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SOCIAL SECURITY RULING AFFECTS NEW APPLICATIONS

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Social Security Ruling (SSR) 11-1p, issued and effective on July 28, 2011, precludes the filing of a subsequent application for benefits while an appeal is pending. This SSR revokes the rules that the Social Security Administration (SSA) had issued more than ten years ago, allowing a new application to proceed to the hearing level while a prior application was pending at the Appeals Council. That policy, effective December 30, 1999, was a response to what were considered at the time to be inordinate waiting periods at the Appeals Council.

Under SSA policy prior to December 30, 1999, a claimant could receive a protective filing date on a subsequent claim, but that claim would not be developed or adjudicated until the pending review request was decided. Although a few subsequent claims did slip through this policy, as a general matter a claimant could not have a subsequent claim adjudicated while an appeal was pending. The 1999 policy permitting development of the subsequent claims was described at POMS DI 12045.027 and HALLEX I-5-3-17.

Innumerable claimants were able to take advantage of that policy by reapplying and, in many cases, receiving benefits, albeit with later onset dates, while their appeals languished at the Appeals Council. Although there were snags in the system, including the possibility of the Appeals Council or the Administrative Law Judge (ALJ) reopening a favorable subsequent application under certain circumstances, the policy offered claimants a viable option. SSA's new SSR changes all that.

Under SSR 11-1p, claimants will generally have to choose between filing an appeal and filing a new application. SSA justifies this change by citing decreased processing times and greater efficiencies at the Appeals Council. According to SSA, the change is necessary to avoid duplication of effort caused by the increase in the numbers of subsequent applications being filed, and to reduce workload at the DDS levels, where staff reductions through attrition and hiring freezes have been most significant. The SSR does provide for the filing of a subsequent application while an appeal is pending, but only in limited situations and at the discretion of the Appeals Council. It also allows for a protective filing date for a subsequent application if the Appeals Council ultimately denies the appeal, but again, only "under certain circumstances."

In the addition to the SSR itself, published in the Federal Register July 28, 2011, and available at www.ssa.gov, SSA has issued EM-11052 REV, which has already been revised twice (https://secure.ssa.gov/apps10/public/reference.nsf/links/09262011014635pm) and CJB (Chief Judge Bulletin) 11-03. Office of Appellate Operations (OAO) Executive Director Patricia Jonas also issued a memorandum to all OAO employees, which is available at Empire Justice Center's on-line resource center as DAP #542. These pronouncements, however, raise more questions than they answer.

The SSR provides, for example, that if a claimant opts to pursue an appeal and has additional evidence that shows a "critical or dire need situation," the claim will be expedited by the Appeals Council. But there are no clear procedures, especially for *pro se* claimants, for getting this evidence before the Appeals Council. Representatives of the Appeals Council have assured advocates that evidence brought to a field or district office by a *pro se* claimant will be forwarded to the Appeals Council. See EM-11052 REV. It will be up to the Appeals Council, however, to decide if the evidence shows a dire or critical situation.

Per the SSR, if additional evidence is submitted that relates to the period on or before the date of the ALJ decision, and it is determined to be "new and material," the Appeals Council will consider the evidence under its current procedures in 20 C.F.R. §§404.970(b) & 416.1470(b). In addition, if the new evidence shows a "critical or disabling condition," the Appeals Council will expedite review. Again, the terms "critical" and "disabling" in this context are not defined, but presumably have the same meaning as in other contexts. See, e.g., HALLEX I-3-1-51, which defines "critical" in terms of dire need or terminal illness. Deciding whether or not the evidence demonstrates a disabling condition seems to put

the cart before the horse, but representatives of the Appeals Council have indicated that new evidence will be reviewed on an expedited basis to see if it "suggests" disability. If so, the claim will be assigned to an analyst out of the Appeals Council's "first in, first out" processing order.

If, however, additional evidence is submitted that does not relate to the period on or before the date of the ALJ decision, SSR 11-1p provides that the evidence will be returned to the claimant pursuant to 20 C.F.R. §§404.976(b) & 416.1476(b) when it acts upon the Request for Review. It will inform the claimant "under certain circumstances" that the date of the Request for Review will be considered a protective filing date for a new claim. Under this provision, a new Title II claim must be filed within six months of the Appeals Council notice; a new Title XVI/SSI claim within 60 days of the notice. But what does "under certain circumstances" mean? Discussions with the Appeals Council indicate that such a protective filing date will be granted in all cases where evidence is proffered but rejected, pursuant to the regulations cited above.

It is therefore crucial that advocates make sure all relevant evidence is forwarded to the Appeals Council. Representatives of the Appeals Council have indicated that submission of new evidence will trigger a review to determine if a claim should be expedited - yet another reason for advocates to submit all relevant evidence in a timely fashion.

Finally, the SSR provides a limited exception under which a new application can be filed while a claim is pending at the Appeals Council. If additional evidence is submitted that does not relate to the period on or before the date of the ALJ decision, but shows a "new critical or disabling condition," the Appeals Council *may* permit the filing of a new application before its completes its review. According to the Jonas Memorandum cited above, these "requests" will be handled through the OAO Executive Director's office. But, again, who decides what a "new critical or disabling condition" is?

The scenario in which the claimant is seriously injured in an accident on the way home from the ALJ hearing could lead to a "new critical or disabling condition" warranting a new application. When faced with such situations, representatives should advocate for application of the "exception." But would a change in age that would dictate an allowance under the Grid be considered a new condition? According to the Appeals Council, probably yes. What if a claimant who was denied based on a finding that drug and alcohol addiction was material has now been "clean" for the six months the case has been pending, and is still disabled? Not clear. And how does the claimant, in particular a *pro se* claimant, take advantage of this provision? *Advocates should specifically request "permission" to file a new application when submitting evidence to the Appeals Council.* The field offices are supposed to submit any new evidence to the Appeals Council that *pro se* claimants present (see EM-11052 REV2), but will the claimant know to advocate for a new application, or will s/he be encouraged to withdraw the pending appeal?

Under these new procedures, however, a claimant will have to decide, in most situations, whether to file a new application or a request for review. Will the field office accept a new application before the 60 days to appeal has expired? The Jonas Memorandum seems to say that the answer is "yes"; the representative and claimant will then be contacted to choose one process if the claimant goes on to file an appeal.

The new SSR does allow for the filing a new application concurrent with an appeal if the new claim is not a "duplicate" of the one on appeal. For example, a new claim under a different title or benefit type should be permitted. According to the Jonas memo, a new claim should also be permitted if the prior claim was a CDR or an age 18 redetermination. Subsequent claims of any type will be permitted if the prior claim is pending in federal court or has been remanded by a federal court.

In many instances, however, claimants will be presented with the Hobson's choice of deciding which claim to pursue. Those claimants who already have filed appeals, and now attempt to file new applications, will also be forced to decide how to proceed. In fact, in order to file a new application, a claimant will have to make a written request to withdraw his/her appeal if the exception does not apply, and will need a Notice of Dismissal from the Appeals Council before the new application is accepted. The Appeals Council will not automatically dismiss a claim, but must consider under the regulations whether there are other parties of interest. See 20 C.F.R §§404.971 & 416.1471. The Appeals Council will also allegedly determine if the claim could be decided favorably before it will issue a dismissal. How long will a claimant have to wait for a decision on a request to withdraw? Not clear, but the Appeals Council has indicated that it will only expedite requests that involve critical claims. And will the date the claimant requests withdraw constitute a protective filing date? Again, according to the Appeals, it will, but only if a protective filing date is requested.

As advocates are well aware, claimants often feel pressured to forego their appeals when faced with the possibility of getting benefits sooner by filing anew. But will claimants, again especially *pro se* claimants, be properly apprised of their rights when they make these decisions? Will they realize that they could be foregoing their rights to Title II benefits if, for example, their insured status has expired during the pendency of the prior abandoned claim? The most recent revisions to EM-11052 REV2 include a chart with a series of "if" - "then" scenarios to be followed if a claimant

asks to file a new application and there is an appeal pending. If a claimant chooses to withdraw the appeal in order to file a new application, the claimant must be advised; that by withdrawing the appeal, he or she relinquishes all appeal rights on the claim; the withdrawal request must be in writing; to include a statement in the withdrawal request that he or she fully understands the effort of the withdrawal and intends to file a new application; the withdrawal request must be signed by the claimant or claimant's representative; and to submit the signed withdrawal request to the Field Office.

Unfortunately, there are still no clear provisions for how the claimant learns the effect of the withdrawal. Perhaps there will be yet another revision to the EM? And to date, there is no form that a claimant can use to withdraw an appeal. Query whether the Appeals Council will devise such a form and, perhaps more importantly, will provide claimants with an explanation of the potential consequences of withdrawing their appeals. And the ultimate query - can SSA legally preclude a claimant from filing an application?

We will keep you informed about the nuances of this new SSR as they emerge.

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