

Regulation Changes for the Submission and Consideration of Medical Evidence

Linda Landry

Disability Law Center

November 2022

Two Must Know Evidence Rule Changes

- Duty to Submit All Evidence
- Revised Rules on Evidence Consideration
 - Different rules now apply for claims filed before 3.27.17 than for those filed after 3.27.17.
 - Both the old and new evidence evaluation rules will be in play for a long time.
 - Whether the old or new rules apply depends on the date on which the claim was filed.

Duty to Submit All Evidence

Duty to Submit All Evidence

- Published at **80 Fed. Reg. 14828** (3/20/2017).
- Effective date: **4/20/2015**
- 20 CFR 404.900, 404.935, 404.1512, 404.1740, 416.912, 416.1400, 416.1435, 416.1450.
- Social Security Ruling (SSR) 17-4.
- HALLEX I-2-5-1

Duty to Submit All Evidence

- Claimant must tell SSA about or submit all known evidence relating to disability.
- Claimant's representative must act with reasonable promptness to help obtain and submit evidence to meet claimant's duty.
- Documents or information must be submitted in the entirety.
- SSA expects reasonable, good faith judgments by claimants, representatives & adjudicators.

SSR 17-4p Responsibility for Developing Written Evidence

- Published October 4, 2017, clarifies that it is not enough to merely inform SSA of new evidence 5 business days prior to hearing w/out a showing of good faith efforts to obtain it.
- Must provide specific formation - evidence source, location, treatment dates, relationship to the claim.
- Don't wait until 5 business days prior to hearing to produce or inform w/out compelling reasons.
- Sanctions may be imposed for noncompliance w/out good cause.

Exceptions to the Duty to submit All Evidence

- **Narrow exceptions** apply to both attorneys and to non-attorney representatives.
- **Attorney Work Product** – includes analysis of the claim, theories, impressions and notes – **but not factual material**.
- **Attorney-client Privilege** – includes oral or written confidential attorney/client communications.
 - **Does not include anything in writing from a medical source.**

New Evidence Consideration Rules

New Evidence Consideration Rules

- Final rule published at 82 FR 5844 (1/18/2017)
 - <https://www.gpo.gov/fdsys/pkg/FR-2017-01-18/pdf/2017-00455.pdf>
- Proposed rule published 81 FR 62560 (9/9/16)
- **Effective date is 3/27/2017, for claims filed on or after that date.**
 - The final rules constitute substantial revisions to the rules for considering medical evidence, including elimination of the ‘treating source’ rule.

Claims Filed Prior to 3/27/17

- Claims filed before 3/27/17 will use the ‘treating physician’ rules in place when the claim was filed - for the life of the claim. HALLEX I-5-3-30B.
- 20 CFR 404.1527, 416.927, as revised in the final, rules apply to these claims.
 - text added in (f) on policies found in SSR 06–03p, re: consideration & articulation of opinions from medical sources who are Acceptable Medical Sources (AMS) & from nonmedical sources.
- SSRs 96-2p, 96-5p, 96-6p, 06-3p rescinded as inconsistent with or duplicative of the final rules.

Claims Filed Prior to 3/27/17

Acceptable Medical Sources (AMS)

- AMS need to establish a diagnosis.
 - Licensed physician; Licensed psychologist; Licensed optometrist; Licensed podiatrist; Qualified SLP
 - 20 CFR 404.1502, 416.902.
- Evidence from other medical and non-medical evaluated to establish the nature and severity of the impairments, including functional limitations.

Claims Filed Prior to 3/27/17 - Evaluation of AMS Medical Opinion

- Use revised 20 CFR 404.1527, 416.927.
- Medical opinions are statements from AMS as defined in 20 CFR 404.1413 , 416.913.
 - Includes judgments about diagnosis, prognosis, symptoms, nature and severity. 20 CFR 404.1527(a)(2), 416.927(a)(2)
- Weighing rules in in Subparts (a)(b) & (c) apply.
 - ‘Treating physician’ rule 20 CFR 404.1527(a), 416/926(a).
 - ‘Good reason’ rule 20 CFR 404.1527(c)(2), 416.927(c)(2).
 - The ‘6 factors’ 20 CFR 404.1527(c), 416.927(c).

Claims Filed Prior to 3/27/17

Evaluation of Other Evidence

- Non-AMS medical & nonmedical evidence
 - Use the ‘six factors’ (not every factor will apply, depending on the particular facts of the case).
- 20 CFR 404.1527(f), 416.927(f)
- The 6 Factors
 - Examining relationship; treatment relationship; supportability; consistency; specialization; other factors.
- 20 CFR 404.1527(c), 416.927(c).

Claims Filed Prior to 3/27/17

Articulation Requirement

- Articulation Requirement (findings)
- Explain weight or otherwise ensure so that claimant or subsequent reviewer can follow reasoning when opinion may have effect on case.
- Greater duty when giving more weight to sources other than treating source.

Claims Filed On or After 3/27/17

Overview

- Additions to Acceptable Medical Sources
- ‘Treating physician rule’ rescinded
 - Evidence will be considered for ‘persuasiveness’
 - Supportability
 - Consistency
- Evidence types re-categorized and defined
- Evidence from medical sources must be considered and ‘articulated’
 - Articulation not mandatory for other sources

Claims Filed on or After 3/27/2017

Additions to AMS

- **For claims filed on or after 3/27/2017**, the following medical providers are AMS who can be considered a treating source and establish the existence of a medically determinable impairment.
 - Advanced Practice Registered Nurses (APRNs)
 - Physician Assistants (PAs)(within scope of practice)
 - Audiologists (hearing loss, auditory processing disorders, balance disorders)
- 20 CFR 404.1502(a)(6),(7),(8), 416.902(a)(6), (7), (8)

Additions to AMS

Who are APRNs?

- Advance Practice Registered Nurses (APRNs) may also be called Advanced Practice Nurse (APN) and may include-
 - Certified Nurse Midwife
 - Nurse Practitioner
 - Certified Registered Anesthetist
 - Clinical Nurse Specialist.
- 82 FR 5845-5846.

Claims Filed on or after 3/27/17

New Evidence Categories

- **Objective Medical Evidence** – signs, laboratory findings or both. Provided by Medical Sources.
- **Medical opinion** – Statement about functional capacity. Provided by Medical Sources.
- **Other medical evidence** – All other evidence from medical sources (e.g., diagnosis, prognosis, treatment & response).
- Evidence from **non-medical sources**.
- **Prior administrative medical findings** – Medical and Psychological Consultants.
- **Issues Reserved for the Commissioner**
- **Other Governmental Agency & Nongovernmental entity decisions.**
- 20 CFR 404.1513, 416.913

Definitions: Medical Source & Medical Opinion

- **Medical Source:** Individual who is licensed as a health care worker by a state & working within the scope of practice permitted under state or federal law. 20 CFR 404.1502, 416.902
- **Medical Opinion:** a statement from a medical source about what the claimant despite his/her impairment(s). 404.1513(a)(2), 416.913(a)(2).
 - (For claims filed before 3/27/17, see 404.1527(a), 416, 927(a) for the definition.)

Role of AMS and Other Medical Sources

- Only AMS can provide objective medical evidence to establish the existence of a medically determinable impairment.
- However, in the preface of the federal register publication of the final rule, SSA states that adjudicators will articulate how they consider medical opinions from all medical sources. 82 Fed. Reg. 5845.

Controlling Weight Eliminated

- No deference or any specific evidentiary weight applies to medical opinions, including controlling weight.
- Adjudicators will “articulate” the persuasiveness of medical opinions.
- All medical opinions are essentially on the same footing.
- 20 CFR 404.1520c(a)&(b), 416.920c(a)&(b).

Objective Medical Evidence

- ‘Objective medical’ evidence means one or more signs, one or more laboratory findings, or both.
 - Symptoms, diagnosis and prognosis not included in the definition (these are now ‘other medical evidence’).
 - 20 CFR 404.1502, 416.902, 82 FR 5844.
 - In the proposed regulations SSA indicated that a diagnosis is not always reliable “...sometimes medical sources diagnose individuals without using objective medical evidence.” Or diagnoses may be “listed solely for billing and medical insurance reasons but that do not include supporting objective medical evidence.” 81 FR 62567

Objective Medical Evidence

- ‘Signs’ means one or more anatomical, physiological, or psychological abnormalities that can be observed, apart from your statements (symptoms).
- Shown by clinical diagnostic techniques.
- 20 CFR 404.1502, 416.902, 82 FR 5850

Claims Filed on or After 3/27/17

Consideration Rules

- ‘Weigh’ & ‘weight’ no longer used. 82 FR 5858
- Medical opinion considered based on persuasiveness
- Five factors of persuasiveness, in order of importance.
 - Consistency
 - Supportability
 - Relationship with the claimant
 - Specialization
 - Other factors
 - 20 CFR 404.1420c, 416.920c.

Consistency & Supportability

- “Our experience in adjudicating claims using the treating source rule since 1991 has shown us that the two most important factors for determining the persuasiveness of medical opinions are consistency and supportability.”
- “The extent to which a medical source’s opinion is supported by relevant objective medical evidence and *the source’s supporting explanation*- supportability- and the extent to which the opinion is *consistent with the evidence from other medical sources and nonmedical sources* in the claim-consistency- *are also more objective measures* that will foster fairness and efficiency...”
- 82 Fed. Reg. 5853

Consistency?

- SSA acknowledges determining “consistency” “may be challenging in certain claims”
 - Per SSA, “consistency” has “the same as the plain language and common definition”
 - “[I]ncludes consideration of factors such as whether the evidence conflicts with other evidence from other medical sources and whether it contains an internal conflict with evidence from the same medical source”
 - 82 Fed. Reg. 5854

Consistency ?

- SSA recognizes that symptom severity may fluctuate.
 - 82 Fed. Reg. 5854
- “[E]vidence from a medical source that has a longstanding relationship with a claimant may contain some inconsistencies over time due to fluctuations in the severity of an individual's impairments”
 - 82 Fed. Reg. 5857

SSA's Responses to Comments re: Treating Physician Rule Change

- 20 CFR 404.1520c, 416.902c allow an adjudicator to consider an individual's medical source to be the most persuasive, if supported by relevant objective medical evidence and if consistent with other evidence. 82 FR 5853
- An individual's medical source may have a unique perspective on an individual's impairments based on the issues listed, such as a long treatment relationship. 82 FR 5857
- The final rule also recognizes that evidence from a medical source who has a long standing treatment relationship with the an individual may contain some inconsistencies over time due to fluctuations in severity... 82 FR 5857.

Relationship Factor

- 20 CFR §§ 404.1520c(c)(3) & 416.920c(c)(3)
- Length of treatment relationship
- Frequency of examinations
- Purpose and extent of treatment relationship
- Examining relationship
- Consideration of these issues may help demonstrate longitudinal understanding or knowledge of impairment

Other Factors?

- The proposed regs. listed familiarity with other evidence in the claim or SSA regulations.
(favored MCs & PCs?)
- Final rule omitted this and also states that new evidence submitted after the MC or PC has rendered an opinion might make the opinion “more or less persuasive”
 - 82 Fed. Reg. 5857
- 20 C.F.R. §§ 404.1520c(c)(5) & 416.920c(c)(5).

“Evaluate” Dropped in Favor of “Consider”

- “Adoption of the term ‘evaluate’ could imply a need to provide written analysis, which is not what we intend”
- “Consider” is “easily distinguishable from the articulation requirements”
- 82 Fed. Reg. 5855

Articulation Requirements - Claims Filed on or after 3/27/17

- Adjudicators must include explanation of the persuasiveness of all **medical opinions** from all **medical sources whether or not the medical source is an AMS.**
 - Must explain supportability & consistency.
 - Must discuss other factors when 2 or more medical opinions or prior administrative medical findings about the same issue are equally well-supported & consistent but not exactly the same.
 - Discretionary whether to discuss in other situations.
- 20 CFR 404.1520c(b)(3), 416.920c(b)(3)

Articulation Requirements Claims Filed on or after 3/27/17

- When a source provides multiple medical opinions, SSA is not required to explain the consideration of each medical opinion separately.
- Instead, SSA must articulate the persuasiveness of all the source's opinions together.
- 20 CFR 404.1520c(a), 416.920c(a).

Articulation Requirements - Claims Filed on or after 3/27/17

- No articulation required under medical source evaluation criteria for evidence from **nonmedical sources** (claimant, ed. personnel, social welfare agency staff, family members, caregivers, friends, employers, clergy).
- 20 CFR 404.1520c(d), 416.920c(d)
- SSA states that adjudicators will continue to assess functional capacity from all sources, including nonmedical sources. 82 FR 5844. “Depending on the unique evidence in each claim, it may be appropriate for an adjudicator to provide written analysis about how he or she considered evidence from nonmedical sources, particularly in claims for child disability.” 82 FR 5850.

Articulation Requirements Claims Filed on or after 3/27/17

- No articulation required for evidence neither inherently valuable nor persuasive
 - Decisions by other agencies (although the medical evidence used may be considered)
 - Disability Examiner findings (DDS)
 - Statements on issues reserved to the Commissioner
- 20 CFR 404.1520b(c), 416.920b(c).

Why These Changes?

- SSA cites –
 - Changes in the delivery of health care.
 - Adjudicatory experience showing consistency and supportability as most important factors in persuasiveness.
 - Courts reviewing claims under current rules have focused more on whether SSA sufficiently articulated the weight given to treating source opinions, rather than on whether substantial evidence supports SSA's decision. Per the ACUS Final Report, these courts are re-weighting evidence and not applying the substantial evidence standard, which is intended to be highly deferential to SSA. 82 FR 5853.
 - Administrative unfeasibility due to voluminous case records.

Regulations & SSRs on symptom & pain evaluation unchanged

- 20 CFR 404.1529, 416.929, How we evaluate symptoms, including pain.
- SSR 16-3p: Titles II and XVI: Evaluation of Symptoms in Disability Claims
- SSR 14-1p: Titles II and XVI: Evaluating Cases Involving Chronic Fatigue Syndrome (CFS)
- SSR 12-2p: Titles II and XVI: Evaluation of Fibromyalgia