EVERYTHING KNOWN AND UNKNOWN

THE "RUMSFELD DOCTRINE" AND THE SOCIAL SECURITY ADMINISTRATION'S FINAL RULES ON THE SUBMISSION OF EVIDENCE IN DISABILITY CLAIMS

By John R. Colvin

As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns — the ones we don't know we don't know.

– Donald Rumsfeld, former U.S. Secretary of Defense

On March 20, 2015 the Social Security Administration issued the final rules on the submission of evidence in disability claims. On the one year anniversary of the final rules becoming effective on April 20, 2015, many social security practitioners have experienced first-hand the practical implications of the new evidence regulation. Prior to the new evidence submission rules becoming final, the SSA received 85 comments upon issuing their proposed rules in February 2014. The SSA elected not to adopt any of the suggested changes. However, there was brief discussion in several of the SSA comments before refusing to adopt them. These comments can be found printed just prior to the actual regulations. Unfortunately, with its final issuance the rules remain unclear and confusing in their practical application and, therefore, warrant a deeper discussion as to their application by Social Security practitioners.

The SSA also has not provided any possible solutions and/or guidance for representatives to follow the rules in accordance with their duty and burden to collect and verify the evidence for its submission.

In reviewing a summary of the proposed rules, it is apparent that nothing was changed in the final regulations from the original submission. In short, the Social Security Administration now requires all claimants and/or their representatives to inform the agency about and/or to submit "all evidence known to you that relates to your disability claim," including "all evidence received from any source in its entirety." Additionally, representatives are required to "help obtain the information or evidence" that must be submitted. The rules go on to state that this includes both evidence which would be considered favorable and unfavorable even if it is not considered material. Accordingly, one can conclude from this discussion that the SSA expects any and *all* evidence to be reported. The problem here begins to be seen more apparently when determining what is included in the definition of "all," what is included in "known" and what is meant by "relates" and "received." In order to examine the rule more fully, this discussion will now turn to more elaboration on the specific definitions of each part of the rule. In order to have a thorough examination, it will be necessary to include a brief discussion of the two privileged communications exceptions. Lastly, as previously stated, the rule as it stands offers no possible solutions for its requirements in a practical application. Therefore, such possible solutions will also be explored.

The discussion should necessarily begin with the most general two terms, "all" and "known." Starting with the term "all" it should be understood that the SSA is referring to all of the evidence that a representative has access to from any and all sources. This definition includes all information from a medical source and other claims by the claimant unless such would fall under one of the two exceptions to the evidence submission rule dealing with certain privileged communications and attorney work product reviewed later in this article. In addition, "all" necessarily includes evidence that should be "known" to a representative. Unfortunately, this drastically increases the burden on the representative. Under the rules, the SSA now requires that a representative provide information that the claimant may or may not have shared with the representative but is currently known to the claimant. This does include, but is not limited to, medical records, medical source statements and any additional claims pursued by the claimant. It should be understood that under this rule, the medical source statement can include an opinion from an accepted medical source which may also include opinions regarding what the claimant is limited to in relation to their day to day existence. It should be noted that in order to fulfill their duty, a representative must specifically request and verify such information from the claimant, rather than just assuming to know the unknown, the representative must ensure that the information being provided is being provided with clarity and completeness. Lastly, with regards to the definition of "all" the rule appears slightly less ambiguous in eliminating the question of whether or not unfavorable evidence must be submitted in Social Security disability cases. It is patently clear from the rule's plain meaning that "all" evidence is defined to include that which is both favorable and unfavorable.

The next issue to be explored here will be that of the term "received." SSA also clarified that while representatives must submit all evidence "received," the representative in certain circumstances does not necessarily have to request the deliverance of all evidence, only that SSA be informed of the existence of such. The SSA's response to the comments also outlines the agency's duty to develop and verify the claimant's file in an instance where both claimants and/or their representatives are requesting only the discharge summary from a hospital chart and not the complete medical record. In

this instance, the representative would be required to submit only the information that is received in response to such a request. However, any submission must be done so in its entirety to the Administration, though it appears from the rules that it is not required of a representative to request and/or pay for all of the other records from a claimant's hospitalization other than what was provided pursuant to a hospital chart request. The claimant or representative must inform the SSA, however, of all available evidence which would require listing the source of the evidence on various SSA forms and questionnaires.

Subsequent to the SSA's final rules on the submission of evidence becoming effective on April 20, 2015, there has been much discussion and debate as to whether the new rules require the representative to "obtain" all of the evidence, however, the actual language found in the rules states that the representative must submit all evidence known or to inform of such. The phrase "or to inform of such" implies that in some instances it may simply be enough for the representative to "inform" the SSA about the evidence. Thus, an argument can be made that it appears to be sufficient for the representative to relate the existence of the evidence to the Administration, but not to actually produce said evidence. However, while on the one hand the rule can be read as providing the representative an alternative solution that addresses the burden of actually requesting, obtaining, and submitting "all" evidence no matter how difficult, onerous, and/or cost prohibitive such might be, this rule also amends the rules of conduct which now requires a representative to act within a reasonable time period to produce such evidence so that such can be considered as soon as is practical. Thus, most practitioners are now experiencing ALJs (administrative law judge) issuing their own rules requiring representatives to obtain such evidence within a sufficient timeframe for it to be properly considered by the decision maker. It is worth noting that while the Administration's request for medical information also limits the amount that a medical provider or healthcare facility can charge for producing such, the representative's request is not afforded the same limitations on the costs imposed by the producing party. While the SSA evidence rules appear to say on the one hand that a representative is not required to obtain or submit all evidence, the representative must nonetheless verify its existence.

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Accordingly, it is highly probable that most ALJs will require being informed of the existence of the evidence with such being submitted regardless of the cost to the representative/claimant. One alternative approach to prevent the representative from being forced to advance the exorbitant reproduction costs imposed by the medical provider in cases of voluminous and costly document retrieval would be to inform the ALJ of the existence of the evidence and request that a subpoena be issued by the ALJ to obtain the documentation; however, the request must still comply with the applicable regulations for its issuance. In any event, shifting the responsibility back on the ALJ to discern what medical evidence is relevant and should be obtained in the claimant's case might circumvent the representative from being accused of failing to produce all known relevant medical documentation.

The next issue which the rule attempts to address is in defining what it means in reference to evidence that "relates" to a disability claim. In this rule, the SSA is apparently invoking the typical meaning of the word "relates." Therefore, the term "relates" is to be understood to mean that if the evidence relates to the disability claim, there is a logical connection between the two. In this instance, the SSA is not vague with regards to the interpretation. Accordingly, there is no need for further discussion of this term in regards to the rule.

In addition to requiring a claimant to inform SSA about or to submit evidence as described above, it should be pointed out that the final rules were modified to clarify a claimant's responsibility to submit evidence received from another source in its entirety. The final rule was also revised to eliminate "entirety" from the rule for a more practical and efficient application in the situation where the same evidence had previously been submitted and would result in duplication in the record, or in such instances where the SSA instructs the claimant otherwise.

Upon adoption of the final evidence rules, the Administration allowed two exceptions to the evidence submission rule for certain privileged communications and attorney work product. It should be noted that these two exceptions also will apply to non-attorney representatives as well. The Administration does provide some clarification as to what is considered work product under the rules such as analysis, theories, and notes made by the representative. However, facts are not protected work product, such as a medical source statement that contains the opinion from an acceptable medical source. Thus if a claimant's medical source sends his or her representative medical records or a written opinion about the claimant's medical condition, the representative cannot withhold those records or that opinion based on the work product doctrine adopted under these rules. However, the representatives can still protect their consultation with any medical source about the claimant's medical condition, meaning that if a representative takes notes during a discussion with the claimant's medical source, those notes taken by the representative along with the representative's theories and analysis would be protected from disclosure as work product. It is noteworthy that the rule still provides that oral communication with a medical source is also privileged.

The additional privileged communication exception relates to attorney-client privilege. The basic definition of attorney client privilege emanates from the legal concept that protects certain communications between a client and his or her attorney and prevents the attorney from being compelled to testify to those communications in court. The rules recognize the basic definition in its application generally. Accordingly, the rules adhere to the traditional concept that confidential communications between a claimant and an attorney are protected unless the privilege is waived. This traditional concept is also extended to communications between a claimant and a non-attorney representative under the rules.

Now that there has been discussion as to the operative terms and definitions found in the rules along with certain issues and exceptions, it is important for the legal practitioner to envision how the rules will most directly affect the practice of law. A helpful discussion for practitioners to have is one that focuses on possible solutions (or at least tools) to counterbalance the administrative nightmare and adverse effects of this rule on a small solo practice. The use of technology can once again play a major role in simplifying the arduous and potentially overwhelming collection of evidence and the duty of the representative to verify it with regards to the application of this rule. One suggestion is to leverage technology by the use of an online form and/or portal created and imbedded on the firm's website where the disability client can report and/or update, in some brevity and clarity, the results of the latest visits or information gathered from a medical source. If such forms were to include simple fields/questions requiring specific information to be entered, rather than a perhaps lengthy description taken over the phone, then it would provide an easier and more efficient means for a legal representative to maintain their duty to submit all evidence as well as its verification. Additionally, the use of an online form and/or client portal would allow for more strict oversight and due diligence for a law office to monitor staff that is tasked with collecting and submitting all of the required evidence under the Rules to the Administration. However, as with any system of information collection, it must be remembered that the information is sometimes as only as good as the reliability of the reporting source. Hence, client education is a must.

Upon discussion of the above identified issues in regards to the Administration's evidence rules, it becomes apparent that they will not only require a much closer examination of the evidence presented to the SSA, the new rules will also involve an increased duty for the representative to extensively and carefully develop their client's file. This will also create the basic duty of the claimant or their representative to accurately list the source of any and all available evidence when responding to SSA forms and/or questionnaires, impacting the effective representation of disability claimants in that it will encourage a much more detailed and involved process for the collection of evidence and its submission to the SSA. Thus, it will be necessary for the representatives to adjust their training and supervision of the staff responsible for both gathering and sending any evidence to the SSA.

In conclusion, the new SSA evidence rules should be viewed in conjunction with the Rules of Professional Conduct already imposed upon attorneys when acting as advocates on behalf of claimants. There is no doubt that the policymakers started with good intentions in drafting a workable SSA evidence rule, but the rule could be easily revised for simplicity's sake to allow for practical application by the Social Security practitioner. The solution would be to utilize Rule 3.3 of the ABA Model Rules of Professional Conduct as a framework:

Advocate

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Accordingly, a straightforward SSA evidence rule would protect the practitioner from the Rumsfeldian trap of being forced to grapple with not only the "known unknowns" but also the "unknown unknowns" and simply require the representative "to inform the tribunal (ALJ) of all material facts known to the lawyer (representative) that will enable the tribunal (ALJ) to make an informed decision, whether or not the facts are adverse."

John R. Colvin is a solo practitioner in Winchester, Tennessee licensed to practice law in Tennessee and Alabama with over 20 years experience representing Social Security claimants across the Tennessee Valley region.