**a.** If the case is not selected for DRB review, the claimant will be sent a final decision notice - the claimant has 60 days in which to file a complaint for judicial review in federal district court.

**b.** If the case is selected for DRB review, the claimant will be notified of that fact and that the DRB has 90 days to complete the review. If there has been no decision at the end of the 90 day period, the ALJ decision becomes the final decision and the claimant can file a petition for judicial review in federal district court within 60 days.

**4. Submitting Evidence** 20 C.F.R. § 405.473(b) & (d).

Evidence can be submitted to the DRB within 30 Days after notice of review and under the same criteria as submitting evidence to ALJs post decision (see Part G.5.d.iii above).

**5. Submitting memoranda.** 20 C.F.R. § 405.425

A written statement no longer than 2000 words in 12 point font can be submitted to the DRB within 10 days of receipt of notice of DRB review.

The DRB may also request submission of a statement.

**6. Standard of Review.** 20 C.F.R. § 405.440 (a).

**a.** Substantial Evidence

**b.** Error of Law

**6. DRB Actions** 20 C.F.R. § 405.440(b)

**a.** Affirm if ALJ findings supported by substantial evidence and if no significant error of law.

**b.** Remand to the ALJ if findings are not supported by substantial evidence and if further development is necessary.

**c.** If there is an error of law, the DRB can issue its own decision which affirms, reverses or modifies the ALJ's decision.

**d.** After the 90<sup>th</sup> day, the DRB can only issue a fully favorable decision. If the claimant has already filed a complaint for judicial review, SSA will seek a remand.

**e.** The DRB will provide a notice of decision explaining its actions in clear and understandable language and the right to seek judicial review.



## **I. Reopening**

- 1. Prior to the ALJ decision.** 20 C.F.R. §§ 404.988, 416.1488, 405.601.

The current rules apply.

- 2. After the ALJ decision.** 20 C.F.R. § 405.601.

Reopening is limited to 6 months from the date of the final decision. SSA will not use new and material evidence as a good reason after the ALJ decision has been made.